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Legal aspects of electronic commerce

Possible future work in the field of electronic contracting: an analysis of the United Nations Convention on Contracts for the International Sale of Goods

Note by the Secretariat

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Introduction

1. At its thirty-third session, in 2000, the Commission held a preliminary exchange of views regarding 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 (hereinafter referred to as "the United Nations Sales Convention" or "the Convention"), which was generally felt to constitute a readily acceptable framework for on-line contracts dealing with the sale of goods. It was pointed out that, for example, additional studies might need to be undertaken to determine the extent to which uniform rules could be extrapolated from the United Nations Sales Convention to govern dealings in services or "virtual goods", that is, items (such as software) that might be purchased and delivered in cyberspace. It was widely felt that, in undertaking such studies, careful attention would need to be given to the work of other international organizations such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO).

2. The second topic was dispute settlement. It was noted that the Working Group on Arbitration had already begun discussing ways in which current legal instruments of a statutory nature might need to be amended or interpreted to authorize the use of electronic documentation and, in particular, to do away with existing requirements regarding the written form of arbitration agreements. It was generally agreed that further work might be undertaken to determine whether specific rules were needed to facilitate the increased use of on-line dispute settlement mechanisms. In that context, it was suggested that special attention might be given to the ways in which dispute settlement techniques such as arbitration and conciliation might be made available to both commercial parties and consumers. It was widely felt that the increased use of electronic commerce tended to blur the distinction between consumers and commercial parties. However, it was recalled that, in a number of countries, the use of arbitration for the settlement of consumer disputes was restricted for reasons involving public policy considerations and might not easily lend itself to harmonization by international organizations. It was also felt that attention should be paid to the work undertaken in that area by other organizations, such as the International Chamber of Commerce (ICC), the Hague Conference on Private International Law and WIPO, which was heavily involved in dispute settlement regarding domain names on the Internet.

3. The third topic was dematerialization of documents of title, in particular in the transport industry. It was suggested that work might be undertaken to assess the desirability and feasibility of establishing a uniform statutory framework to support the development of contractual schemes currently being set up to replace traditional paper-based bills of lading by electronic messages. It was widely felt that such work should not be restricted to maritime bills of lading, but should also envisage other modes of transportation. In addition, outside the sphere of transport law, such a study might also deal with issues of dematerialized securities. It was pointed out that the work of other international organizations on those topics should also be monitored.

4. After discussion, the Commission welcomed the proposal to undertake studies on the three topics. While no decision as to the scope of future work could be made until further discussion had taken place in the Working Group on Electronic Commerce, the Commission generally agreed that, upon completing its current task, namely, the preparation of draft uniform rules on electronic signatures, the Working

Group would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine, at its first meeting in 2001, 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. 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.

5. Particular emphasis was placed by the Commission on the need to ensure coordination of work among the various international organizations concerned. In view of the rapid development of electronic commerce, a considerable number of projects with possible impact on electronic commerce were being planned or undertaken. The Secretariat was requested to carry out appropriate monitoring and to report to the Commission as to how the function of coordination was fulfilled to avoid duplication of work and ensure harmony in the development of the various projects. The area of electronic commerce was generally regarded as one in which the coordination mandate given to UNCITRAL by the General Assembly could be exercised with particular benefit to the global community and deserved corresponding attention from the Working Group and the Secretariat. [1]

6. The current note is intended to bring preliminary information to the Working Group regarding issues of electronic contracting. It investigates very tentatively whether electronic contracting requires the development of new legal rules or whether the rules applied to traditional contracts can respond to the need of new communication techniques (either unchanged or with a degree of adaptation to be determined). For that purpose, the note reviews some of the rules set forth by the United Nations Sales Convention, which is widely recognized by academics and practitioners as not only covering one of the main commercial contracts, but also as laying down rules relevant to general contract law (for example, with respect to such issues as the formation of contracts, damages, etc).

7. The Working Group may wish to use the analysis of the United Nations Sales Convention provided in this note as a basis for its deliberations, bearing in mind that further studies may need to be undertaken regarding existing or draft rules and other instruments designed specifically to harmonize certain aspects of the law governing electronic commerce transactions. As an example of such rules that may require further study, the Uniform Computer Information Transactions Act (UCITA) was developed in the United Sates of America, since it was felt that the approach of the "sale of goods" transactions embodied in the Uniform Commercial Code (UCC) was not adequate to address the way in which technology services and items such as software were being sold. Other attempts at providing uniform rules for electronic commerce such as the draft Uniform Rules and Guidelines for Electronic Trade and Settlement (URETS) and the Model Electronic Sale Contract (both instruments being prepared by the ICC) may also need to be taken into account.

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[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 384-388.

I. International and personal sphere of application of the United Nations Sales Convention

A. Internationality of the sales transaction

8. As indicated in article 1, the United Nations Sales Convention is applicable only to contracts that are concluded between parties having their place of business in different countries. This “internationality” is “to be disregarded” under article 1(2) “whenever [it] does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract”. Since electronic commerce tends to blur the distinction between domestic and international transactions, a closer look at the above-mentioned provisions of the Convention becomes necessary.

9. Where the parties to a contract concluded electronically clearly indicate where their relevant place of business is located, that place of business is to be taken into consideration in determining the internationality of the sales transaction. In that situation, electronic contracting hardly differs from the case where the contract is concluded by more traditional means. The same remark applies even in those instances where a party has more than one place of business (an issue dealt with by article 10 of the Convention). Indeed, according to a number of legal writers an indication by a party as to which of several places of business is the relevant one in relation to a specific transaction is an important criterion, if not the most important one, in determining the internationality of a contract under the Convention where a party has multiple places of business. A clear indication of the relevant place of business also avoids any difficulty as to whether the internationality of the transaction was sufficiently disclosed to the parties, as required by article 1(2) for application of the Convention.

10. If the relevant place of business has not been clearly indicated by the parties before or at the time of conclusion of the contract, the question arises as to whether there exist circumstances from which the location of the relevant place of business can be inferred. In this respect, it may be appropriate to consider taking into account the address from which the electronic messages are sent. Where a party uses an address linked to a domain name connected to a specific country (such as addresses ending with ".at" for Austria, ".nz" for New Zealand, etc.), it can be argued that the place of business should be located in that country. Thus, a sales contract concluded between a party using an e-mail address that designates a specific country and a party using e-mail address that designates a different country would have to be considered international. Recognizing the legal significance of an e-mail address being linked to a specific country through a domain name would have the advantage of necessarily making the parties aware that the contract may not be a domestic one. Consequently, the application of the United Nations Sales Convention could not be avoided on the grounds that the parties were unaware of the international character of their transaction, a situation considered in article 1(2).

11. The above-mentioned solution locates a party’s place of business (where it has not otherwise been indicated or where it cannot be determined otherwise) in the country designated by the e-mail address. That solution would leave open the case where the address does not allow for a similar solution because it does not evidence any link to a particular country, as in those cases where an address is a top level domain such as .com, .net, etc. It could be argued that, in such a case, the contract should always be presumed to be international; this could be justified by the fact

that the use of an address which is not linked to any particular country is presumably due to the fact that the party does not want to be located in any specific country or may want to be accessible universally. Such an approach could be combined with article 1(2) of the United Nations Sales Convention, provided it could be presumed that anybody contracting electronically with a party using such an address could not have been unaware of the fact that it was contracting "internationally". While this approach might be consistent with the United Nations Sales Convention, additional rules might be needed to establish such presumptions.

12. Another approach might be used to determine the internationality of an electronically-concluded sales transaction under the Convention. That alternative approach would rely on a definition of the "place of business" for those cases where the contract is concluded electronically. Such a definition should of course not displace the generally-understood meaning of the notion of "place of business" under the Convention, as developed in legal literature in the absence of a definition of "place of business" in the Convention. It should also accommodate the need for each party's place of business to be easily determinable. To that effect, every effort should be made to avoid creating a situation where any given party would be considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means.

13. This alternative approach would have the advantage of making applicable to electronically-concluded sales transactions all the rules (on internationality, on multiple places of business (article 10), as well as on party awareness regarding the international character of the transaction) applicable to sales transactions concluded by more traditional means. The Working Group may wish to consider whether further studies should be undertaken regarding the possible contents of a definition of "place of business" for the purposes of electronic commerce transactions. In that context, questions may be raised as to how notions commonly found in legal literature with respect to the place of business in traditional commerce, such as "stability" or "autonomous character" of the place of business could be transposed in cyberspace. While the Working Group may wish to preserve the "functional equivalence" approach taken in the UNCITRAL Model Law on Electronic Commerce, more innovative legal thinking may also need to be resorted to.

B. Parties to the sales transaction

14. Although the international character of the transaction and thus the applicability of the United Nations Sales Convention depend on where the "parties" have their place of business, the concept of "party" is not defined in the Convention. A question therefore arises as to who is party to a contract. This question, however, is not unique to electronic contracting, since it also arises where the contract is concluded by more traditional means, for instance where a seller avails itself of the collaboration of an intermediary.

15. As the Convention does not deal with the issue of agency[2], the applicable domestic law is to be applied when determining who is to be considered a "party" to

[2] See, e.g., OGH, 20 March 1997, Österreichische Juristenzeitung 829 (1997) = CLOUT case n. 189; AG Tessin, 12 February 1996, Schweizerische Zeitschrift für europäisches und internationales Recht 135 (1996); AG Alsfeld, 12 May 1995, Neue Juristische Wochenschrift Rechtsprechungs-Report 120 (1996); KG Berlin, 24 January 1994, Recht der internationalen Wirtschaft 683 (1994) = CLOUT case n. 80; LG Hamburg, 26 September 1990, Praxis des

a contract. Thus, it will be up to the applicable domestic law to decide, for instance, whether the principal or its agent is party to a specific contract. The same solution (applicability of domestic law to the issue of agency) should apply to electronic agents as well.

16. When examining whether the above-mentioned solution is appropriate, it should be borne in mind that the issue of the electronic agent has been discussed by the UNCITRAL Working Group in the context of the preparation of the UNCITRAL Model Law on Electronic Commerce, where it was generally felt that a computer should not become the subject of any right or obligation (see the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, para. 35). The person (whether a natural or legal one) on whose behalf a computer is programmed, for example to issue purchase orders, should ultimately be responsible for any message generated by the machine. It was also felt that the parties should, however, subject to the aforementioned principle, have the possibility to freely organize any automated communication scheme. In this respect it may be worth noting that such an automated scheme would not conflict with the Convention, which expressly allows the parties to create their own rules (article 6). The Working Group may wish to explore the possibility of further studying the implications of the operation of a fully automated communication scheme in the context of contract formation.

C. Criteria of applicability of the United Nations Sales Convention

17. In order for the Convention to be applicable to an international sales contract, the parties must not only have their place of business in different countries, but these countries must also be Contracting States to the Convention at a given time (article 100) or, where this criterion of applicability set forth in article 1(1)(a) is not met, the rules of private international law of the forum must lead to the law of a Contracting State, as indicated in article 1(1)(b).

18. As far as the first of these criteria of applicability is concerned, it makes no difference whether the contract is concluded electronically or by any other means, since the required feature is that the countries in which the parties have their place of business are Contracting States. Indeed, once the location of the place of business has been determined, it should be easy to establish whether the country in which the place of business is located was, at the time of the conclusion of the contract, a Contracting State. This point further illustrates the importance of a workable definition of “place of business” in an electronic environment.

19. As far as the second criterion of applicability is concerned, the use of electronic means (as opposed to more traditional means of communication) when concluding international sales contracts becomes relevant where the rules of private international law of the forum refer, as a connecting factor, to the place of conclusion of the contract. In this case, the determination of the place of conclusion of the contract may cause difficulties, among others due to the lack of specific rules on this issue. Where, however, the rules of private international law of the forum do refer to connecting factors different from the place of conclusion of the contract, as do for instance the 1994 Inter-American Convention on the Law Applicable to Contractual Obligations and the 1980 Rome Convention on the Law Applicable to Contractual Obligations, the use of electronic means should not lead to problems that are any different from those arising out of the use of more traditional means. In

internationalen Privat- und Verfahrensrechts 400 (1991) = CLOUT case n. 5.

that area, therefore, it does not appear that electronically-concluded contracts should be treated differently from contracts concluded by any other means. The Working Group may wish to envisage the possibility of further investigating the notion of "place of conclusion" of the contract in parallel with the notion of "place of business".

II. Substantive sphere of application

A. Goods

20. The United Nations Sales Convention is solely applicable to contracts for the international sale of "goods", but the Convention does not include a definition of what is to be considered as "goods". However, this does not mean that the notion of "good" under the Convention should be interpreted by reference to domestic concepts. As with most concepts in the United Nations Sales Convention (article 7), the concept of "goods" is to be understood "autonomously", *i.e*. not in the light of any particular domestic legal system, in order to ensure uniformity.

21. The Convention seems to embody a rather conservative concept of "goods", as it is considered both in legal writings and case law to apply basically to moveable tangible goods[3]. Thus, according to most commentators intangible rights, such as patent rights, trademarks, copyrights, a quota of a limited liability company[4], as well as know-how, are not to be considered "goods". The same is true for immovable property.

22. It is obvious that the above-mentioned interpretation of the concept of "goods" is valid irrespective of whether the sales contract is concluded electronically or otherwise. Thus, there seems to be no need to modify the concept of "goods" as currently understood under the Convention to fit specific needs of electronic contracting. However, the question remains as to whether the Convention does (and, if not, whether it should) cover what is sometimes defined as "virtual goods" and could also fall under a definition of "services". In this respect it may be helpful to consider how software is dealt with under the Convention both by commentators and courts. According to many legal writers, the sale of software may fall under the Convention's substantive sphere of application, although software is not a tangible good, to the extent it is not custom-made or, even where it is standard software, to the extent it is not extensively modified to fit the buyer's particular needs. This view has been justified on the grounds that in this line of cases (not unlike cases where books or discs are sold), the intellectual activity is incorporated in tangible goods. Ultimately, this view would, however, exclude the sale of software from the Convention's substantive sphere of application whenever it is not incorporated in a tangible good, as in those cases where the software is sent electronically.

23. The view that the sale of software can be covered by the United Nations Sales Convention was recently upheld by several courts as well. In an *obiter dictum*, a German court of appeal stated that the sale of standard software can be considered a

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[3] See OLG Köln, 26 August 1994, Neue Juristische Wochenschrift Rechtsprechungs-Report 246 (1995) = CLOUT case n. 122.

[4] See Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 20 December 1993, = CLOUT case n. 161.

sale of goods, at least where the software is not custom-made[5]. A German court of first instance reached the same result on a previous occasion[6].

24. In view of the above-mentioned case law, it is apparent that a clarification of whether the software should be considered as "goods" in the sense of the Convention would be useful in order to ensure uniformity. Should the Convention's sphere of application be extended to include software, careful consideration should be given to the scope of such an extension. In that respect, a policy decision may be needed as to whether it would be appropriate for the Convention to cover the sale of software only where the software is incorporated in a tangible goods or whether it would be better to have the Convention govern regardless of the manner in which the software is delivered.

25. Even if software was to be regarded as "goods" in the sense of the Convention, the sale of "custom-made software" would probably have to be excluded from the current sphere of application of the Convention since, according to article 3(2), the Convention "does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services". The Working Group may wish to consider whether further study should explore the possibility of introducing rules modelled on an extended version of the scope of the United Nations Sales Convention to cover the sale of software or other dematerialized products in cyberspace and the possible ambit of the required extension.

B. Sales contract

26. The issue whether "virtual goods" (which might also be regarded as services) should be included in the notion of "goods" under the Convention is not the only relevant one when one has to decide whether the Convention should cover transactions concerning "virtual goods". Another notion that is paramount is that of "sales contract".

27. Although the Convention does not expressly define the sales contract[7], a concept of what is to be considered a "sales contract" falling within the Convention's sphere of application can be inferred from the different rights and obligations of the parties. Thus, the "sales contract" can be (and has been) defined in case law as a contract by virtue of which the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods sold, whereas the buyer is bound to pay the price for the goods and take delivery of them.

28. Given the above-mentioned contents of the notion of "sales contract", a question may arise as to whether the transactions in "virtual goods" (or services) do actually fall under that definition. According to some commentators, transactions in these goods do not fall under this definition, since they are in the form of licenses, not sales. The differences in these approaches are considerable. A sales contract, for instance, frees the buyer (*i.e.* "user") from restrictions as to the use of the product bought and, thus, clearly delineates the boundaries of control that may be

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[5] OLG Köln, 26 August 1994, Neue Juristische Wochenschrift Rechtsprechungs-Report 246 (1995) = CLOUT case n. 122.

[6] See also OLG Koblenz, 17 September 1993, Recht der internationalen Wirtschaft 934 (1993) = CLOUT case n. 281.

[7] See OGH, 10 November 1994, österreichische Juristische Blätter 253 (1995) = CLOUT case n. 106.

exercised by a patent or copyright owner over the use of the product that incorporates the patented or copyrighted work. In contrast, a license agreement allows the producer or developer of the "virtual good" (or service) to exercise control over the product down through the licensing chain (where sales, as mentioned, would free users from those controls).

29. As a consequence, it becomes apparent that it is not just sufficient to decide whether the United Nations Sales Convention should extend to the "sale" of "virtual goods" (or services), an issue one could solve simply by extending the scope of the Convention. Starting from the various hypotheses of web-based transactions regarding software (or other de-materialized products incorporating intellectual property rights), the Working Group may need to have preliminary discussion of, at least, the following three sets of issues: (1) If those transactions are to be regarded as contracts for the "sale of goods" (possibly as a result of the establishment of a rule based on a revised version of article 3 of the Convention), do the substantive rules laid down by the Convention accommodate the practical needs of those kinds of transactions? (2) If the Working Group wishes to recommend to the Commission that rules should be laid down for web-based transactions involving directly the sale of services, can those rules be derived from the United Nations Sales Convention? (3) If the recommendation to the Commission were to undertake work with respect to web-based transactions that involve sales and other contracts (e.g., licensing) over goods and services (and any intermediate or additional category that might be created), can the Convention provide any inspiration in designing a set of rules for such a broad spectrum? In that discussion, the Working Group may wish to bear in mind that the ongoing debate within the World Trade Organization (WTO) on the nature of goods, virtual goods or services exchanged in cyberspace.

C. Consumer purpose of the sale

30. According to article 2(a), the United Nations Sales Convention does 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". In respect of this exclusion, the issue of whether contracting is conducted electronically as opposed to contracting by more traditional means does not appear to make any difference. As the case would be in instances where the contract is concluded by more traditional means, the buyer is the only one to know about the purpose of the transaction. Where the buyer informs the seller about its purpose, and this purpose is exclusively a personal, household or domestic one, the Convention is not applicable. However, according to legal literature, where the buyer does not inform the seller of such a purpose, the Convention's applicability depends on the seller's possibility of recognizing that purpose. In order to determine whether this possibility exists, just as in cases where the contract is not formed electronically, elements such as the number of items bought, their nature, etc., should be taken into account.

III. Form

A. General issues

31. Although the Convention does not generally deal with issues of validity, as indicated in article 4(a), it expressly deals with the formal validity of contracts for the international sale of goods. Indeed, article 11 establishes that "a contract for the international sale of goods need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." Thus, article 11 establishes the principle that the formation and the evidence of a contract subject to the Convention is free of any form requirement[8], and therefore can be concluded orally, in writing[9] or in any other way. As a result, exchange of e-mail messages should suffice to form a contract under the United Nations Sales Convention, an opinion to which most legal writers have subscribed.

32. However, freedom of form of the sales contract is subject to the effects of the reservation which the States are allowed to declare according to article 96. Under that provision, "a Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State."

33. Some legal writers interpret this provision to mean that whenever one party has its place of business in a State that has made a declaration under article 96, the courts are not allowed to disregard form requirements. According to these writers, courts should take into account the domestic form requirements of the State that made the declaration. Thus, if this view were accepted, this would mean that it would depend on the domestic law of the State that made the declaration whether contracts could be concluded or evidenced by electronic means. Only where that State's domestic law allows such freedom of form would electronic contracting thus become possible.

34. According to other legal writers, the effects of the article 96 declaration are different, *i.e.*, the reservation would not automatically lead to the application of the domestic law form requirements of the State that made the declaration. Rather, it should be up to the rules of private international law of the forum to determine which law is to be applied to the form issue. Thus, if the rules of private international were to lead to the law of a Contracting State that did not make a declaration, the principle of informality set forth in article 11 would be applicable despite the fact that one party has its place of business in a State that made a reservation under article 96. If the conflict-of-laws rules were to lead to the law of a State that made a declaration, that State's rules on form requirements would apply.

35. As a result of the above reasoning, there may remain instances where, despite the Convention's applicability, electronic forms of communication would still be deprived of legal effects. The most effective way to solve this problem would be the

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[8] See OGH, 6 February 1996, österreichische Zeitschrift für Rechtsvergleichung 248 (1996) = CLOUT case n. 176

[9] For this statement, see, *e.g.*, OLG München, 8 March 1995, CLOUT case n. 134.

withdrawal of the various declarations under article 96, since by doing so one would extend the principle of informality to all contracts for the international sale of goods to which the Convention applies. The Working Group may wish to explore the ways in which Contracting States that have made a declaration under article 96 could be encouraged to withdraw such declarations.

B. Definition of "writing" under article 13

36. Whereas article 11 deals with the issue of form requirements both in respect of how a contract is formed and the form in which a contract for the international sale of goods is to be evidenced, article 13 is a relevant provision for the interpretation of the term "writing". According to that article, "for the purposes of this Convention 'writing' includes telegram and telex". Thus, if the parties do not provide otherwise, both telex and telegram will satisfy the writing requirement. According to many authors, article 13 should be applied by analogy to telefax communications as well, on the grounds that it merely constitutes a technical development of telex. Some of the authors who favour this view, argue that messages transferred via computer do not satisfy the writing requirement, fundamentally on the grounds that no hard copy is received. This view is opposed by other authors who state that electronic forms of communication (as the ones covered by the UNCITRAL Model Law on Electronic Commerce) should also be considered "writings" under the United Nations Sales Convention. These authors base their view on the fact that the issue is not expressly settled in the Convention, even though it is governed by it, and that under article 7 it must therefore be settled in conformity with its general principles, namely that of informality which allows for an extensive interpretation of article 13.

37. Even if the Working Group were to agree with the latter view, this would not necessarily lead to a uniform response to the question whether, whenever the Convention is applicable, electronic forms of communication always satisfy the "writing" requirements. There remain divergent views regarding the effects of article 13 in cases where a State that has made a declaration under article 96 excluding the application of article 11. Some commentators hold the view that since no reservation may be made to article 13, that article ensures that, even where the law of a State that has made a declaration is applicable, that State's form requirements are satisfied by telex and telegram, as well as by electronic forms of communication, at least if one holds that article 13 also covers these kind of communications.

38. According to a different view, article 13 has more limited effects, *i.e.*, it only applies to those instances where the Convention itself refers to a "writing" requirement. If one were to adopt this view, one could not be sure that electronic forms of communication would always satisfy the "writing" requirement. If, for instance, the domestic law of a State that made an article 96 declaration regarding article 11 is applicable, the reply depends on whether, under that domestic law, electronic forms of communication are considered "writings". The Working Group may wish to explore whether promotion of the UNCITRAL Model Law on Electronic Commerce might sufficiently address the issue of the definition of "writing" under the Convention (see Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, para. 5).

IV. Substantive issues

39. The issue whether the United Nations Sales Convention applies to contracts for the international sale of goods concluded electronically must be distinguished from that of whether the rules set forth in the Convention are appropriate for electronic contracting. In the following paragraphs some of the main rules of the Convention are examined in the light of their appropriateness in an electronic context. On that basis, the Working Group may wish to discuss whether the rules of the Convention, in particular those rules that are relevant to contract law in general, can be taken into account in trying to elaborate rules for general application to electronic contracting.

A. Formation of contract: general issues

40. The rules on the formation of contracts set forth by the United Nations Sales Convention, namely articles 14-24, are among those rules dealing with an issue which goes beyond sales law and which, therefore, could be used as a model when elaborating rules on electronic contracting.

41. The advantage of the Convention's rules on formation consists in their having demonstrated their workable character in an international environment. This is evidenced, *inter alia*, by the fact that they have been used as models for UNIDROIT's unification efforts which led to the "Principles of International Commercial Contracts"[10]. However, despite the success of the Convention's rules on offer and acceptance, which is due to their ability to transcend the traditional differences in the approaches taken by civil and common law, questions may be asked as to whether they deal exhaustively with all the issues relating to contract formation and, consequently, whether they can be resorted to when drafting general rules on electronic contracting.

42. The rules set forth in the Convention rules have been drafted mainly with a view to dealing with those cases where a contract is formed through offer and acceptance. The fact that those cases do not cover all the ways by which an agreement can be reached, becomes evident if attention is given to the possible complexity of negotiations which may include a great deal of communication between the parties, and which does not necessarily fit within the traditional analysis of offer and acceptance. According to one school of thought, agreements reached without an offer and an acceptance being clearly discernible do not fall within the scope of the Convention scope and should therefore be dealt with by resorting to the applicable domestic law. Under such an approach, it might be impossible to use the body of the Convention's rules on formation of the sales contract as model for an exhaustive body of rules on the formation of electronic contracts.

43. However, according to a majority of commentators, the Convention covers even the agreements reached without resorting to the traditional "offer-acceptance" scheme. The fact that the Convention does not expressly refer to them is not due to their being excluded from the scope of the Convention, but rather to the fact that the drafters did not consider it necessary to address them specifically and to tackle the additional difficulties they might have encountered in trying to devise appropriate wording for those types of agreements. Thus, like any other matter which is

governed by (albeit not expressly settled in) the Convention, the issue of whether there is an agreement even without a clear offer and acceptance, has "to be settled in conformity with the general principles on which it is based" under article 7 (1), for example, the principle of a consensual nature of the contract as well as the principle according to which the existence of the contract depends on whether it is possible to discern the minimum contents required for the conclusion of the contract (such as the elements defined in article 14 for the sales contract).

44. Irrespective of which of the two above-mentioned approaches is taken with respect to the United Nations Sales Convention, it is apparent that the elaboration of rules on electronic contracting will have to take into account this lack of express reference in the Convention to the agreements reached in ways other than a discrete offer and acceptance.

B. Formation of contracts: offer and acceptance

45. Article 14 of the Convention lays down the substantive criteria that a declaration has to meet in order to be considered an offer: it has to be addressed to one or more specific persons, it has to be sufficiently definite (in the sense that it must indicate the goods and somehow fix or make provision for determining the quantity and the price) and it must indicate the intention of the offeror to be bound in case of acceptance[11].

46. As far as the element of specificity is concerned, it appears to make no difference what form of communication one uses. In respect of this substantive feature of the offer, there are, in other words, no more problems intrinsic to electronic forms of communication than to other forms of communication.

47. This is basically also true in respect of the required intention to be bound which distinguishes an offer from an invitation to make an offer. Generally, advertisements in newspapers, radio and television, catalogues, brochures, price lists, etc., are considered invitations to submit offers (according to some legal writers, even in those cases where they are directed to a specific group of customers), since in these cases the intention to be bound is considered to be lacking. The same interpretation might be extended to web-sites through which a prospective buyer can buy goods: where company advertises its goods on the Internet, it should be considered as merely inviting those who access the site to make offers.

48. In order to be considered an offer, a declaration must also be addressed to one or more specific persons. Thus, price circulars sent to an indefinite group of people are considered not to constitute offers, even where the addressees are individually named. The same general rule can apply as far as electronic messages are concerned: via electronic means it will be even less problematic to address messages to a very large number of specific persons.

49. The above reasoning in respect of the offer and its substantive requirements is *mutatis mutandis* applicable as well in respect of the acceptance.

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[10] Compare articles 2.1 et seq. of the UNIDROIT Principles of International Commercial Contracts.

[11] See OGH, 10 November 1994, österreichische Juristische Blätter 253 (1995) = CLOUT case n. 106.

50. According to the Convention, both the offer and the acceptance (at least in most cases) become effective upon their “receipt”, as defined in article 24, according to which “for the purposes of this Part of the Convention, an offer, declaration of acceptance [. . .] 'reaches' the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address”.

51. In respect of the traditional forms of communication, such as oral or paper-based communications, the above-mentioned provision does not seem to cause any problems. A question arises, however, about electronic forms of communications, as to whether article 24 can apply without creating problems. That question has probably to be answered affirmatively. The issue is only one of defining the “receipt” of the electronic message. In this respect, recourse may be had to the UNCITRAL Model Law on Electronic Commerce, which states, in article 15(2), when an electronic message is to be considered received. Thus, it can be concluded that the United Nations Sales Convention, in particular article 24, contains a rule that can serve as a general model even in an electronic environment. The Working Group may wish to consider the extent to which the rule should be made more specific to be useful in electronic contracting practice.

52. The same approach may be taken in respect of the “dispatch" theory which (as far as the formation of contracts is concerned) is relevant for instance under article 16(1), which provides that “an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance”. The rule may be appropriate even for an electronic context, but it does not seem to be specific enough. Whereas it appears obvious when a paper-based statement is dispatched, there are doubts when an electronic message must be considered as having been sent. In this respect, the UNCITRAL Model Law on Electronic Commerce is once again helpful, since it defines “dispatch” in article 15(1), according to which “dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the message on behalf of the originator.”

53. There appears to be, however, one instance where problems may arise if electronic messages are compared to more traditional ones, such as telegrams, letters, telex, as the Convention contains one provision which makes a distinction between these forms of communications. Namely, according to article 20(1) “a period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.” Thus, for the purpose of deciding when the time for acceptance begins to run, a decision should be made as to whether the electronic message should be compared to a means of instantaneous communication rather than to a letter or telegram.

C. Effectiveness of communications made according to Part III of the United Nations Sales Convention

54. Whereas Part II of the Convention is based upon the principle that communications are effective upon receipt[12], Part III is based upon a different principle. By providing that "a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication", the drafters of the Convention favoured, at least according to most commentators, the "dispatch theory", since, where the parties did not agree otherwise or where the Convention itself does not provide differently[13], the addressee bears the risk of loss, delay or alteration of the message.

55. The problem, like in respect of the "receipt theory", is one of defining "dispatch" for the purposes of electronic contracting; it is not one of appropriateness of the rule in an electronic context. In order to solve this issue, it may be sufficient to refer to the earlier suggestion to have recourse to the definition set forth in article 15(1) of the UNCITRAL Model Law on Electronic Commerce (see above, para. 52).

Conclusion

56. It appears that the United Nations Sales Convention is, in general terms, suitable not only to contracts concluded via traditional means, but also to contract concluded electronically. The rules set forth in the Convention do appear to offer workable solutions in an electronic context as well. Some of the rules, such as those relating to the effectiveness of communications, may need to be adapted to an electronic context.

57. The question of applicability of the Convention to electronically-concluded contracts must be distinguished from the question of whether the Convention also covers the sale of "virtual goods". As mentioned earlier, the transactions in these kinds of goods (or services) may appear not to be sales, but rather license agreements. The Working group may wish to discuss whether rules derived from the United Nations Sales Convention should be developed for these kinds of transactions.

[12] For exceptions, see articles 19(2) and 21(1).

[13] See, for instance, articles 47(2), 48(2) and (3).