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Legal aspects of electronic commerce

Electronic contracting: provisions for a draft convention

Note by the Secretariat

1. The Working Group began its deliberations on electronic contracting at its thirty-ninth session (New York, 11-15 March 2002), when it considered a note by the Secretariat on selected issues relating to electronic contracting (A/CN.9/WG.IV/WP.95). That note also contained an initial draft tentatively entitled "Preliminary draft convention on [international] contracts concluded or evidenced by data messages" (A/CN.9/WG.IV/WP.95, annex I).

2. At that time, the Working Group held a general exchange of views on the form and scope of the instrument, but agreed to postpone discussion on exclusions from the draft convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation (see A/CN.9/509, paras. 18-40). The Working Group then took up articles 7 and 14, both of which dealt with issues related to the location of the parties (A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft convention at that session with a discussion of draft article 15 on availability of contract terms (A/CN.9/509, paras. 122-125). The Working Group agreed, at that time, that it should consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (definitions) and 6 (interpretation), at its fortieth session (A/CN.9/509, para. 15).

3. The Working Group resumed its deliberations on the preliminary draft convention at its fortieth session (Vienna, 14-18 October 2002). The Working Group began its deliberations by a general discussion on the scope of the preliminary draft convention (A/CN.9/527, paras. 72-81). The Working Group proceeded to consider



articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (definitions) and 6 (interpretation) (A/CN.9/527, paras. 82-126).

4. The Secretariat prepared thereafter a revised version of the preliminary draft convention (A/CN.9/WG.IV/WP.100, annex). The Working Group, at its at its forty-first session (New York, 5-9 May 2003), reviewed articles 1-11 of the revised preliminary draft convention (see A/CN.9/528, paras. 26-151). The Secretariat was requested to prepare a revised version of the preliminary draft convention, for consideration at the Working Group's forty-second session (Vienna 17-21 November 2003).

5. The annex to this note contains the newly revised version of the preliminary draft convention, which reflects the deliberations and decisions of the Working Group at its previous sessions.

Annex

Preliminary draft convention¹ on the use of data messages in [international trade] [the context of international contracts]

CHAPTER I. SPHERE OF APPLICATION

Article 1. Scope of application

1. This Convention applies to the use² of data messages [in connection with an existing or contemplated contract] [in the context of the formation or performance of contracts]³ between parties whose places of business are in different States:

- (a) When the States are Contracting States;
- (b) When the rules of private international law lead to the application of the law of a Contracting State; or⁴
- (c) When the parties have agreed that it applies.⁵

2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or

¹ The form of a convention represents a working assumption only (A/CN.9/484, para. 124) and is without prejudice to a final decision by the Working Group as to the nature of the instrument.

² The last version of this article described the scope of application as follows: "This Convention applies to [any kind of information in the form of data messages that is used][the use of data messages] in the context of [transactions] [contracts] [...]." The Working Group regarded the choice between those options as being of a stylistic nature (see A/CN.9/528, para. 41). The Secretariat suggests the retention of the second phrase only, as the draft convention is only concerned with the legal recognition of the use of data messages in the context of contracts, unlike the UNCITRAL Model Law on Electronic Commerce, which deals with the legal value of information in the form of data messages, regardless of whether the information is actually "used" (for instance, under article 10 of the Model Law, which deals with record retention). The deletion of the word "transactions" follows a decision by the Working Group (A/CN.9/528, para. 40). This change has also been made in other provisions that previously referred to "transactions".

³ The alternative words in square brackets are meant to bring the draft article closer in line with draft article 8.

⁴ This paragraph reproduces a rule that is contained in the provisions on the sphere of application of other UNCITRAL instruments. There have been objections to this rule on the grounds that such an expansion in the convention's field of application would significantly reduce certainty at the time of contracting owing to its inherent ex post facto nature (A/CN.9/509, para. 38). At its forty-first session, the Working Group agreed to retain the subparagraph (A/CN.9/528, para. 42). If the draft paragraph is retained, the Working Group would still need to consider whether reservations to this rule should be permitted, as was suggested at its forty-second session (A/CN.9/528, para. 42). See also draft article X, paragraph 1.

⁵ This possibility is provided, for instance, in article 1, paragraph 2 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The Working Group postponed a decision on this subparagraph until it has considered the operative provisions of the draft convention (A/CN.9/528, paras. 43-44). The Working Group may wish to consider whether it should be possible for contracting States to exclude this provision through a declaration made pursuant to draft article X, paragraph 1.

from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract.

3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2. Exclusions⁶

This Convention does not apply to the use of data messages [in connection with the following contracts, whether existing or contemplated] [in the context of the formation or performance of the following contracts]:

(a) Contracts concluded for personal, family or household purposes [unless the party offering the goods or services, at any time before or at the conclusion of the contract, neither knew nor ought to have known that they were intended for any such use];⁷

[(b) Contracts for the grant of limited use of intellectual property rights];⁸

(c) [*Other exclusions that the Working Group may decide to add.*]⁹ [Other matters identified by a Contracting State under a declaration made in accordance with article X].¹⁰

⁶ The last version of this draft article contained two variants reflecting alternative approaches for the treatment of consumer contracts. Variant A excluded consumer contracts by using the same technique that is used in article 2, subparagraph (a) of the United Nations Sales Convention. Variant B deferred to domestic law on consumer protection issues, without excluding consumer transactions from the draft convention (see A/CN.9/527, para. 89; see also A/CN.9/528, paras. 51-54). The present version of the draft article retains only the former Variant A. The former Variant B has been incorporated into draft article 3, as its content is more akin to that article, in its current formulation.

⁷ The last phrase is in square brackets, since there was some support at the Working Group's forty-first session to the suggestion that all the words after "household purposes" should be deleted (A/CN.9/528, para. 52).

⁸ This exclusion is in square brackets as the Working Group has not yet reached an agreement on the matter (see A/CN.9/527, paras. 90-93 and A/CN.9/528, paras. 55-60).

⁹ This draft article might contain additional exclusions, as may be decided by the Working Group. Annex II of the initial draft (A/CN.9/WG.IV/WP.95) reproduced, for illustrative purposes and without the intention of being exhaustive, exclusions typically found in domestic laws on electronic commerce. Additional exclusions that had been proposed at the Working Group's fortieth session and reiterated at its forty-first session related to certain existing financial services markets with well-established rules resulting from specific regulations, standard agreements and practices, system rules or otherwise. Those exclusions included payment systems, negotiable instruments, derivatives, swaps, repurchase agreements (repos), foreign exchange, securities and bond markets, while possibly including general procurement activities of banks and loan activities (A/CN.9/527, para. 95 and A/CN.9/528, para. 61). Additional exclusions proposed at the Working Group's forty-first session include "real estate transactions, as well as contracts involving courts or public authorities, family law and the law of succession" (A/CN.9/528, para. 63). The Working Group may wish to note, in this connection, that the Commission, at its thirty-sixth session, has decided to undertake work in the area of public procurement, including procurement by electronic means (A/58/17, paras. 225-230). This may render an open-ended exclusion of "contracts involving courts or public authorities" inappropriate.

¹⁰ This phrase is an alternative formulation that would obviate the need for a common list of exclusions (A/CN.9/527, para. 96).

Article 3. Matters not governed by this Convention

This Convention does not affect or override¹¹ any rule of law relating to:

- [(a) The protection of consumers;]¹²
- (b) The validity of the contract or of any of its provisions or of any usage [except as otherwise provided in articles [...]];¹³
- (c) The rights and obligations of the parties arising out of the contract or of any of its provisions or of any usage;¹⁴ or
- (d) The effect which the contract may have on the ownership of rights created or transferred by the contract.¹⁵

Article 4. Party autonomy

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions [except for the following: ...].¹⁶

¹¹ This formulation has been used following a suggestion at the Working Group's forty-first session that the words previously used ("This Convention is not concerned with") were inaccurate (A/CN.9/528, para. 67).

¹² Draft subparagraph (a) appears within square brackets, as it represents in some respects an alternative to draft article 2, subparagraph (a) (see A/CN.9/528, para. 52). Under this rule, consumer transactions would not be automatically excluded from the scope of the draft convention, but its provisions would not supersede or affect rules on consumer protection.

¹³ Draft subparagraph (b) is derived from article 4, subparagraph (a), of the United Nations Sales Convention. The Working Group may wish to consider the relationship between the general exclusions under the draft article and other provisions that, for instance, affirm the validity of data messages, such as draft articles 8, 9 and 13 (see A/CN.9/527, para. 103).

¹⁴ The preliminary draft convention is not concerned with substantive issues arising out of the contract, which, for all other purposes, remains subject to its governing law (see A/CN.9/527, paras. 10-12).

¹⁵ Draft subparagraph (d) is based, *mutatis mutandis*, on article 4, subparagraph (b), of the United Nations Sales Convention.

¹⁶ The Working Group has yet to consider whether some limitation to the principle of party autonomy is appropriate or desirable in the context of the preliminary draft convention, in particular in the light of provisions such as draft articles 9, para. 3; 11 and 15 (see A/CN.9/527, para. 109; see also A/CN.9/528, paras. 71-75). The earlier version of this article contained a second paragraph dealing with parties' consent to the use of data messages in a contractual context. That provision has now been combined with draft article 8.

CHAPTER II. GENERAL PROVISIONS*Article 5. Definitions¹⁷*

For the purposes of this Convention:

(a) “Data message” means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(b) “Electronic data interchange (EDI)” means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

(c) “Originator” of a data message means a person by whom, or on whose behalf, the data message purports to¹⁸ have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;

(d) “Addressee” of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

(e) “Information system” means a system for generating, sending, receiving, storing or otherwise processing data messages;¹⁹

(f) “Automated information system” means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;²⁰

[(g) “Electronic signature” means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the person holding the signature creation data in relation to the data message and indicate that person’s approval of the information contained in the data message;²¹

¹⁷ The definitions contained in draft paragraphs (a) to (e) are derived from article 2 of the UNCITRAL Model Law on Electronic Commerce. The definition of “electronic signature” corresponds to the definition of the same expression in article 2 of the UNCITRAL Model Law on Electronic Signatures. The definitions of “offeror” and “offeree” have been deleted, although the Working Group had tentatively retained them (A/CN.9/527, para. 115). The Secretariat submits that those words have become superfluous in view of the reformulation of draft articles 8 and 13 (see A/CN.9/528, para. 106).

¹⁸ The wording of this definition is taken from article 2, subparagraph (c), of the UNCITRAL Model Law on Electronic Commerce. It has been suggested to the Secretariat that it might be preferable to delete the words “purports to have been” and use instead the words “has been sent”.

¹⁹ The Working Group may wish to consider whether this definition needs further clarification, in view of the questions that have been raised in connection with paragraph 2 of the former article 11 (currently article 10) (see A/CN.9/528, paras. 148-149).

²⁰ This definition is based on the definition of “electronic agent” contained in section 2 (6) of the Uniform Electronic Transactions Act of the United States of America; a similar definition is also used in section 19 of the Uniform Electronic Commerce Act of Canada. This definition was included in view of the contents of draft article 14.

²¹ The initial draft contained in document A/CN.9/WG.IV/WP.95 included, as a variant to this

[(h) “Place of business”²² means [any place of operations where a person carries out a non-transitory activity with human means and goods or services;]²³ [the place where a party maintains a stable establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location;]²⁴

[(i) “Person” and “party” include natural persons and legal entities;]²⁵

[(j) Other definitions that the Working Group may wish to add.]²⁶

Article 6. Interpretation

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on

provision, a general definition of “signature”. Although the Working Group tentatively agreed on retaining both variants, the Secretariat suggests that it might be more appropriate, given the limited scope of the draft convention, to define only “electronic signatures”, leaving a definition of “signature” for the otherwise applicable law, as had been suggested at the Working Group’s fortieth session (A/CN.9/527, paras. 116-119).

²² The proposed definition appears within square brackets since the Commission has not thus far defined “place of business” (see A/CN.9/527, paras. 120-122). At the Working Group’s thirty-ninth session, it was suggested that the rules on parties’ location should be expanded to include elements such as the place of an entity’s organization or incorporation (A/CN.9/509, para. 53). The Working Group decided that it could consider the desirability of using supplementary elements to the criteria used to define the parties’ location by expanding the definition of place of business (A/CN.9/509, para. 54). The Working Group may wish to consider whether the proposed additional notions and any other new elements should be provided as an alternative to the elements currently used or only as a default rule for those entities without an “establishment”. Additional cases that might deserve consideration by the Working Group might include situations where the most significant component of human means or goods or services used for a particular business are located in a place bearing little relationship to the centre of a company’s affairs, such as when the only equipment and personnel used by a so-called “virtual business” located in one country consists of leased space in a third-party server located elsewhere.

²³ This alternative reflects the essential elements of the notions of “place of business”, as understood in international commercial practice, and “establishment”, as used in article 2, subparagraph (f), of the UNCITRAL Model Law on Cross-Border Insolvency.

²⁴ This alternative follows the understanding of the concept of “place of business” in the European Union (see paragraph 19 of the preamble to Directive 2000/31/EC of the European Union).

²⁵ During the preparation of the UNCITRAL Model Law on Electronic Commerce, it was felt that such a definition did not belong in the text of the instrument, but in its guide to enactment. As a Convention would not normally be accompanied by extensive comments, the proposed definition has been included in the form of a provision, should the Working Group find such a definition necessary, particularly in view of provisions such as draft article 9, Variant B, subparagraph 4 (b).

²⁶ The Working Group may wish to consider whether definitions of other terms should be included, such as “signatory” (if variant B of draft article 10 (formerly 14) is adopted), “interactive applications”, “electronic mail” or “domain name”.

which it is based or, in the absence of such principles, in conformity with the law applicable [by virtue of the rules of private international law].²⁷

*Article 7. Location of the parties*²⁸

1. For the purposes of this Convention, a person's place of business is presumed to be the location indicated by that person [, unless the person does not have a place of business at such location [[and] that such indication is made solely to trigger or avoid the application of this Convention]].

2. If a person [has not indicated a place of business or, subject to paragraph 1 of this article, a person]²⁹ has more than one place of business, the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

3. If a person does not have a place of business, reference is to be made to the person's habitual residence.

4. The place of location of the equipment and technology supporting an information system used by a person in connection with the formation of a contract or the place from which such information system may be accessed by other persons, in and of themselves, do not constitute a place of business [, unless such legal entity does not have a place of business [within the meaning of article 5 (h)]].³⁰

²⁷ The closing phrase has been placed in square brackets at the request of the Working Group. Similar formulations in other instruments had been incorrectly understood as allowing immediate referral to the applicable law pursuant to the rules on conflict of laws of the forum State for the interpretation of a Convention without regard to the conflict of laws rules contained in the Convention itself (A/CN.9/527, paras. 125 and 126).

²⁸ Draft paragraph 1 builds upon a proposal made at the thirty-eighth session of the Working Group to the effect that the parties should have the duty to disclose their places of business (A/CN.9/484, para. 103). That duty is reflected in draft article 11, paragraph 1, subparagraph (b). The draft provision is not intended to create a new concept of "place of business" for the online world. The phrase in square brackets aims to prevent a party from benefiting from recklessly inaccurate or untruthful representations (A/CN.9/509, para. 49), but not to limit the parties' ability to choose the Convention or otherwise agree on the applicable law. The two variants previously contained in the draft paragraph have been combined as the Working Group preferred the former Variant A (A/CN.9/528, para. 88). The words "manifest and clear", which the Working Group found to be conducive to legal uncertainty (A/CN.9/528, para. 86), have been deleted.

²⁹ It has been suggested to the Secretariat that the presumption contemplated in the draft article could also apply in the event that a party does not indicate its place of business. This suggestion has been inserted in square brackets, since the presumption contemplated in the draft article has been used in other UNCITRAL instruments only in connection with multiple places of business.

³⁰ The draft paragraph reflects the principle that rules on location should not result in any given party being considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means (A/CN.9/484, para. 103). The draft paragraph follows the solution proposed in paragraph 19 of the preamble to Directive 2000/31/EC of the European Union. The phrase within square brackets is intended to deal only with so-called "virtual companies" and not with natural persons, who are covered by the rule contained in draft paragraph 3. The Working Group may wish to consider whether draft paragraphs 4 and 5, which the Working Group agreed to retain for further consideration, should be combined in one provision (A/CN.9/509, para. 59).

5. The sole fact that a person makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in such country.³¹

CHAPTER III. USE OF DATA MESSAGES IN INTERNATIONAL CONTRACTS³²

Article 8 [10]. Legal recognition of data messages³³

1. Any communication, declaration, demand, notice or request that the parties are required to make or choose to make [in connection with an existing or contemplated contract] [in the context of the formation or performance of a contract]³⁴ [, including an offer and the acceptance of an offer,]³⁵ may be conveyed by means of data messages and shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose.

[2. Nothing in this Convention requires a person to use or accept information in the form of data messages, but a person's consent to do so may be inferred from the person's conduct.]³⁶

[3. The provisions of this article do not apply to the following: [...] [The provisions of this article do not apply to those matters identified by a Contracting State under a declaration made in accordance with article X.]³⁷

³¹ The current system for assignment of domain names was not originally conceived in geographical terms. Therefore, the apparent connection between a domain name and a country is often insufficient to conclude that there is a genuine and permanent link between the domain name user and the country (A/CN.9/509, paras. 44-46). However, in some countries the assignment of domain names is only made after verification of the accuracy of the information provided by the applicant, including its location in the country to which the relevant domain name relates. For those countries, it might be appropriate to rely, at least in part, on domain names for the purpose of article 7, contrary to what was suggested in the draft paragraph (A/CN.9/509, para. 58). The Working Group may wish to consider whether the proposed rules should be expanded to deal with those situations.

³² This chapter has been restructured. The numbers in square brackets after the article numbers indicate the corresponding numbers in the previous version of the draft convention (A/CN.9/WG.IV/WP.100).

³³ Paragraphs 1 and 2 have been combined to avoid unnecessary repetition. The phrase "unless otherwise agreed by the parties" has been deleted, as it was done elsewhere in the text (see A/CN.9/528, paras. 97-1100 and 126).

³⁴ The reference to "existing or contemplated contract" has been added pursuant to a suggestion by the Working Group (A/CN.9/528, para. 125). These words, and the alternative reference to "the formation and performance of a contract" have also been used elsewhere.

³⁵ The reference to "offer and acceptance" in square brackets is intended to facilitate a consideration by the Working Group as to whether the substance of draft articles 8 and 13 could be usefully combined (see A/CN.9/528, para. 105).

³⁶ The provision reflects the idea that parties should not be forced to accept contractual offers or acts of acceptance by electronic means if they do not want to do so (A/CN.9/527, para. 108). This paragraph was originally contained in draft article 4 (see footnote 15).

³⁷ Since the draft convention now covers all electronic communications and not only contract formation, the Working Group may wish to consider whether additional specific exclusions would be needed. There were expressions of support for developing a common list of exclusions, in the interest of ensuring a high degree of uniformity in the application of the convention, but there were also expressions of doubt as to the feasibility of developing such a list. The Working Group agreed to keep both options in the text and to revert to the matter later (A/CN.9/528, para. 131).

Article 9 [14]. Form requirements

[1. Nothing in this Convention requires a contract or any other communication, declaration, demand, notice or request that the parties are required to make or choose to make [in connection with an existing or contemplated contract] [in the context of the formation or performance of a contract]³⁸ to be made or evidenced in [a particular form, including written form] [by data messages, writing or any other form] or subjects a contract to any other requirement as to form.]³⁹

2. Where the law requires that a contract or any other communication, declaration, demand, notice or request that the parties are required to make or choose to make in connection with a contract should be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.⁴⁰

3. Where the law requires that a contract or any other communication, declaration, demand, notice or request that the parties are required to make or choose to make in connection with a contract should be signed, or provides consequences for the absence of a signature, that requirement is met in relation to a data message if:

Variant A⁴¹

(a) A method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) That method is as reliable as appropriate to the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

³⁸ The qualification "falling within the scope of this Convention" has been deleted in the draft paragraph and elsewhere, so as to avoid possible conflicts between the field of application of the draft convention and the field of application of other conventions, to which draft article Y refers.

³⁹ This provision incorporates the general principle of freedom of form contained in article 11 of the United Nations Sales Convention, in the manner suggested at the Working Group's thirty-ninth session (A/CN.9/509, para. 115).

⁴⁰ This provision sets forth the criteria for the functional equivalence between data messages and paper documents, in the same manner as article 6 of the UNCITRAL Model Law on Electronic Commerce. The Working Group may wish to consider the meaning of the words "the law" and "writing" and whether there would be a need for including definitions of those terms (see A/CN.9/509, paras. 116 and 117).

⁴¹ Variant A recites the general criteria for the functional equivalence between hand-written signatures and electronic identification methods referred to in article 7 of the UNCITRAL Model Law on Electronic Commerce.

Variant B⁴²

... an electronic signature is used which is as reliable as appropriate to the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

4. An electronic signature is considered to be reliable for the purposes of satisfying the requirements referred to in paragraph 3 of this article if:

(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) Where the purpose of the legal requirement for a signature is to provide assurances as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

5. Paragraph 4 of this article does not limit the ability of any person:

(a) To establish in any other way, for the purposes of satisfying the requirement referred to in paragraph 3 of this article, the reliability of an electronic signature;

(b) To adduce evidence of the non-reliability of an electronic signature.

Article 10 [11]. Time and place of dispatch and receipt of data messages⁴³

1. The time of dispatch of a data message is deemed to be the time when the data message enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

2. The time of receipt of a data message is determined as follows:

(a) If the addressee has designated an information system for the purpose of receiving data messages, the data message is deemed to be received at the time when it enters the designated information system;

(b) If the addressee has designated an information system for the receipt of the data message, but the data message is sent to another information system of the addressee, the data message is deemed to be received at the time when it is retrieved by the addressee;

⁴² Variant B is based on article 6, paragraph 3, of the draft UNCITRAL Model Law on Electronic Signatures. The Working Group may wish to consider the need for a definition of "person" (currently provided in subparagraph (i) of draft article 5) in view of the fact that authentication and signature devices may be issued to the holder of particular functions within a corporation or other type of legal entity.

⁴³ Except for draft paragraph 4, the rules contained in this draft article are based on article 15 of the UNCITRAL Model Law on Electronic Commerce, with some adjustments to harmonize the style of the individual provisions with the style used elsewhere in the draft convention. Both paragraphs 1 and 2 have been redrafted, as their previous formulation was felt to be unclear (A/CN.9/528, paras. 140 and 148-149).

(c) If the addressee has not designated an information system, the message is deemed to be received at the time when the data message enters an information system of the addressee unless ...⁴⁴

[Variant A

... it was unreasonable for the originator to have chosen that particular information system for sending the data message, having regard to the circumstances of the case and the content of the data message.] [or]

[Variant B

... the addressee could not reasonably expect that the data message would be addressed to that particular information system.]

3. Paragraph 2 of this article applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph 5 of this article.

4. When the originator and the addressee use the same information system, both the dispatch and the receipt of a data message occur when the data message becomes capable of being retrieved and processed by the addressee.⁴⁵

5. A data message is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 7.

⁴⁴ The alternative words in square brackets in subparagraph (c) reflect proposals made at the Working Group's forty-first session (A/CN.9/528, paras. 146-147). The Secretariat submits that those sets of words are not necessarily mutually exclusive, and has combined them with the conjunction "or".

⁴⁵ This draft paragraph deals with cases where both the originator and the addressee use the same information system. In such a case, the criterion used in draft paragraph 1 cannot be used, since the message remains in a system that cannot be said to be "outside the control of the originator". The rule proposed in the draft paragraph treats dispatch and receipt of a data message as being simultaneous when the message "becomes capable of being retrieved and processed by the addressee". This situation was not contemplated by article 15, paragraph 1, of the Model Law. It is submitted, however, that the proposed special rule, which is inspired by section 23 (1) (a) of the Uniform Electronic Commerce Act of Canada, does not conflict with the rules contained in article 15 of the Model Law. The Working Group may wish to consider whether mutual use of the world wide web, a web site or specific web page for communication purposes should be considered as "use of the same information system."

[Article 11 [15]. General information to be provided by the parties⁴⁶

Data messages used for the advertisement or offer of goods or services⁴⁷ shall include the following information:⁴⁸

(a) The name of the party on whose behalf the advertisement or offer is made and, for legal entities, its full corporate name and place of registration, organization or incorporation;⁴⁹

(b) The geographic location and address at which that party has its place of business, including its electronic mail address and other contact details.⁵⁰

Article 12 [9]. Invitations to make offers⁵¹

Variant A

1. A proposal to conclude a contract made through one or more data messages which is not addressed to one or more specific persons, but is generally accessible to persons making use of information systems is to be regarded merely as an invitation to make offers, unless it indicates the intention of the person making the proposal to be bound in case of acceptance.⁵²

⁴⁶ The draft article, which is inspired by article 5, paragraph 1, of Directive 2000/31/EC of the European Union, appears in square brackets, as there was no consensus on the need for the provision within the Working Group (A/CN.9/509, paras. 61-65). In its current form, the draft article does not contemplate any sanctions or consequences for a party's failure to provide the required information, a matter that still needs to be considered by the Working Group (see A/CN.9/509, para. 123, and A/CN.9/527, para. 103). The draft article would only apply to data messages related to contracts that are not excluded from the scope of application of the draft convention under article 2.

⁴⁷ The previous version of the draft article used the phrase "a person that uses data messages to advertise or offer goods or services [...]." The Working Group may wish to consider whether a formulation that focuses on the data message and its contents, rather than on an obligation imposed upon a person might help address the concerns that have been expressed regarding the apparently regulatory nature of the provision (A/CN.9/509, para. 63). The second paragraph of the earlier version, which provided that the information required by paragraph 1 should be "easily, directly and permanently accessible" has been deleted, as direct accessibility is implied by the new formulation of the draft article.

⁴⁸ The Working Group may wish to consider the desirability of specifying in the provision how the information is to be made "available", for instance, whether it must be contained in the data message or messages offering goods or services or by appropriate reference therein, in particular whether the information also needs to be capable of being retrieved or stored by the addressee.

⁴⁹ The reference to trade registers and registration numbers has been replaced with a more general reference to the corporate name and place of registration, organization or incorporation.

⁵⁰ The former subparagraphs (b) and (c) of the draft provisions have been combined for ease of reading.

⁵¹ This provision deals with an issue that has given rise to extensive debate. At the Working Group's forty-first session, it was noted that "there was currently no standard business practice in that area" (A/CN.9/528, para. 117). Accordingly, the two variants represent the two different business practices that exist. Although both variants are meant as default rules in the absence of a clear indication of a person's intention, their appropriateness in the draft convention has been questioned (A/CN.9/528, paras. 117-118).

⁵² This provision is inspired by article 14, paragraph 1, of the United Nations Sales Convention, and results from an analogy between offers made by electronic means and offers made through more traditional means (see A/CN.9/509, paras. 76-85). The Working Group may wish to

2. Unless otherwise indicated by the person making the proposal, a proposal to conclude a contract that makes use of interactive applications for the [automatic] placement of orders through such information system,⁵³ is an offer and is presumed to indicate the intention of the offeror to be bound in case of acceptance.⁵⁴

Variant B⁵⁵

A proposal to conclude a contract made through one or more data messages which is not addressed to one or more specific persons, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the [automatic] placement of orders through such information system, is to be regarded as an invitation to make offers, unless it clearly indicates the intention of the person making the proposal to be bound in case of acceptance.

Article 13 [8]. Use of data messages in contract formation⁵⁶

1. [An offer and the acceptance of an offer may be expressed by means of data messages.] Where data messages are used [in the formation of a contract] [to convey an offer or the acceptance of an offer], [that contract] [the resulting contract]

consider, however, whether specific rules should be formulated to deal with offers of goods through Internet auction platforms and similar transactions, which in many legal systems have been regarded as binding offers to sell the goods to the highest bidder.

⁵³ The previous version of the draft article referred to the use of “automated information systems” or, as an alternative, to the use of “an interactive application that appears to allow for the contract to be concluded automatically.” At the Working Group’s thirty-ninth session, it was said that the party placing an order might have no means of ascertaining how the order would be processed and whether it was in fact dealing with “automated computer systems allowing the contract to be concluded automatically” or whether other actions, by human intervention or through the use of other equipment, might be required in order to effectively conclude a contract or process an order. The original formulation in the draft paragraph was further criticized because the reference to an application that allowed a contract “to be concluded automatically”, seemed to assume that a valid contract had been concluded, which was felt to be misleading in a context dealing with actions that might lead to contract formation (A/CN.9/509, para. 82). The draft article refers to applications for the “placement” of orders, rather than to applications for “processing” orders, because the provision focuses on the elements that are apparent to the person placing an order, rather than on the internal functioning of the mechanism being used. The Working Group may wish to consider whether the current formulation would achieve the degree of objectivity desired by the Working Group.

⁵⁴ The rule proposed in variant A is similar to the rule proposed in legal writings for the functioning of automatic vending machines (see A/CN.9/WG.IV/WP.95, para. 54).

⁵⁵ At the Working Group’s thirty-ninth session, it was pointed out that entities offering goods or services through a web site that used interactive applications enabling negotiation and immediate processing of purchase orders for goods or services frequently indicated in their web sites that they were not bound by those offers. If that already was the case in practice, it would be questionable for the Working Group to make a presumption in the opposite direction in the draft provision (A/CN.9/509, para. 82). Variant B, which combines paragraphs 1 and 2 in a single provision, reflects that proposition and treats offers of goods or services, even where an “automated information system” is used, as an invitation to make offers (A/CN.9/528, para. 119).

⁵⁶ The Working Group may wish to consider whether the draft article would retain its relevance if the Working Group were to combine its substance with draft article 8 (see A/CN.9/528, para. 105).

shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose.⁵⁷

Variant A

2. When conveyed in the form of a data message, an offer and the acceptance of an offer become effective when they are received by the addressee.⁵⁸

Variant B

2. Where the law of a Contracting State attaches consequences to the moment in which an offer or an acceptance of an offer reaches the offeror or the offeree, and a data message is used to convey such offer or acceptance, the data message is deemed to reach the offeror or the offeree when it is received by the offeror or the offeree.⁵⁹

*Article 14 [12]. Use of automated information systems for contract formation*⁶⁰

A contract may be formed by the interaction of an automated information system and a person or by the interaction of automated information systems, even if no person reviewed each of the individual actions carried out by such systems or the resulting agreement.

⁵⁷ Paragraphs 1 and 3 have been combined in order to align this provision with the new structure of draft article 8. The first sentence has been placed in square brackets, as its elements may be already covered by the additional language in square brackets in draft article 8, paragraph 1. The second sentence contains language in square brackets offering two drafting choices for the provision.

⁵⁸ The rule in this paragraph, which appeared in the former draft article 8, reflect the essence of the rules on contract formation contained, respectively, in articles 15, paragraph 1, and 18, paragraph 2, of the United Nations Sales Convention. The verb “reach”, which is used in the United Nations Sales Convention, has been replaced with the verb “receive” in the draft article so as to align it with draft article 10, which is based on article 15 of the UNCITRAL Model Law on Electronic Commerce. The Working Group may wish to consider whether this rule is indeed needed, in view of the substantive nature and the limited scope of the instrument.

⁵⁹ This alternative has been suggested at the Working Group’s forty-first session (see A/CN.9/528, paras. 105-106). The Working Group may wish to consider, however, whether a parallel provision should be added for the notion of “dispatch”, even though it is not the prevailing rule on contract formation under the United Nations Sales Convention, since it may be relevant for contracts not covered by that convention, depending on the applicable law.

⁶⁰ This draft provision, which the Working Group, at its thirty-ninth session, decided to retain in substance (A/CN.9/509, para. 103), develops further a principle formulated in general terms in article 13, paragraph 2, subparagraph (b) of the UNCITRAL Model Law on Electronic Commerce. The draft article does not deviate from the current understanding of legal effects of automated transactions that a contract resulting from the interaction of a computer with another computer or person is attributable to the person in whose name the contract is entered into (A/CN.9/484, para. 106).

[Article 15 [16]. Availability of contract terms⁶¹

A party offering goods or services through an information system that is generally accessible to persons making use of information systems⁶² shall make the data message or messages which contain the contract terms⁶³ available to the other party [for a reasonable period of time] in a way that allows for its or their storage and reproduction. [A data message is deemed not to be capable of being stored or reproduced if the originator inhibits the printing or storage of the data message or messages by the other party.]⁶⁴

*Article 16 [13]. Error in electronic communications*Variant A⁶⁵

[Unless otherwise [expressly] agreed by the parties,]⁶⁶ a contract concluded by a person that accesses an automated information system of another party has no legal effect and is not enforceable if the person made an error in a data message and:⁶⁷

⁶¹ The draft article, which is based on article 10, paragraph 3, of Directive 2000/31/EC of the European Union, appears in square brackets, as there was no consensus on the need for the provision within the Working Group (A/CN.9/509, paras. 123-125). If the provision is retained, the Working Group may wish to consider whether the draft article should provide consequences for the failure by a party to make available the contract terms, and which consequences would be appropriate. In some legal systems the consequences might be that a contractual term that has not been made available to the other party cannot be enforced against it.

⁶² The Working Group may wish to consider whether these words adequately describe the types of situations that the Working Group intends to address in the draft article.

⁶³ The words “and general conditions” have been deleted as they appeared to be redundant. The Working Group may however wish to consider whether the provision should be made more explicit as to the version of the contract terms that needs to be retained.

⁶⁴ The Working Group may wish to consider whether this sentence is sufficiently flexible to allow for the creation of “original” or “unique” electronic records, which a party might have a legitimate interest in rendering incapable of replication (A/CN.9/509, para. 124).

⁶⁵ This draft paragraph deals with the issue of errors in automated transactions (see A/CN.9/WG.IV/WP.95, paras. 74-79). Earlier versions of the draft article contained, in paragraph 1 of Variant A, a rule based on article 11, paragraph 2, of Directive 2000/31/EC of the European Union, which creates an obligation for persons offering goods or services through automated information systems to offer means for correcting input errors, and required such means to be “appropriate, effective and accessible”. The draft article was the subject of essentially two types of objections: one objection was that the draft convention should not deal with a complex substantive issue such as error and mistake, a matter on which the Working Group has not yet reached a final decision; another objection was that the obligations contemplated in article 14, paragraph 2, of the first version of the draft convention (as contained in A/CN.9/WG.IV/WP.95) were regarded as being of a regulatory or public law nature (A/CN.9/509, para. 108). The Working Group may wish to consider whether the latter objection could be addressed by deleting the reference to an obligation to provide means for correcting errors and by contemplating only private law consequences for the absence of such means.

⁶⁶ The Working Group may wish to consider whether the possibility of derogation by agreement needs to be expressly made or can result from tacit agreement, for instance, when a party proceeds to place an order through the seller’s automated information system even though it is apparent to such party that the system does not provide an opportunity to correct input errors.

⁶⁷ This provision deals with the legal effects of errors made by a natural person communicating with an automated information system. The draft provision is inspired by section 22 of the Uniform Electronic Commerce Act of Canada. At the Working Group’s thirty-ninth session it was suggested

(a) The automated information system did not provide the person with an opportunity to prevent or correct the error;

(b) The person notifies the other party of the error as soon as practicable when the person making the error learns of it and indicates that he or she made an error in the data message;

[(c) The person takes reasonable steps, including steps that conform to the other party's instructions, to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy such goods or services; and

[(d) The person has not used or received any material benefit or value from the goods or services, if any, received from the other party.]⁶⁸

Variant B

1. [Unless otherwise [expressly] agreed by the parties,]⁶⁹ a contract concluded by a person that accesses an automated information system of another party has no legal effect and is not enforceable if the person made an error in a data message and the automated information system did not provide the person with an opportunity to prevent or correct the error. The person invoking the error must notify the other party of the error as soon as practicable and indicate that he or she made an error in the data message.⁷⁰

[2. A person is not entitled to invoke an error under paragraph 1:

(a) If the person fails to take reasonable steps, including steps that conform to the other party's instructions, to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy such goods or services; or

(b) If the person has used or received any material benefit or value from the goods or services, if any, received from the other party.]⁷¹

*[Other substantive provisions that the Working Group may wish to include.]*⁷²

that such provisions might not be appropriate in the context of commercial (that is, non-consumer) transactions, since the right to repudiate a contract in case of material error may not always be provided under general contract law. The Working Group nevertheless decided to retain it for further consideration (A/CN.9/509, paras. 110 and 111).

⁶⁸ Subparagraphs (c) and (d) appear within square brackets since it was suggested, at the Working Group's thirty-ninth session, that the matters dealt with therein went beyond matters of contract formation and departed from the consequences of avoidance of contracts under some legal systems (A/CN.9/509, para. 110).

⁶⁹ See note 66.

⁷⁰ This variant combines in two paragraphs the various elements contained in paragraphs 2 and 3 and subparagraphs (a)-(d) of the first version of the draft article (A/CN.9/WG.IV/WP.95), as was requested by the Working Group (A/CN.9/509, para. 111).

⁷¹ See footnote 68.

⁷² Such additional provisions might include, beyond consequences for a person's failure to comply with draft articles 11, 15 and 16, an issue that the Working Group has not yet considered (A/CN.9/527, para.103), other issues dealt with in electronic commerce legislation, such as liability of information services providers for loss or delay in the delivery of data messages.

CHAPTER IV. FINAL PROVISIONS

[Article X. Declarations on exclusions]⁷³

1. Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph 1 (b) of article 1 of this Convention.] ⁷⁴

2. Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not apply this Convention to the matters specified in its declaration.

3. Any declaration made pursuant to paragraphs 1 and 2 of this article shall take effect on the first day of the month following the expiration of [six] months after the date of its receipt by the depositary.]

Article Y. Communications exchanged under other international conventions⁷⁵

1. Except as otherwise stated in a declaration made in accordance with paragraph 2 of this article, a State party to this Convention [may declare at any time that it]⁷⁶ undertakes to apply the provisions of [article 7 and] chapter III⁷⁷ of this Convention to the exchange [by means of data messages] of any communications, declarations, demands, notices or requests [, including an offer and acceptance of an offer,] that the parties are required to make or choose to make in connection with or under ...

⁷³ The Working Group has not yet concluded its deliberations on possible exclusions to the preliminary draft convention under draft article 2 (A/CN.9/527, paras. 83-98). The draft article has been added as a possible alternative, in the event that consensus was not achieved on possible exclusions to the preliminary draft convention.

⁷⁴ At its forty-first session, the Working Group agreed to consider, at a later stage, a provision allowing Contracting States to exclude the application of subparagraph (b) of article 1, paragraph 1, along the lines of article 95 of the United Nations Sales Convention (A/CN.9/528, para. 42).

⁷⁵ The draft article is intended to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments, which had been the object of a survey contained in an earlier note by the Secretariat (A/CN.9/WG.IV/WP.94). At the Working Group's fortieth session, there was general agreement to proceed in that manner, to the extent that the issues were common, which was the case at least with regard to most issues raised under the instruments listed in variant A (A/CN.9/527, paras. 33-48). Variant B, in turn, would make it possible for a Contracting State to extend the application of the new instrument to the use of data messages in the context of other international conventions, as the Contracting State sees fit. Both variants might even be combined (see footnote 78).

⁷⁶ The language in square brackets is intended to give more flexibility in the application of the draft article, since, without such clarification, the provision might be read to the effect that an undertaking pursuant to the draft article needed to be assumed upon signature, ratification or accession and could not be expanded at a later stage. If these words are retained, a provision along the lines, of paragraph 3 of draft article X may be needed also in draft article Y.

⁷⁷ The specific reference to the substantive provisions of the draft convention contained in chapter III is intended to avoid the impression that the provisions on the scope of application of the draft convention would affect the definition of the scope of application of other international conventions. The Working Group may wish to consider whether the provisions of draft article 7, to which reference is made in square brackets, are also suitable for subsidiary (interpretative) application in the context of other international conventions, or whether they might interfere with the existing interpretation of those conventions.

Variant A

... any of the following international agreements or conventions to which the State is or may become a Contracting State:

Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980)

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 17 April 1991)

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995)

United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001)

Variant B

... any international agreement or convention on private commercial law matters to which the State is a Contracting State and which are identified in that State's declaration.]⁷⁸

2. Any State may declare at any time that it will not apply this Convention [or any specific provision thereof] to international contracts falling within the scope of [any of the above conventions.] [one or more international agreements, treaties or conventions to which the State is a Contracting Party and which are identified in that State's declaration.]

3. Any declaration made pursuant to paragraph 2 of this article shall take effect on the first day of the month following the expiration of [six] months after the date of its receipt by the depositary.

[Customary and other final clauses that the Working Group may wish to include.]

⁷⁸ A third possibility might be to combine both variants so that the application of paragraph 1 to the listed conventions would be without prejudice to the right of a Contracting State to extend the application of the new instrument to the use of data messages in the context of other international conventions.