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# Report of the Working Group IV (Electronic Commerce) on the work of its fortieth session

## (Vienna, 14-18 October 2002)

Contents



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# I. Introduction: previous deliberations of the Working Group

1. At its thirty-third session, in 2000, the Commission held a preliminary exchange of views on proposals for future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible. The first dealt with electronic contracting, considered from the perspective of the United Nations Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention");[1] the second was online dispute settlement; and the third topic was dematerialization of documents of title, in particular in the transport industry.

2. The Commission welcomed the proposal to study further the desirability and feasibility of undertaking future work in respect of those topics. The Commission generally agreed that, upon completing the preparation of the Model Law on Electronic Signatures, the Working Group would be expected to examine, at its thirty-eighth session, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission at its thirty-fourth session (Vienna, 25 June-13 July 2001). It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.[2] The Working Group considered those proposals at its thirty-eighth session, in 2001, on the basis of a set of notes dealing with a possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89), dematerialization of documents of title (A/CN.9/WG.IV/WP.90) and electronic contracting (A/CN.9/WG.IV/WP.91).

3. The Working Group held an extensive discussion on issues related to electronic contracting (A/CN.9/484, paras. 94-127). The Working Group concluded its deliberations on future work by recommending to the Commission that work towards the preparation of an international instrument dealing with certain issues in electronic contracting be started on a priority basis. At the same time, it was agreed to recommend to the Commission that the Secretariat should be entrusted with the preparation of the necessary studies concerning three other topics considered by the Working Group, namely: (a) a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments; (b) a further study of the issues related to transfer of rights, in particular, rights in tangible goods, by electronic means and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interests in such goods; and (c) a study discussing the UNCITRAL Model Law on International Commercial Arbitration,[3] as well as the UNCITRAL Arbitration Rules,[4] to assess their appropriateness for meeting the specific needs of online arbitration (A/CN.9/484, para. 134).

4. At the thirty-fourth session of the Commission, in 2001, there was wide support for the recommendations made by the Working Group, which were found to constitute a sound basis for future work by the Commission. The views varied, however, as regards the relative priority to be assigned to the topics. One line of thought was that a project aimed at removing obstacles to electronic commerce in existing instruments should have priority over the other topics, in particular over the preparation of a new international instrument dealing with electronic contracting. It was said that references to "writing", "signature", "document" and other similar

provisions in existing uniform law conventions and trade agreements already created legal obstacles and generated uncertainty in international transactions conducted by electronic means. Efforts to remove those obstacles should not be delayed or neglected by attaching higher priority to issues of electronic contracting.

5. The prevailing view, however, was in favour of the order of priority that had been recommended by the Working Group. It was pointed out, in that connection, that the preparation of an international instrument dealing with issues of electronic contracting and the consideration of appropriate ways for removing obstacles to electronic commerce in existing uniform law conventions and trade agreements were not mutually exclusive. The Commission was reminded of the common understanding reached at its thirty-third session that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.[5]

6. There were also differing views regarding the scope of future work on electronic contracting, as well as the appropriate moment to begin such work. Pursuant to one view, the work should be limited to contracts for the sale of tangible goods. The opposite view, which prevailed in the course of the Commission's deliberations, was that the Working Group on Electronic Commerce should be given a broad mandate to deal with issues of electronic contracting, without narrowing the scope of the work from the outset. It was understood, however, that consumer transactions and contracts granting limited use of intellectual property rights would not be dealt with by the Working Group. The Commission took note of the preliminary working assumption made by the Working Group that the form of the instrument to be prepared could be that of a stand-alone convention dealing broadly with the issues of contract formation in electronic commerce (A/CN.9/484, para. 124), without creating any negative interference with the well-established regime of the United Nations Sales Convention (A/CN.9/484, para. 95), and without unduly interfering with the law of contract formation in general. Broad support was given to the idea expressed in the context of the thirty-eighth session of the Working Group that, to the extent possible, the treatment of Internet-based sales transactions should not differ from the treatment given to sales transactions conducted by more traditional means (A/CN.9/484, para. 102).

7. As regards the timing of the work to be undertaken by the Working Group, there was support for commencing consideration of future work without delay during the third quarter of 2001. However, strong views were expressed that it would be preferable for the Working Group to wait until the first quarter of 2002, so as to afford States sufficient time to hold internal consultations. The Commission accepted that suggestion and decided that the first meeting of the Working Group on issues of electronic contracting should take place in the first quarter of 2002.[6]

8. At its thirty-ninth session, the Working Group considered a note by the Secretariat discussing selected issues on electronic contracting. That note also contained, as its annex I, an initial draft tentatively entitled "Preliminary Draft Convention on [International] Contracts Concluded or Evidenced by Data Messages" (A/CN.9/WG.IV/WP.95). The Working Group further considered a note by the Secretariat transmitting comments that had been formulated by an ad hoc expert group established by the International Chamber of Commerce to examine the

issues raised in document A/CN.9/WG.IV/WP.95 and the draft provisions set out in its annex I (A/CN.9/WG.IV/WP.96).

9. The Working Group began its deliberation by considering the form and scope of the preliminary draft convention (see A/CN.9/509, paras. 18-40). The Working Group agreed to postpone a 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. In particular, the Working Group decided to proceed with its deliberations by first taking 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 with a discussion on draft article 15 (A/CN.9/509, paras. 122-125). The Working Group agreed 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. The Working Group requested the Secretariat to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions for consideration by the Working Group at its fortieth session.

10. At that session, the Working Group was also informed of the progress that had been made by the Secretariat in connection with the survey of possible legal obstacles to electronic commerce in existing trade-related instruments. The Working Group was informed that the Secretariat had begun the work by identifying and reviewing trade-relevant instruments from among the large number of multilateral treaties that were deposited with the Secretary-General. The Secretariat had identified 33 treaties as being potentially relevant for the survey and analysed possible issues that might arise from the use of electronic means of communications under those treaties. The preliminary conclusions reached by the Secretariat in relation to those treaties were set out in a note by the Secretariat (A/CN.9/WG.IV/WP.94) that was submitted to the Working Group at its thirty-ninth session, in March 2002.

11. The Working Group took note of the progress that had been made by the Secretariat in connection with the survey, but did not have sufficient time to consider the preliminary conclusions of the survey. The Working Group requested the Secretariat to seek the views of member and observer States on the survey and the preliminary conclusions indicated therein and to prepare a report compiling such comments for consideration by the Working Group at a later stage. The Working Group took note of a statement stressing the importance that the survey being conducted by the Secretariat should reflect trade-related instruments emanating from the various geographical regions represented on the Commission. For that purpose, the Working Group requested the Secretariat to seek the views of other international organizations, including organizations of the United Nations system and other intergovernmental organizations, as to whether there were international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be included in the survey being conducted by the Secretariat.

12. The Commission considered the Working Group's report at its thirty-fifth session, in 2002. The Commission noted with appreciation that the Working Group

had started its consideration of a possible international instrument dealing with selected issues on electronic contracting. The Commission reaffirmed its belief that an international instrument dealing with certain issues of electronic contracting might be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission commended the Working Group for the progress made in that regard. However, it also took note of the varying views that were expressed within the Working Group concerning the form and scope of the instrument, its underlying principles and some of its main features. The Commission noted, in particular, the proposal that the Working Group's considerations should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. The Commission was of the view that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues. For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions on a possible international instrument dealing with selected issues on electronic contracting until its forty-first session (New York, 5-9 May 2003).[7]

13. As regards the Working Group's consideration of possible legal obstacles to electronic commerce that may result from trade-related international instruments, the Commission reiterated its support for the efforts of the Working Group and the Secretariat in that respect. The Commission requested the Working Group to devote most of its time at its fortieth session, in October 2002, to a substantive discussion of various issues that had been raised in the Secretariat's initial survey (A/CN.9/WG.IV/WP.94).[8]

# II. Organization of the session

14. The Working Group on Electronic Commerce, which was composed of all States members of the Commission, held its fortieth session in Vienna from 14 to 18 October 2002. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, Cameroon, Canada, China, Colombia, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Lithuania, Mexico, Russian Federation, Singapore, Spain, Sudan, Thailand and United States of America.

15. The session was attended by observers from the following States: Algeria, Australia, Bahrain, Belgium, Denmark, Indonesia, Ireland, Lebanon, Norway, Peru, Philippines, Poland, Qatar, Republic of Korea, Senegal, Slovakia, Switzerland, Syrian Arab Republic, Tunisia, Turkey, Ukraine, Venezuela and Yemen.

16. The session was also attended by observers from the following international organizations: (a) organizations of the United Nations system: United Nations Conference on Trade and Development (UNCTAD), United Nations Industrial Development Organization and World Intellectual Property Organization (WIPO); (b) intergovernmental organizations: Asian Clearing Union and Commonwealth Secretariat, European Commission; (c) non-governmental organizations invited by the Commission: Centre for International Legal Studies, International Chamber of Commerce, Moot Alumni Association and Nordic Industrial Fund.

17. The Working Group elected the following officers:

*Chairman*: Jeffrey Chan Wah Teck (Singapore)

*Rapporteur*: Ligia González (Mexico)

18. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.IV/WP.97); (b) the note by the Secretariat referred to in paragraph 10 above (A/CN.9/WG.IV/WP.94); (c) a note by the Secretariat transmitting comments on the survey that were received from member and observer States, from intergovernmental organizations and international non-governmental organizations (A/CN.9/WG.IV/WP.98 and Add.1-4) in response to a circular communication issued by the Secretariat pursuant to the Working Group's request (see para. 11 above); and (d) the notes by the Secretariat referred to in paragraph 8 above (A/CN.9/WG.IV/WP.95 and A/CN.9/WG.IV/WP.96).

19. The following background documents were also made available to the Working Group: (a) report of the Working Group on Electronic Commerce on the work of its thirty-ninth session (A/CN.9/509); (b) note by the Secretariat on legal barriers to the development of electronic commerce in international instruments relating to international trade (A/CN.9/WG.IV/WP.89); and (c) proposal by France on legal aspects of electronic commerce (A/CN.9/WG.IV/WP.93).

20. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Legal barriers to the development of electronic commerce in international instruments relating to international trade.
4. Electronic contracting: provisions for a draft convention.
5. Other business.
6. Adoption of the report.

# III. Summary of deliberations and decisions

21. The Working Group reviewed the survey of possible legal barriers to electronic commerce contained in document A/CN.9/WG.IV/WP.94. The Working Group generally agreed with the analysis and endorsed the recommendations that had been made by the Secretariat (see A/CN.9/WG.IV/WP.94, paras. 24-71). The Working Group agreed to recommend that the Secretariat take up the suggestions for expanding the scope of the survey so as to review possible obstacles to electronic commerce in additional instruments that had been proposed for inclusion in the survey by other organizations and explore with those organizations the modalities for carrying out the necessary studies, taking into account the possible constraints put on the Secretariat by its current workload. The Working Group invited member States to assist the Secretariat in that task by identifying appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments.

22. The Working Group reviewed the preliminary draft convention contained in annex I of the note by the Secretariat (A/CN.9/WG.IV/WP.95). The decisions and deliberations of the Working Group with respect to the draft convention are reflected in section V below (see paras. 72-126). The Secretariat was requested to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions for consideration by the Working Group at its forty-first session, scheduled to take place in New York from 5 to 9 May 2003.

23. The Working Group began its deliberation by a general discussion on the scope of the preliminary draft convention (see paras. 72-81 below). 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) (see paras. 82-126). The Working Group requested the Secretariat to prepare a revised text of the preliminary draft convention for consideration by the Working Group at its forty-first session.

# IV. Legal barriers to the development of electronic commerce in international instruments relating to international trade

24. The Working Group was reminded that the topic under consideration originated from a proposal, which had been considered by the Working Group at its thirty-eighth session, in 2001, for the formulation of an interpretative agreement, in simplified form, for the purpose of specifying and supplementing the definition of the terms “writing”, “signature” and “document” in all existing and future international instruments, irrespective of their legal status. At that time, however, the Working Group had felt that, prior to recommending a specific course of action to the Commission, it should consider the nature and context of such possible barriers to electronic commerce, which should be identified in a comprehensive and detailed survey of international trade-related instruments to be carried out by the Secretariat (A/CN.9/484, para. 86).

25. The Working Group was informed that, as a starting point, the Secretariat had limited its survey of possible barriers to electronic commerce in existing trade-related conventions to international conventions and agreements that were deposited with the Secretary-General. The Working Group was advised that the Secretariat had sought the views of some 60 intergovernmental and international non-governmental organizations, pursuant to a request by the Working Group, at its thirty-ninth session, in 2002, as to whether they wished additional instruments to be included in the Secretariat’s survey. The replies that had been received by the Secretariat, as well as the views of Governments on the topic in general, were reflected in a note by the Secretariat (A/CN.9/WG.IV/WP.98 and Add.1-4).

**General comments**

26. There was strong support for the idea that the Working Group’s review of existing trade-related instruments should not be limited to identifying possible obstacles to electronic commerce and formulating proposals for removing them. Equally important, it was said, would be a consideration of action that might be needed to facilitate electronic transactions in the areas covered by those instruments. While there were no objections to that proposal, it was pointed out that

the consideration of measures to facilitate electronic commerce should focus on rules of private law that applied to commercial transactions and not on general measures to facilitate trade among States, as it was generally felt that issues of trade policy were not within the mandate of the Working Group.

27. A concern was raised with respect to possible duplication of effort, given the work on electronic commerce issues being conducted in other international bodies, such as the World Trade Organization (WTO), the Asia Pacific Economic Cooperation and the Organisation for Economic Cooperation and Development. The Working Group was informed that a number of international bodies had undertaken work on electronic commerce issues at the request of their members and that such issues ranged from private law issues to taxation, privacy matters and consumer protection issues. In most cases, such work did not overlap with the work of the Commission. In the instances where there might exist aspects of common interest, coordination of efforts and consistency of approach might be ensured by contemplating the provision by the Working Group of expert advice and assistance on specific questions upon request by the concerned organizations. Such advice and assistance might take the form, for instance, of responding to queries from other international bodies, holding joint meetings or preparing comments on draft instruments of other bodies at their request. The Secretariat was requested, within the constraints of resources, to prepare reports on the activities of other international bodies in the area of electronic commerce.

28. The Working Group held an extensive discussion on the relationship between its work concerning removal of barriers to electronic commerce in existing international conventions and the preparation of a draft convention on electronic contracting. The Working Group was mindful of the Commission's recommendation that the Working Group's consideration of possible barriers to the development of electronic commerce in existing international instruments should be carried out simultaneously with other topics on the Working Group's work programme, including, in particular, a possible draft convention on electronic contracting and issues related to the transferability of rights in an electronic environment.

29. It was observed that the preliminary conclusions of the survey contained in the note by the Secretariat (A/CN.9/WG.IV/WP.94) showed that all legal instruments surveyed fell into the following few categories with respect to their potential for raising barriers to electronic commerce:

(a) A large group of instruments appeared to raise no issues and require no action;

(b) A second group of surveyed instruments appeared to raise issues that could not be solved by the simple principle of electronic equivalent, because, for example, they implied notions of "location", "dispatch and receipt of an offer" or similar notions that required a more complex adaptation to the electronic environment. Such issues, it was noted, were among those covered by the draft convention on electronic contracting (see A/CN.9/WG.IV/WP.95, annex I) or should fall within the scope of other projects under consideration by the Working Group, such as transfer of rights in tangible goods or other rights by electronic means, or online dispute settlement systems;

(c) A third group of surveyed instruments appeared to raise issues of a trade policy nature that would be outside the area of work of UNCITRAL;

(d) A last group of instruments included two instruments relating to international transport by sea and by road that, in all likelihood, might require some specific adaptation provisions.

30. The Working Group agreed to consider the survey that had been prepared by the Secretariat with a view to ascertaining whether the issues had been correctly identified by the Secretariat, whether there were additional matters to be considered and what action, if any, should be recommended in respect of each instrument. The Working Group also agreed that the question of the form of any instrument to be prepared to address those issues should be left for an appropriate time, after consultations had been conducted on the questions of public international law raised by the topic under consideration. Lastly, the Working Group agreed that it should attempt to identify the common elements between removing legal barriers to electronic commerce in existing instruments and a possible international convention on electronic contracting.

## A. International trade and development

**Convention on Transit Trade of Land-locked States (New York, 8 July 1965)**[9]

31. The Working Group noted that the provisions of the Convention were of a trade policy nature. They were addressed to States and did not establish rules directly applicable to private law transactions. Furthermore, the extent to which electronic communications might be substituted for paper-based documents for the purposes of the Convention was largely dependent upon the capability and readiness of public authorities in the contracting parties to the Convention to process such documents in electronic form.

32. In the light of the above, the Working Group agreed that no action should be recommended in respect of the Convention.

**Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980)**[10]

33. The Working Group noted that the provisions in the Convention that could give rise to uncertainties in connection with electronic commerce could be grouped into four main categories. The first category contained those provisions which contemplated notices or declarations that might be exchanged by the parties, with an implicit subset of that category being the timing of the notice. The second category of provisions consisted of those which expressly contemplated written notices or communications and included definitions of “writing”, while the third category comprised those provisions which referred to the time and place of the formation of the contract and included such important issues as the time and scope of the contract. Finally, the fourth category contained those provisions which referred to an existing undertaking or agreement between the parties.

34. The Working Group noted that the analysis of the Convention and its Protocol had served as a model for the analysis of other conventions in the Secretariat’s survey and that analyses of similar concepts in later portions of the survey referred back to the earlier analysis of the Convention. The Working Group was mindful, in particular, of the close relationship between the Convention and the United Nations

Sales Convention and that discussion of the legal barriers to electronic commerce in one instrument would necessarily have implications for the other.

35. It was noted that there were two main issues evident in the Convention: the question of the validity of communications in the contractual context and the question of the time and place of dispatch and receipt of such communication. In that regard, it was suggested that those issues were germane to the types of issues being proposed for consideration under the draft new instrument on electronic contracting, so that the substantive solution developed in connection with that new instrument should, at least conceptually, be the same for addressing issues raised under the Convention.

36. As regards the appropriate source of substantive rules to address those issues, support was expressed for the suggestion that reliance ought to be placed on the solutions offered in the UNCITRAL Model Law on Electronic Commerce. Another view, however, was that developing rules to deal with the issues raised under the Convention might require going beyond a simple transposition of the criteria of functional equivalence contained in the Model Law. Issues related to the manner in which notifications or declarations were deemed to be made, it was said, were examples of matters not directly covered by the provisions of the Model Law.

37. The Working Group took note of the view that the Model Law might not always offer the means for resolving legal barriers to electronic commerce in international trade, since the Model Law was intended to deal with obstacles in national law. The Working Group was open to the idea that removal of legal barriers to electronic commerce in existing international instruments might require consideration of matters not covered in the Model Law or even a forward-looking development of principles laid down in the Model Law. Nevertheless, the Working Group was mindful of the fact that the Model Law had become a widely adopted model for domestic laws on electronic commerce throughout the world. It was noted that the body of national jurisprudence arising from the enactment of domestic provisions based upon the Model Law was developing a certain uniform approach to issues of electronic commerce.

38. Having considered those general views, the Working Group noted that there was a general agreement as to the types of issues that arose under the Convention that required consideration by the Working Group (see para. 29 above). The Working Group took the view that it was preferable to hold a discussion on the appropriate solution for those issues in the context of its consideration of the draft convention on electronic contracting, to the extent that the issues were common. It was noted, in that connection, that the Working Group, at its thirty-ninth session, had agreed that an instrument on electronic contracting should be expanded beyond issues related to the formation of contracts so as to cover more broadly the uses of electronic means of communications in the context of commercial transactions (A/CN.9/509, para. 36).

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

39. The Working Group was of the view that the issues that had been identified in connection with the Convention on the Limitation Period in the International Sale of Goods were also present in the context of the United Nations Sales Convention. In

addition to those general issues, the United Nations Sales Conventions gave rise to two particular sets of issues, namely, whether certain intangible goods could be regarded as being covered by the Convention and what acts constituted performance of a sales contract in respect of those goods.

40. Before turning to those specific issues, the Working Group reverted to its initial discussion of issues related to the use of electronic communications for the purpose of exchanging notices an declarations relating to the sales contract, an issue that arose under the United Nations Sales Convention in the same manner as it arose under the Convention on the Limitation Period in the International Sale of Goods. The Working Group considered in particular the question as to whether notices or declarations so exchanged should always have legal effect, even if the addressee did not expect to receive communications in electronic form or had not expressly agreed to receive communications in electronic form.

41. The discussion within the Working Group was focused on two alternative approaches to the use of electronic means of notification and declaration with respect to specific contracts, one requiring a positive agreement of the addressee to the use of electronic communications (the "opt-in" approach) and the other assuming such an agreement, unless otherwise stated by the addressee (the "opt-out" approach). Support was expressed for the "opt-in" approach, which was said to provide a solid basis that prior consent existed for electronic communication for notification and declarations.

42. However, it was suggested that an "opt-in" approach would create legal barriers to electronic commerce rather than remove them. It was noted that the more remote a party to a contract might be, the more difficult it might be for it to receive prior notices and declaration expeditiously concerning the form in which further dealing had to be conducted. It was suggested, in that connection, that the "opt-out" approach would provide greater legal certainty, since there would be less risk that a declaration or notification within the framework of an existing contract would be challenged by a party solely on the basis that there was no evidence of that party's agreement to the use of electronic messages. It was also suggested that the United Nations Sales Convention, by recognizing the importance of trade usages in interpreting the parties' will, highlighted the importance of having regard to the prior dealings and the course of conduct between the parties when determining whether they had acquiesced in the use of electronic communications.

43. The Working Group noted that there were two distinct issues being discussed, which might need to be separated in future considerations. The first issue was a discussion of the medium for effecting a declaration under the Convention and other international instruments, while the second was an examination of an appropriate rule for deciding when the notification had reached the person that it was intended to reach. Both issues, it was eventually agreed, deserved further consideration by the Working Group in the context of its deliberations in the draft convention on electronic contracting, which was regarded as an appropriate opportunity to formulate policy choices in that regard.

44. As regards the two sets of specific issues raised by the Convention, the Working Group was of the view those issues were not related to the means of communications used by the parties to conclude a sales contract, but to the very scope of application of the Convention. It was pointed out that the United Nations

Sales Convention was commonly understood as not covering a variety of transactions currently made online other than sales of movable tangible goods in the traditional sense. The Working Group was of the view that the development of uniform rules on transactions involving such intangible goods, however desirable it might be, might entail a revision of the scope of application of the Convention or at least a constructive interpretation of its scope of application. That result, it was felt, could not be achieved by means of the draft convention on electronic contracting and would probably require specific consideration in the context of the Convention. Nevertheless, as the issues were logically associated with the discussions on the proposed scope of application of the draft convention on electronic contracting, the Working Group agreed to take note of the issue and revert, at an appropriate stage, to the question of whether an expansion of the scope of application of the United Nations Sales Convention should be recommended.

**United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 9 December 1988)**[11]

45. In view of the particular nature of the issues raised by electronic substitutes for negotiable instruments, it was felt that a comprehensive new legal framework might be required in order to allow for the international use of data messages in lieu of paper-based negotiable instruments. The Working Group was of the view that developing such a comprehensive legal framework might go beyond the scope of its efforts to remove obstacles to electronic commerce in existing instruments related to international trade. Furthermore, the Working Group noted that financial markets and other business circles had not yet reached the level of development on the practical use of electronic alternatives to paper-based negotiable instruments that could justify the formulation of uniform rules.

46. The Working Group agreed that the specific requirements for such a comprehensive legal framework deserved further analysis, but that it might best be undertaken in the course of the Working Group's consideration of legal issues related to the transfer of rights, in particular, rights in tangible goods, by electronic means, at an appropriate stage.

**United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 17 April 1991)**[12]

47. The Working Group considered that the types of issues of electronic contracting raised under the Convention might best be addressed in the context of its deliberations on the development of an international instrument dealing with some issues of electronic contracting.

**United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995)**[13]

48. The Working Group was of the view that the Convention, being flexible as to the form of the guarantee undertaking and expressly providing for undertakings being in form other than paper, did not create obstacles to the use of electronic means of communications as an alternative to the issuance and exchange of paper-based documents and that therefore no particular action with regard to the Convention was needed.

## B. Transport and communications instruments

### 1. Customs matters

**International Convention to Facilitate the Importation of Commercial Samples and Advertising Material (Geneva, 7 November 1952);**[14] **Customs Convention on Containers (Geneva, 18 May 1956);**[15] **Customs Convention on Containers, 1972 (Geneva, 1 December 1972);**[16] **Customs Convention on the International Transport of Goods under Cover of TIR Carnets (Geneva, 15 January 1959);**[17] **Customs Convention on the International Transport of Goods under Cover of TIR Carnets (Geneva, 14 November 1975);**[18] **European Convention on Customs Treatment of Pallets used in International Transport (Geneva, 9 December 1960);**[19] **International Convention on the Harmonization of Frontier Controls of Goods (Geneva, 21 October 1982);**[20] **Convention on Customs Treatment of Pool Containers used in International Transport (Geneva, 21 January 1994)**[21]

49. The Working Group was generally of the view that, with the possible exception of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (Geneva, 14 November 1975), the above Conventions were of a trade policy nature, being addressed to States and without establishing rules directly relevant for private law transactions. Furthermore, the Working Group noted that the extent to which electronic communications might be substituted for paper-based documents for the purposes of those Conventions was largely dependent upon the capability and readiness of public authorities in the contracting parties to those Conventions to process such documents in electronic form.

50. The Working Group was therefore of the view that further study on issues related to electronic commerce under those Conventions should be more appropriately carried out by other international organizations, such as WTO, the Customs Cooperation Council (also known as the World Customs Organization), the Economic Commission for Europe (ECE) and other regional organizations. Any study by the Working Group of issues related to customs conventions should only be considered if any of those organizations invited the views of the Working Group on specific issues falling within its area of expertise, such as legal issues concerning the interplay between specific customs conventions and various contract documents that might be concluded electronically (for example, electronic letters of credit or seaway bills).

### 2. Road traffic

**Convention on Road Traffic (Geneva, 19 September 1949)**[22]

51. The Working Group noted that the purpose of the Convention was to harmonize the rules governing road traffic among contracting States, ensure their compliance in order to facilitate international road traffic and increase road safety. The provisions of the Convention were felt to deal essentially with road safety and traffic control issues and did not establish rules directly relevant for private law transactions. The Working Group was of the view that no action was required in respect of the Convention.

**Convention on Road Traffic (Vienna, 8 November 1968)**[23]

52. The Working Group noted that the purpose of the Convention was to facilitate international road traffic and to increase road safety through the adoption of uniform traffic rules. The Working Group was of the view that the Convention did not contain any provisions that might be directly relevant to electronic commerce.

**General Agreement on Economic Regulations for International Road Transport and (a) Additional Protocol; and (b) Protocol of Signature (Geneva, 17 March 1954)**[24]

53. The Working Group noted that the purpose of the General Agreement was to favour the development of the international carriage of passengers and goods by road by establishing a common regime for international road transport. The Working Group was of the view that the General Agreement did not contain any provisions that might be directly relevant to electronic commerce.

**Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956) and Protocol thereto (Geneva, 5 July 1978)**[25]

54. The Working Group was of the view that a number of provisions in the Convention were of special relevance for the use of electronic communications, in particular those concerning the instrument of the contract of carriage (consignment note). The Working Group concurred with the Secretariat's assessment of the possible legal difficulties involved with electronic substitutes for the consignment note, in particular as regards the interplay between the consignment note and disposal of the goods.

55. The Working Group noted, however, that the ECE Working Party on Road Transport was currently considering proposals for amending the Convention so as to expressly allow for the use of data messages in connection with international road carriage. The Working Group welcomed those efforts and affirmed its readiness to assist the ECE Working Party on Road Transport in any manner that the Working Party might deem appropriate, for instance by offering comments or suggestions in connection with any instrument that the Working Party might wish to bring to the attention of the Working Group.

**Convention on the Taxation of Road Vehicles Engaged in International Goods Transport (Geneva, 14 December 1956)**[26]

56. The Working Group noted that the purpose of the Convention was to exempt from taxes and charges vehicles that are registered in the territory of one of the contracting parties and are temporarily imported in the course of international goods transport into the territory of another contracting party, under certain stipulated conditions. The Working Group was of the view that the Convention did not contain any provisions that might be directly relevant to electronic commerce.

**Convention on the Taxation of Road Vehicles Engaged in International Passenger Transport (Geneva, 14 December 1956)**[27]

57. The Working Group noted that the purpose of the Convention was to facilitate the taxation of road vehicles transporting persons and their baggage between countries for remuneration or other considerations. The Working Group was of the

view that the Convention did not contain any provisions that might be directly relevant to electronic commerce.

**European Agreement concerning the International Carriage of Dangerous Goods by Road (Geneva, 30 September 1957) and (a) Protocol amending article 14, paragraph 3; and (b) Protocol amending article 1 (a), article 14, paragraph 1, and article 14, paragraph 3**[28]

58. The Working Group noted that the purpose of the Agreement was to increase the safety of international transport of dangerous goods by road, with the use of prohibitive or regulatory measures. The Working Group was of the view that the Agreement Convention did not contain any provisions that might be directly relevant to electronic commerce.

**Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (Geneva, 1 September 1970)**[29]

59. The Working Group noted that, despite their significance for international trade, the substantive provisions of the Convention were essentially of a health and sanitary nature. They were addressed to States and did not establish rules directly relevant for private law transactions. Furthermore, the extent to which electronic communications might be substituted for paper-based documents for the purposes of the Convention was largely dependent upon the capability and readiness of public authorities in the contracting parties to the Convention to process such documents in electronic form. The Working Group was therefore of the view that no action was required in respect of the Convention.

**European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (Geneva, 1 July 1970)**[30]

60. The Working Group noted that the provisions of the Agreement dealt essentially with social matters and issues related to work safety and did not establish rules directly relevant for private law transactions. The Working Group was therefore of the view that no action was required in respect of the Agreement.

**European Agreement supplementing the Convention on Road Traffic opened for Signature at Vienna on 8 November 1968 (Geneva, 1 May 1971)**[31]

61. The Working Group noted that the purpose of the Agreement was to harmonize rules governing road traffic in Europe, ensure their compliance in order to facilitate international road traffic and increase road safety. The Working Group was of the view that the Agreement did not contain any provisions that might be directly relevant to electronic commerce.

**Convention on the Contract for the International Carriage of Passengers and Luggage by Road (Geneva, 1 March 1973) and Protocol thereto**[32]

62. The Working Group noted that the particular nature of the issues raised by electronic substitutes for transferable instruments might require a comprehensive new legal framework in order to allow for the international use of data messages in lieu of the paper-based transport documents envisaged by the Convention. Developing rules to achieve that result, however, was felt to go beyond the scope of

the Working Group's efforts to remove obstacles to electronic commerce in existing international trade-related instruments. That circumstance, and the limited geographic scope of the Convention led the Working Group to take the view that no action should be recommended in respect of the Convention.

### 3. Transport by rail

#### International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail (Geneva, 10 January 1952)[33]

63. The Working Group noted that the purpose of the Convention was to ensure an effective and efficient examination at designated stations for goods carried by rail crossing frontiers. The Working Group was of the view that the Convention did not contain any provisions that might be directly relevant to electronic commerce.

### 4. Water transport

#### Convention relating to the Limitation of the Liability of Owners of Inland Navigation Vessels and Protocol thereto (Geneva, 1 March 1973)[34]

64. The Working Group noted that the purpose of the Convention was to enable owners and crew members of inland navigation vessels to limit their liability, either contractually or extra-contractually, by constituting a limitation fund in accordance with the provisions of the Convention. The Working Group was of the view that the Convention did not contain any provisions that might be directly relevant to electronic commerce.

#### United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978)[35]

65. The Working Group noted that electronic substitutes for bills of lading and, to a lesser extent, electronic substitutes of other transport documents gave rise to a number of particular issues that might require specific solutions. Thus, those issues were felt to go beyond the scope of the Working Group's efforts to remove obstacles to electronic commerce in existing international trade-related instruments. The Working Group noted that electronic substitutes for maritime transport documents were one of the various issues at present under consideration by Working Group III (Transport Law). The Working Group was of the view that the work of Working Group III should be allowed to proceed without interference, but affirmed its readiness to offer its comments on that work at an appropriate stage.

#### International Convention on Maritime Liens and Mortgages (Geneva, 6 May 1993)[36]

66. The Working Group noted the particular nature of the issues raised by electronic registry systems in the Convention. The Working Group was of the view that an analysis of the specific requirements for the functioning of electronic registration systems under the Convention might best be undertaken in the course of the Working Group's consideration of legal issues related to the transfer of rights, in particular, rights in tangible goods, by electronic means, in cooperation with the United Nations Conference on Trade and Development and the International Maritime Organization, if those organizations wished that such joint work be undertaken.

### 5. Multimodal transport

#### United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980)[37]

67. The Working Group noted that the consideration of the particular issues involved in electronic substitutes for multimodal transport documents could go beyond the scope of the Working Group's efforts to remove obstacles to electronic commerce in existing international trade-related instruments. The Working Group was of the view that the Secretariat should be requested to consult with UNCTAD and to inform the Working Group, at an appropriate stage, on any joint work that might be undertaken in connection with those matters.

#### European Agreement on Important International Combined Transport Lines and Related Installations and Protocol thereto (Geneva, 1 February 1991)[38]

68. The Working Group noted that the purpose of the Convention was to facilitate the operation of combined transport services and infrastructures necessary for their efficient operation in Europe. The Working Group was of the view that none of the provisions in the Convention would be directly relevant to electronic commerce.

## C. Commercial arbitration

#### Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)[39]

69. The Working Group noted that the potentially problematic provisions in the Convention fell into the following three categories: (a) provisions requiring a written form of the arbitration agreement; (b) provisions requiring the submission of "original" documents; and (c) provisions that contemplated notices or declarations that might be exchanged by the parties.

70. The Working Group took note of the work being undertaken by Working Group II (Arbitration) in connection with the written form of the arbitration agreement under article II of the Convention and related issues.

#### European Convention on International Commercial Arbitration (Geneva, 21 April 1961)[40]

71. The Working Group took note of the fact that ECE was currently considering a revision of the Convention and agreed that issues relating to coordination of work with ECE should best be left for the Working Group II (Arbitration).

# V. Electronic contracting: provisions for a draft convention

#### General comments

72. The Working Group noted that, at its thirty-ninth session, held in New York from 11 to 15 March 2002, it had began its deliberation on the preliminary draft convention by holding a general exchange of views on the form and scope of the instrument (see A/CN.9/509, paras. 18-40). At that time, the Working Group had 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. In particular, the Working Group had then proceeded with its deliberations by firstly taking 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 (A/CN.9/509, paras. 122-125). The Working Group had 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.

73. At the current session, the Working Group decided to resume its deliberations on the preliminary draft convention by holding a general discussion on the scope of the Convention and proceeding to consider those matters which had not been the subject of an initial debate at its previous session.

74. The Working Group noted that when it had first considered the possibility of further work on electronic commerce after the adoption of the Model Law on Electronic Signatures, it had contemplated, among other issues, a topic broadly referred to as "electronic contracting". Although the Working Group had not, on that occasion, spent much time on defining the issues to be touched upon, it had then been generally felt that one of those issues was formation of contracts in an electronic environment.

75. Consistent with that initial understanding, the draft preliminary convention submitted to the Working Group included essentially three types of provisions: those dealing with the sphere of application of the instrument, which followed other UNCITRAL conventions closely, those concerning the formation of contracts and a limited number of provisions dealing with specific rights and obligations of the parties in the context of contract formation by electronic means.

76. The Working Group was reminded, in that connection, of the concerns that had been expressed at its thirty-ninth session concerning the risk of establishing a duality of regimes for contract formation: a uniform regime for electronic contracts under the new instrument and a different, not harmonized regime, for contract formation by any other means, except for the very few types of contract that were already currently covered by uniform law, such as sales contracts falling under the United Nations Sales Convention.

77. It was pointed out that the question of the scope of the preliminary draft convention involved two different elements, namely, which transactions should be covered and how they should be covered. In that connection, the view was expressed that it might be useful for the Working Group to consider extending the scope of the preliminary draft convention to issues beyond contract formation, so as to include also the use of electronic messages in connection with the performance or termination of contracts. Moreover, the Working Group was invited to consider dealing not only with electronic contracts or contract-related communications, but also addressing other transactions conducted electronically, subject to specific exclusions that the Working Group might deem appropriate. With regard to the second element under consideration, namely, the question of how to cover those transactions, it was suggested that the Working Group should focus only on the

issues raised by the use of electronic communications in the context of those transactions, leaving aspects of substantive law to other regimes such as the United Nations Sales Convention.

78. While no fundamental objections were raised to the proposal of extending the scope of the draft instrument beyond contracts, the Working Group heard expressions of concern that broadening the scope of the preliminary draft convention beyond a contractual context at such an early stage might be premature, as the Working Group had not yet reached a sufficient level of consensus on the substantive matters to be dealt with in the new instrument. That particular proposal, it was generally felt, should be reserved for consideration at a later stage of the process.

79. There was, however, general agreement that limiting the scope of the new instrument only to formation of contracts by electronic means was an excessively narrow approach and that, as agreed at the Working Group's thirty-ninth session, the new instrument should at least deal with certain issues of contract performance (A/CN.9/509, paras. 35 and 36).

80. The Working Group proceeded to consider the question of whether and to what extent the new instrument should address substantive issues of contract law or whether it should limit itself to the technicalities of contract formation and performance in an electronic environment. The Working Group was reminded of its earlier discussions concerning article 8 of the preliminary draft convention, which provided minimal substantive rules on the moment of contract formation inspired by the United Nations Sales Convention (A/CN.9/509, paras. 66-73). That discussion, it was said, was illustrative of the difficulties faced by the Working Group, as the views had then been divided between those opposing any substantive rules on formation to avoid a duality of regimes and those favouring at least a minimal set of rules, so as to render the provisions of the new instrument self-contained.

81. The Working Group held an extensive exchange of views on the matter. The prevailing view within the Working Group was that the new instrument should not attempt to develop uniform rules for substantive contractual issues that were not specifically related to electronic commerce or to the use of electronic communications in the context of commercial transactions. The Working Group took note, however, of the widely shared view that a strict separation between mechanical and substantive issues in the context of electronic commerce was not always feasible or desirable. The purpose of the Working Group's efforts, it was said, was to develop a new instrument that offered practical solutions to issues related to the use of electronic means of communication for commercial contracting. Where substantive rules were needed beyond the mere reaffirmation of the principle of functional equivalence in order to ensure the effectiveness of electronic communications for transactional purposes, the Working Group should not hesitate to formulate substantive rules. Location of parties, validity of data messages, receipt and dispatch of data messages, among other issues, were mentioned as examples of the interplay between mechanical and substantive rules. The Working Group agreed that those considerations should be borne in mind as it proceeded with its work.

**Article 2. Exclusions**

82. The text of the draft article, as considered by the Working Group, read as follows:

"This Convention does not apply to the following contracts:

"(a) Contracts concluded for personal, family or household purposes;

"(b) Contracts granting limited use of intellectual property rights;

"(c) [Other exclusions, such as real estate transactions, to be added by the Working Group.]"

*Subparagraph (a)*

83. The Working Group noted that subparagraph (a) was based on the approach generally taken toward the exclusion of consumers in UNCITRAL instruments. It was noted, in particular, that the language of the exclusion was drawn from article 2, subparagraph (a), of the United Nations Sales Convention, since it was language that had been tested in practice and had proved to be workable.

84. The Working Group held an extensive discussion on the desirability of excluding consumer transactions from the scope of application of the draft preliminary convention. Among the arguments put forward for such an exclusion, for which there was strong support, was the concern that issues of consumer protection varied greatly between legal systems, which was a reason why consumer transactions had thus far been systematically excluded from the field of application of UNCITRAL instruments. Moreover, UNCITRAL had consistently kept its focus on business or commercial transactions, leaving other organizations to deal with consumer issues, to the extent that such issues lent themselves to international harmonization. It was noted that, while divergences in consumer law with respect to contracts have caused problems for businesses around the world and businesses could well benefit from a harmonization, such a task would be unlikely to succeed. The countervailing view, for which there were also expressions of strong support, was that nothing in the text of the draft preliminary convention affected the protection of consumers, a matter that would continue to be governed by domestic law, often having the nature of public policy. An outright exclusion of consumer transactions from the new instrument, however, was felt to be neither desirable nor necessary, as there was no reason to deprive consumers from the benefits of legal certainty and facilitation of contract formation that might be provided by the new instrument. In any event, it was said, it would be premature to make a final decision on such exclusion before the Working Group had considered more fully the substantive provisions of the draft preliminary convention.

85. Having considered the various views that had been expressed, the Working Group reaffirmed its understanding that the new instrument should not deal with consumer protection issues. The Working Group also agreed that, in keeping with the established practice of UNCITRAL in that respect, the preliminary draft convention should exclude consumer transactions from its scope of application, but that the Working Group might reconsider the need for such an exclusion once it had advanced its consideration of the substantive provisions of the preliminary draft convention.

86. Subject to that general understanding, the Working Group proceeded to consider the formulation used for the exclusion. It was pointed out that the draft subparagraph did not reproduce the entire provision on the exclusion of consumers in the United Nations Sales Convention. According to its article 2, subparagraph (a), the latter did not apply to sales of goods bought for personal, family or household use, "unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use". That provision was regarded as important to ensure legal certainty, otherwise the applicability of the United Nations Sales Convention would depend entirely on the seller's ability to ascertain the purpose for which the buyer had bought the goods. Thus, the consumer purpose of a sales contract could not be held against the seller, for the purpose of excluding the applicability of the Convention, if the seller did not know or could not have been expected to know (for instance, having regard to the number or nature of items bought) that the goods were being bought for personal, family or household use. It followed from those provisions that the drafters of the United Nations Sales Convention assumed that there might be situations where a sales contract would fall under the Convention, despite the fact of it having being entered into by a consumer. The legal certainty gained with the provision appeared to have outweighed the risk of covering transactions intended to have been excluded. It was observed, moreover, that, as indicated in the commentary on the draft Convention on Contracts for the International Sale of Goods, which had been prepared at the time by the Secretariat (A/CONF.97/5), article 2, subparagraph (a), of the United Nations Sales Convention was based on the assumption that consumer transactions were international transactions only in "relatively few cases".[41]

87. It was said, however, that if a new instrument on electronic contracting should exclude consumer transactions, the formulation of article 2, subparagraph (a), of the United Nations Sales Convention might be problematic, as the ease of access afforded by open communication systems not available at the time of the preparation of the Convention, such as the Internet, greatly increased the likelihood of consumers purchasing goods from sellers established abroad.

88. The Working Group recognized that the greater likelihood of consumers becoming parties to international contracts was a matter that required careful attention in the formulation of an exclusion of consumer transactions from the draft preliminary convention. However, questions were raised as to whether the choice made in subparagraph (a) of draft article 2 was correct, since the simple deletion of the additional elements that were contained in the corresponding provision of the United Nations Sales Convention made the applicability of the new instrument solely dependent upon the purpose of a transaction, a circumstance that might not be easily ascertained by the seller at the moment of the negotiation of the contract. It was therefore suggested that the additional language found in the United Nations Sales Convention should be restored in draft article 2 (a) in square brackets, in order for it to be considered in the future.

89. An alternative approach, which the Secretariat was also requested to take into account when preparing a revised draft of the provision, was to define the scope of the transactions covered by the preliminary draft convention in a manner that made it clear that the instrument applied to commercial transactions and not to contracts entered into by consumers and that nothing in the new instruments affected any

rules of law intended for the protection of consumers, as had been done in footnote ** to article 1 of the UNCITRAL Model Law on Electronic Commerce.

*Subparagraph (b)*

90. The Working Group was reminded that the subparagraph originated in a preliminary discussion of issues of electronic commerce that had taken place at the thirty-eighth session of the Working Group with respect to the scope of application of the United Nations Sales Convention. At that time, the Working Group had noted that licensing of intellectual property rights was generally outside the scope of the Convention, which had been conceived for the sale of tangible goods. It had been noted, however, that with the passage of time and the evolution of technology, it had on occasion become difficult to establish a clear delineation between licensing and sales contracts, as was the case in transactions involving some of the so-called "virtual goods" (A/CN.9/484, paras. 116 and 117). In the interest of ensuring the greatest possible consistency between the new instrument and the United Nations Sales Convention, the draft preliminary convention, it was noted, excluded transactions involving the limited grant of intellectual property rights.

91. The Working Group heard expressions of general support for not dealing with licensing arrangements in the new instrument. It was suggested that industry sectors immediately concerned with transactions involving intellectual property rights had developed their own contracting practices and that all efforts should be made to avoid interference therewith. Failure to do so at the current preliminary stage of the examination of the draft preliminary convention might undermine the development of the new instrument. In effect, it was noted that many other international and commercial bodies had attempted in a general way to define the intersections between intellectual property rights, contractual rights and traditional sales law and that such attempts had been controversial and unsuccessful.

92. There was sympathy within the Working Group for those arguments. However, it was felt that it would be wise to pursue the examination of the remainder of the draft preliminary convention first and to return to the exclusions in draft article 2 at a later time. In that regard, it was suggested that if including the subject of subparagraph (b) in the scope of the instrument proved to create difficulties to progress on the draft instrument, appropriate exclusions could be made at a later stage. Support was expressed for that position, in particular given the lack of certainty regarding whether the draft instrument would cover substantive aspects of contract law.

93. Having considered those views, the Working Group decided that it might be useful to revert to the question of excluding intellectual property rights from the draft instruments at a later stage, possibly at its forty-first session. The Working Group agreed that it would be useful at that juncture to reserve sufficient time for an exchange of views with the various organizations having an interest in this matter, such as WPO, the International Standards Organization and relevant non-governmental organizations, such as citizens' interest organizations. It also noted that, in deciding upon the exceptions to the convention, it might be necessary to distinguish between various types of intellectual property and that a broad exchange of views with different interests in the area would be of assistance in that regard.

*Subparagraph (c)*

94. With respect to its consideration of additional exclusions to be proposed to the draft convention under subparagraph (c), the Working Group agreed that suggested exclusions should not take the form of a recital of exclusions from domestic laws on electronic commerce, but that they should represent considered views on subject areas best left outside of the scope of such an international commercial instrument.

95. Various suggestions were made regarding possible exceptions to the scope of the draft convention, including contracts creating rights in real estate, those involving courts or public authorities and those on suretyship, family law or the law of succession. Those transactions were said to be appropriate cases for exclusions as they were not ordinarily the subject of international trade. Additional suggestions were made to exclude certain existing financial services markets with well-established rules, including 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, in order not to interfere with established practices of electronic contracting in those industries.

96. Caution was expressed concerning the exclusion of matters that could in the future develop international commercial dimensions. It was suggested that one method of accommodating concerns regarding specific exceptions would be to allow for States to make reservations with respect to certain subject areas. However, it was also suggested that such an approach was unsatisfactory in that it would detract from the general effort of harmonization.

97. Another suggested approach was to achieve a limitation of the scope of application of the convention by a positive determination of the matters it covered as being essentially international commercial transactions, which could be made in article 1 of the draft instrument. In response to that proposal it was observed, however, that reference to the "commercial" nature of a transaction might not be feasible in an international uniform instrument, the understanding of that term varied greatly among legal systems.

98. The Working Group decided that the matter of exclusions should be reconsidered at a later stage, following examination of the substantive parts of the draft preliminary convention. The Secretariat was requested to take the above suggestions, views and concerns into consideration when preparing a future draft of the provision, possibly including appropriate variants. In order to clarify the exceptional nature of subparagraph (c), it was suggested that the phrase "to be added" should be changed to "could be added".

**Article 3. Matters not governed by this convention**

99. The text of the draft article, as considered by the Working Group, read as follows:

> "This Convention governs only the formation of contracts concluded or evidenced by data messages. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> "(a) The validity of the contract or of any of its provisions or of any usage;

"(b) The rights and obligations of the parties arising out of the contract or of any of its provisions or of any usage;

"(c) The effect which the contract may have on the ownership of rights created or transferred by the contract."

100. The Working Group noted that the draft article had been included so as to make it clear that the preliminary draft convention was not concerned with substantive issues arising out of the contract, which, for all other purposes, remained subject to its governing law. However, having regard to its previous deliberations on the scope of the preliminary draft convention (see paras. 77-81), the Working Group was of the view that at least the *chapeau* of the draft article would need to be substantially reformulated. A revised version of the draft article, it was suggested, should make it clear that the new instrument dealt only with the possible formal or substantial problems created by the use of electronic means of communication in connection with the various aspects of contracting including formation, notices and termination of contracts (or commercial transactions in general, if the Working Group eventually preferred to use such a criterion to define the scope of application of the instrument). The draft article should further make it clear that the new instrument was aimed at facilitating electronic contracting and was not intended to introduce new formal or substantial legal requirements concerning contracts or commercial transactions in general, nor to modify any such existing requirements.

101. There was general agreement within the Working Group that the draft article needed to be reformulated so as to reflect the Working Group's decision that the new instrument should not be limited only to the use of electronic communications for the purpose of contract formation. Reservations were expressed, however, concerning the use of the word "transactions", since that term was not uniformly understood and might be given an excessively broad interpretation, covering even actions taken in connection with situations not involving any economic value or commercial interest. The Working Group took note of those reservations but accepted the suggestion that, at such an early stage of its deliberations, it was not desirable to exclude particular options for formulations that might be used in defining the scope of application of the new instrument.

102. The Working Group proceeded to consider the nature of limitations to the substantive field of application of the preliminary draft convention. There was general agreement that, in the interest of avoiding a duality of legal regimes, depending on whether a contract was negotiated through electronic means or otherwise, provisions on substantive matters that went beyond setting the criteria for the functional equivalence for electronic communications should be limited to those which dealt with situations particularly relevant for electronic commerce or the use of electronic means of communication. In that connection, it was suggested that the phrase "except as otherwise expressly provided in this Convention" in the *chapeau* of the draft article was misleading and should not appear in a revised draft, as the preliminary draft convention was in any event not intended to deal with the types of matters referred to in the draft article.

103. At that juncture, however, the attention of the Working Group was drawn to the possible relationship between issues of validity and issues related to the rights and obligations of the parties and other provisions of the preliminary draft

convention. One such example was the positive affirmation that use of data messages in the context of contract formation should not by itself constitute grounds for the invalidity of the contract under draft article 12, paragraph 2. Another example was the question of whether the new instrument should provide possible legal consequences for the failure by a party to make contract terms available under draft article 15, an issue that still remained to be considered by the Working Group. The Working Group agreed that the relationship between the matters excluded under article 3 and the substantive provisions found elsewhere in the draft preliminary convention should be carefully considered by the Working Group at a future session, once a consensus had emerged on the nature of substantive provisions to be included in the text.

104. The Working Group was reminded of the importance of ensuring consistency between draft articles 1 and 3, which both set the parameters of the field of application of the preliminary draft convention. In that connection, the Working Group reiterated its understanding that the preliminary draft convention should avoid using the phrase such as "contracts concluded or evidenced by data messages" (draft article 1) or "formation of contracts concluded or evidenced by data messages" (draft article 3). Moreover, the Working Group agreed that it could consider at a future session a simplified version of draft article 3 that would only refer to matters excluded from the scope of the preliminary draft convention.

**Article 4. Party autonomy**

105. The text of the draft article, as considered by the Working Group, read as follows:

> "The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions."

106. There was strong support within the Working Group for a provision reaffirming the principle of party autonomy. Not only had that principle been traditionally recognized in various UNCITRAL texts, but it was also a fundamental principle of commercial law in most legal systems. It was also suggested, in that connection, that recognizing the principle of party autonomy might possibly reduce the need for exclusions under draft article 2 on the grounds that certain business sectors had already established satisfactory practices for dealing with electronic contracting.

107. Without prejudice to the general validity of the rule reflected in the draft article in the context of the preliminary draft convention, the Working Group proceeded to consider whether there might be situations where party autonomy could be limited or even excluded in favour of mandatory rules.

108. As regards the general principle of non-discrimination under draft article 10, paragraph 2, it was noted that parties should not be forced to accept contractual offers or acceptances of offers by electronic means if they did not want to. It was therefore appropriate to allow the parties to exclude that possibility by means of a prior agreement. The same reasoning might also apply to the acceptance of electronic signatures under draft article 13, paragraph 3. In connection with the latter provision, however, the view was also expressed that party autonomy should not be allowed to go as far as relaxing statutory requirements on signature in favour of methods of authentication that provided a lesser degree of reliability than

electronic signatures, which was the minimum standard recognized by the preliminary draft convention. Generally, it was said, party autonomy did not mean that the new instrument should empower the parties to set aside statutory requirements on form or authentication of contracts and transactions.

109. The Working Group took note of views to the effect that, depending on the provisions to be included in chapters II and III of the preliminary draft convention, the Working Group might need at a later stage to consider whether or not it should formulate exceptions to the principle of party autonomy. Possible provisions in respect of which the scope for party autonomy might be limited included, for example, provisions requiring the parties to offer means for correcting input errors (draft article 12) or to make available records of the contract terms (draft article 15). In the example of draft article 12, it was said, a duty to offer means for correcting input errors was predicated on the assumption that electronic transactions offered a greater potential for those errors than in paper-based transactions. If the Working Group eventually followed that assumption, the new instrument might include substantive rules to protect those more easily in error. The nature of such a provision, however, if adopted, might also vary from a compulsory rule or to a simple recommendation without sanctions.

110. Having considered the various views that were expressed on the matter and reaffirming its general support for the principle of party autonomy, the Working Group decided that the provision should be retained and that the issue of possible exclusions or limitations to the draft article should be considered at a later stage, in the light of the Working Group's decision on the substantive provisions of the draft preliminary convention.

**Article 5. Definitions**

111. The text of the draft article, as considered by the Working Group, read as follows:

> "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 to 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) 'Automated computer 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 at each time an action is initiated or a response is generated by the system.

"(f) 'Information system' means a system for generating, sending, receiving, storing or otherwise processing data messages;

"(g) 'Offeror' means a natural person or legal entity that offers goods or services;

"(h) 'Offeree' means a natural person or legal entity that receives or retrieves an offer of goods or services;

**Variant A**

"[(i) 'Signature' includes any method used for identifying the originator of a message and indicating that the information contained in the message is attributable to the originator;]

**Variant B**

"[(i) '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;]

**Variant A**

"[(j) 'Place of business' means any place of operations where a person carries out a non-transitory activity with human means and goods or services;]

**Variant B**

"[(j) 'Place of business' means the place where a party pursues an economic activity through a stable establishment for an indefinite period;]

"(k) 'Person' and 'party' include natural persons and legal entities;

"[(l) Other definitions that the Working Group may wish to add.]"

**General comments**

112. The Working Group noted that the number and nature of the definitions depended to a large extent on decisions that the Working Group would need to take in the future concerning substantive provisions of the preliminary draft convention. There was therefore general agreement with the proposal that the list of definitions could be retained in its current form. Nevertheless, the Working Group decided that it would be useful to advance its deliberations to review the definition of terms in the draft article 5, bearing in mind that a final decision should await the outcome of the discussions on the remainder of the draft convention.

*"Automated computer system" and "Information system"*

113. Questions were asked on the difference between an "automated computer system" in subparagraph (e) and an "information system" in subparagraph (f). The

distinction was said to be unclear, in particular in some of the language versions of the preliminary draft convention. In response, it was explained that the notion of "automated computer system", which was also used in draft article 12, referred essentially to a system for automatic negotiation and conclusion of contracts without involvement of a person, at least on one of the ends of the negotiation chain. An "information system", in turn, was a term already used in the UNCITRAL Model Law on Electronic Commerce and referred to a system used for generating, sending, receiving and storing data messages, a notion that was particularly important in connection with the transmission and reception of data messages. An automated computer system might be part of an information system, but that need not necessarily be the case. It was noted, however, that those terms might need to be better aligned in a future draft.

114. Clarification was also sought of the terms "review and intervention" in draft subparagraph (e). It was noted that, while the language could be clarified in a future draft, the definition was intended to exclude the situation where the computer system was not completely automated, in that it would not complete its task without the intervention of a natural person in the system in order to intercept a message or to review and approve its content.

*"Offeror" and "offeree"; "originator" and "addressee"*

115. Questions were raised as to the need for definitions of "offeror" and "offeree". In particular, it was suggested that both terms might be subsumed in the broader definitions of "originator" and "addressee". In response, it was observed that the terms "offeror" and "offeree" were used in draft articles 8 and 9 in a context in which they might not easily be replaced with the words "originator" or "addressee". It was suggested that although those terms might not be needed if draft articles 8 and 9 were not kept in the final text, it might be preferable, for the time being, to retain them.

*"Signature" and "electronic signature"*

116. The Working Group considered questions regarding the difference between "signature" and "electronic signature" in draft paragraph 5 (i), variants A and B. It was pointed out, in response, that variant A was intended to provide a general definition of signatures, while variant B, drawn from article 2 (a) of the UNCITRAL Model Law on Electronic Signatures, was intended to include a more specific requirement for the recognition of electronic signatures.

117. Reservations were expressed concerning the use of a definition of "signature", which was not contained in either of the UNCITRAL Model Laws, in particular as it might be more appropriate to leave such a definition for domestic law. Furthermore, the relationship between the definitions was said to be unclear, as they were not strictly speaking mutually exclusive, as long as "electronic signatures" could be regarded as a subset of "signatures".

118. Concern was also expressed regarding the relationship between the definitions of "electronic signature", "data message" in subparagraph (a), which included also information in the form of telegrams, telexes or telecopies, each of which resulted in a paper document. An electronic signature, it was said, could not possibly be attached to paper documents. In response, it was noted that the central element in

the definition of data messages was the notion of "information", rather than the form in which the message was received. However, it was agreed that the interplay between the two definitions might need to be looked at more closely, so as to avoid the erroneous impression that the draft contemplated an electronic signature, which was defined as "data in electronic form", appearing in the paper printout of a telegram, telex or telecopy.

119. Despite those observations, and in accordance with its general approach to the draft article, there was support for the retention of both variants A and B.

*"Place of business"*

120. It was noted that the proposed definition of "place of business" in variant A reflected 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. The proposed definition appeared within square brackets in view of the fact that, although having repeatedly used the concept of "place of business" in its various instruments, thus far the Commission had not defined such concept.

121. In response to a query concerning the meaning of the words "indefinite period" in variant B, it was explained that the language was meant to exclude only the temporary provision of goods or services out of a specific location, without requiring, however, that the company providing those goods or services be established indefinitely at that place.

122. The view was expressed that the desirability of a definition of place of business should be carefully considered by the Working Group at a later stage in view of the fact that such a definition was not made in the United Nations Sales Convention, which left the matter to domestic law. The Working Group was reminded of the risk of establishing a duality regime for contracts negotiated through electronic means and other contracts.

**Article 6. Interpretation**

123. The text of the draft article, as considered by the Working Group, read as follows:

> "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 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."

124. The Working Group noted that the principles reflected in the draft article had appeared in most of the UNCITRAL texts, and that its formulation mirrored article 7 of the United Nations Sales Convention. The provision was meant to facilitate uniform interpretation of the provisions in uniform instruments on commercial law. It was further emphasized that there had been a practice in private law treaties to provide self-contained rules of interpretation, without which the

reader would be referred to general rules of public international law on the interpretation of treaties that might not be entirely suitable for the interpretation of private law provisions.

125. The view was expressed that 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. The Working Group took note of that concern.

126. The Working Group agreed that the questions arising from the article 6 stemmed mainly from the closing phrase in draft article 6, paragraph 2, "by virtue of the rules of private international law". While some were of the view that the phrase should be deleted, it was noted that deletion could cause problems in interpretation later, given the common use of similar language in other instruments. The Working Group decided that the phrase should be placed in square brackets in a future draft of article 6.

*Notes*

[1] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.

[2] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 384-388.

[3] Ibid., *Fortieth Session, Supplement No. 17* (A/40/17), annex I.

[4] Ibid., *Thirty-first Session, Supplement No. 17* (A/31/17, Chap. V, sect. C.

[5] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 293.

[6] Ibid., para. 295.

[7] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 206 (for the dates of the future sessions of the Working Group, see paras. 296 (d) and 297 (d)).

[8] Ibid., para. 207.

[9] United Nations, *Treaty Series*, vol. 597, No. 8641, p. 3.

[10] Ibid., vol. 1511, No. 26119, p. 1.

[11] General Assembly resolution 43/165, annex.

[12] A/CONF.152/13.

[13] A/50/640 and Corr.1, annex.

[14] United Nations, *Treaty Series*, vol. 221, No. 3010, p. 255.

[15] Ibid., vol. 338, No. 4834, p. 103.

[16] Ibid., vol. 988, No. 14449, p. 43.

[17] Ibid., vol. 348, No. 4996, p. 13, and vol. 481, p. 598.

[18] Ibid., vol. 1079, No. 16510, p. 89.

[19] Ibid., vol. 429, No. 6200, p. 211.

[20] Ibid., vol. 1409, No. 23538, p. 3.

[21] ECE/TRANS/106.

[22] United Nations, *Treaty Series*, vol. 125, No. 1671, p. 3.

[23] Ibid., vol. 1042, No. 15705, p. 17.

[24] E/ECE/186 (E/ECE/TRANS/460).

[25] United Nations, *Treaty Series*, vol. 399, No. 5742, p. 189.

[26] Ibid., vol. 436, No. 6292, p. 115.

[27] Ibid., vol. 436, No. 6293, p. 131.

[28] Ibid., vol. 619, No. 8940, p. 77.

[29] Ibid., vol. 1028, No. 15121, p. 121.

[30] Ibid., vol. 993, No. 14533, p. 143.

[31] Ibid., vol. 1137, No. 17847, p. 369.

[32] Ibid., vol. 1774, No. 30887, p. 109.

[33] Ibid., vol. 163, No. 2139, p. 27, and vol. 328, p. 319.

[34] ECE/TRANS/3.

[35] United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3.

[36] A/CONF.162/7.

[37] TD/MT/CONF/16.

[38] United Nations, *Treaty Series*, vol. 1746, No. 30382, p. 3.

[39] Ibid., vol. 330, No. 4739, p. 3.

[40] Ibid., vol. 484, No. 7041, p. 349.

[41] *Official Records of the United Nations Conference on Contracts for the International Sale of Goods: documents of the Conference and summary records of the plenary meetings and of the meetings of the Main Committee* (United Nations publication, Sales No. E.81.IV.3), p. 16.