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Report of the Working Group on Electronic Commerce on the work of its forty-fourth session (Vienna, 11-22 October 2004)

Contents

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I. Introduction

1. At its thirty-fourth session (Vienna, 25 June-13 July 2001), the Commission endorsed a set of recommendations for future work that had been made by the Working Group on Electronic Commerce at its thirty-eighth session (New York, 12-23 March 2001). They included, among other topics, the preparation of an international instrument dealing with selected issues on electronic contracting and a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments.

2. The draft instrument has tentatively been prepared in the form of a preliminary draft convention entitled "the draft convention on the use of electronic communications in international contracts". The most recent summary of the discussions of the Working Group on the draft convention can be found in document A/CN.9/WG.IV/WP.109, paras. 5-34.

II. Organization of the session

3. The Working Group on Electronic Commerce, which was composed of all States members of the Commission, held its forty-fourth session in Vienna, from 11 to 22 October 2004. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Colombia, Croatia, Czech Republic, France, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Morocco, Nigeria, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Thailand, Tunisia, Turkey, United States of America, Venezuela and Zimbabwe.

4. The session was attended by observers from the following States: Congo, Denmark, Egypt, Finland, Indonesia, Iraq, Ireland, New Zealand, Peru, Philippines, Romania, Sudan, Ukraine and Yemen.

5. The session was further attended by observers from the following international organizations: (a) intergovernmental organizations: African Development Bank, Asian Clearing Union, European Commission and the Hague Conference on Private International Law; (b) non-governmental organizations invited by the Commission: American Bar Association, Centre for International Legal Studies, International Chamber of Commerce and the European Law Students' Association.

6. The Working Group elected the following officers:

Chairman: Jeffrey CHAN Wah Teck (Singapore);

Rapporteur: Marco Antonio PEREZ USECHE (Colombia).

7. The Working Group had before it a newly revised version of the preliminary draft convention, which reflected the deliberations at the Working Group's forty-third session (A/CN.9/WG.IV/WP.110). The Working Group also had before it comments received from the Treaty Section of the United Nations Office of Legal Affairs (A/CN.9/WG.IV/WP.111), a proposal to amend draft article 10, paragraph 2, of the preliminary draft convention (A/CN.9/WG.IV/WP.112) and a note by the

Secretariat reproducing the text of the document "ICC eTerms 2004 and ICC Guide to electronic contracting" (A/CN.9/WG.IV/WP.113).

8. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Electronic contracting: provisions for a draft convention.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

9. The Working Group resumed its deliberations on the newly revised preliminary draft convention contained in annex I of the note by the Secretariat A/CN.9/WG.IV/WP.110. The decisions and deliberations of the Working Group with respect to the draft convention are reflected in chapter IV below (see paras. 13-206).

10. The Working Group reviewed and adopted draft articles 1 to 14, 18 and 19 of the draft convention, as set out in the annex to this report. The Working Group further held an initial exchange of views on the preamble and the final clauses of the draft convention, including proposals for additional provisions in chapter IV. In the light of its deliberations on chapters I, II and III and articles 18 and 19 of the draft convention, the Working Group requested the Secretariat to make consequential changes in the draft final provisions in chapter IV. The Working Group also requested the Secretariat to insert within square brackets in the final draft to be submitted to the Commission the draft provisions that had been proposed for addition to the text considered by the Working Group (A/CN.9/WG.IV/WP.110). The Secretariat was requested to circulate the revised version of the draft convention to Governments for their comments, with a view to consideration and adoption of the draft convention by the Commission at its thirty-eighth session.

11. The Working Group considered a note by the Secretariat reproducing the text of the document "ICC eTerms 2004 and ICC Guide to electronic contracting" (A/CN.9/WG.IV/WP.113) and expressed its appreciation to the International Chamber of Commerce for having submitted that document for the information of the Working Group. The Working Group noted the different nature of the work done by the ICC, which was in the form of contractual advice to private parties, and its own work on the draft convention, which had legislative character. The Working Group was of the view that the levels of work were complementary, rather than conflicting. As for the substance, the Working Group noted that, despite varying terminology in the ICC eTerms and the draft convention, as revised by the Working Group, such as the provisions on time and place of dispatch and receipt of electronic communications (see paras. 140-166), there was no substantial contradiction between the instruments. However, given the limited time available, that discussion should not be understood as an endorsement of those documents by the Working Group or by the Commission at the present time.

12. Subject to approval by the Commission, the Working Group requested the Secretariat to prepare explanatory notes or a draft official commentary on the draft convention. The Working Group also recommended that the Commission consider preparing draft contractual clauses to facilitate the parties' choice of the draft convention referred to in draft article 18, paragraph 1 (c). The Working Group requested the Secretariat to continue monitoring issues related to electronic substitutes for documents of title and negotiable instruments with a view to making recommendations, in due course, for possible work by the Commission and to ensure consistency with the work of the Working Group on Transport Law. The Working Group further requested the Secretariat, subject to the availability of resources, to monitor the implementation of the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, including issues related to cross-border recognition of electronic signatures, and to compile judicial decisions on the matters dealt with in those Model Laws, even from jurisdictions that had not adopted them, and to publish the results of its research with a view to making recommendations to the Commission as to whether future work in those areas would be possible.

IV. Electronic contracting: provisions for a draft convention

Organization of deliberations

13. The Working Group agreed that, given the logical relationship between draft articles 1, 18 and 19, it should consider those provisions together. The Working Group further agreed to consider the preamble only after it had settled the operative provisions of the draft convention.

Article 1. Scope of application

14. The text of the draft article was as follows:

"1. This Convention applies to the use of electronic communications in connection with the [negotiation] [formation] or performance of a contract between parties whose places of business are in different States:

"(a) When the States are Contracting States;

"(b) When the rules of private international law lead to the application of the law of a Contracting State; or

"(c) When the parties have agreed that it applies.

"2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract.

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

"[Variant A

"4. Without prejudice to article 19 [Y], the provisions of this Convention do not apply to electronic communications relating to the [negotiation] [formation] or performance of a contract which is governed by an international convention, treaty or agreement which is not referred to in paragraph 1 of article 19 [Y], or has not been the subject of a declaration made by a Contracting State under paragraph 2 of article 19 [Y].]

"[Variant B

"4. The provisions of this Convention apply further to electronic communications in connection with the [negotiation] [formation] or performance of a contract that is governed by an international convention, treaty or agreement, even if such international convention, treaty or agreement is not specifically referred to in paragraph 1 of article 19 [Y], unless the Contracting State has excluded this provision by way of a declaration made in accordance with paragraph 3 of article 18 [X].]"

Paragraph 1 and draft article 18

15. With respect to the text in square brackets, it was suggested that the terms "negotiation" and "formation" should both be retained to encompass instances when negotiation did not lead to the formation of contracts. An alternative suggestion was to state in the opening sentence that the draft convention covered the use of all electronic communications relevant to contracting process, including negotiation, formation and performance of a contract. The Working Group agreed, however, to retain only the word "formation" as it was felt to be sufficiently broad to cover all contracting stages, including negotiation as well as invitations to make offers under draft article 11. It was suggested that explanatory notes or an official commentary on the draft convention could explain that the term "formation" was to be interpreted broadly.

16. The Working Group did not accept a suggestion to delete the phrase "in connection with the formation or performance of a contract" in the opening sentence of the paragraph. It was felt that those words were not superfluous, even if they appeared in the definition of the term "communication" in draft article 4 (a), as they helped the reader understand the scope of application of the draft convention already from its opening provision.

17. The need for draft sub-paragraphs (a), (b) and (c) was questioned in light of the enabling nature of the draft convention. In support of the current formulation, it was noted that the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the United Nations Sales Convention") only applied to international contracts if both parties were located in contracting States of the Convention or the rules of private international law led to the application of the law of a Contracting State. In order to ensure consistency between the two texts, it was suggested that similar wording should be used in the draft paragraph. In response, it was stated that it would be incongruous for a State to use the rules of the draft convention to interpret existing law only when a given transaction met the requirements of the draft paragraph, while using other rules in connection with transactions that did not meet those requirements. That result would create a duality of regime for the use of electronic communications in international contracts, which

was said to be contrary to the aim of uniformity pursued by the draft convention. In view of those observations, the Working Group agreed that there was a close relationship between those subparagraphs and the exclusions provided under draft article 18 and decided to consider the matter in connection with its discussion of draft article 18.

18. The Working Group reverted to draft article 1, paragraph 1, after it concluded its deliberations on draft article 18 (see paragraphs 28-46). The Working Group then agreed that all qualifying elements to the scope of application of the draft convention, which were currently contained in paragraph 1 of draft article 1, should be moved to current draft article 18, and that draft paragraph 1 should read:

> "This Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States."

19. It was noted that under the revised formulation, the draft convention would apply to electronic messages exchanged between parties whose places of business were in different States even if those States were not both Contracting States of the Convention, so long as the law of a Contracting State applied to the dealings of the parties.

20. The Working Group approved the substance of the draft paragraph, as revised, and referred it to the drafting group.

Paragraph 2

21. The Working Group approved the substance of the draft paragraph and referred it to the drafting group.

Paragraph 3

22. The Working Group approved the substance of the draft paragraph and referred it to the drafting group.

Paragraph 4 and draft article 19

23. The Working Group noted that both variants A and B were intended to clarify the relationship between draft articles 1 and 19 in the light of earlier deliberations of the Working Group on the matter (A/CN.9/548, paras. 42-46 and 72-81). Variant A reflected the understanding that the draft convention would only apply to the exchange of electronic communications in connection with a contract that was covered by an existing uniform law convention (other than one of those listed in draft article 19, paragraph 1) if the relevant convention had been the subject of a declaration made by a Contracting State under paragraph 2 of article 19. Variant B, in turn, was intended to widen the scope of application of the draft convention by making it clear that its provisions might also apply to the exchange of electronic communications covered by other treaties beyond those specifically listed in draft article 19, paragraph 1. The latter reflected the view that the list of instruments in draft article 19, paragraph 1, or any declaration made under paragraph 2 of that article, should be regarded as non-exhaustive clarifications intended to remove doubts as to the application of the draft convention, but not as effective limitations on its reach (see A/CN.9/548, para. 75).

24. Strong support was expressed for retaining variant A. In particular, it was said that:

(a) Variant A provided greater legal certainty than variant B, as parties to a contract to which another international instrument applied would immediately know whether the provisions of the draft convention applied to their contracts by reading draft article 1(4), draft article 19(1) and any declaration submitted by Contracting States under draft article 19(2); and

(b) Variant A made it easier for States to adhere to the draft convention, as it obviated the need for the treaty services of States to assess the compatibility of the provisions of the draft convention with other instruments ratified by them, without precluding the possibility of extending the provisions of the draft convention to other treaties at a later stage by declarations under draft article 19(2).

25. The prevailing view within the Working Group, however, was in favour of variant B, mainly for the following reasons:

(a) Variant B expanded the scope of application of the draft convention and allowed the parties to a contract to which another legal instrument applied automatically to benefit from the enhanced legal certainty for the exchange of electronic communications that the draft convention provided;

(b) Given the enabling nature of the provisions of the draft convention, States would be more likely inclined to extend its provisions to trade-related instruments than to exclude their application to other instruments. To the extent that such an expansion under variant B operated automatically, without the need for individual declarations under draft article 19(2), variant B facilitated the application of the draft convention better than variant A, which, it was said, would require States to submit numerous opt-in declarations to achieve the same result.

26. The suggestion was made, however, that if variant B were retained, the Working Group should attempt to qualify the types of contracts to which the provisions of the draft convention could apply by virtue of paragraph 4 of article 1, by adding qualifications such as “on commercial law matters” or “pertaining to international trade”, which were contained in square brackets in draft article 19, paragraph 2. The Working Group did not accept that suggestion, however, in view of the difficulty of formulating a universally acceptable definition of the intended subject matter. It was further felt that the reference to contracts in the draft article already provided sufficient indication of the relevant subject matter and that any further attempt to clarify the nature of the instruments contemplated by paragraph 4 might unduly limit the flexibility of States in the application of the draft convention.

27. Having tentatively agreed to retain variant B, the Working Group agreed that it should proceed to consider draft article 19 so as to ascertain better whether variant B provided a sound basis for dealing with the relationship between the draft convention and other instruments. After it had concluded its deliberations on draft article 19 (see paras. 47-58), the Working Group confirmed its preference for retaining only variant B, but agreed that the provision would be better placed as a new subparagraph in the current draft article 19 (see para. 54).

Article 18 [X]. Reservations and declarations

28. The text of the draft article was as follows:

> "1. No reservations are permitted except those expressly authorized in this article.
>
> "2. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 1 (a) of article 1 of this Convention.
>
> "3. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 1 (b) of article 1 of this Convention.
>
> "4. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 4 of article 1 of this Convention.
>
> "[5. Any State may declare in writing at any time that it will not apply this Convention to the matters specified in its declaration.]
>
> "6. A State making a reservation in writing under paragraphs 2, 3 and 4 of this article shall not be bound by the matters specified in such reservation."

General comments

29. The Working Group took note of the comments made by the Treaty Section of the United Nations Office of Legal Affairs on draft article 18 and final clauses (A/CN.9/WG.IV/WP.111), most of which had been incorporated in the new draft, including a change in the title of the article. The Working Group took note, in particular, of the comment that the declarations contemplated in the draft article were in fact reservations and should be treated as such.

30. The Working Group noted that those comments were in line with the practice of the Secretary-General as depositary of multilateral treaties. Nevertheless, the Working Group was of the view that the specific needs of the draft convention might require a solution different from the one currently envisaged in the draft article. It was pointed out that, unlike most instruments negotiated by the United Nations, which were typically concerned with the relations between States and other public international law matters, the draft convention dealt with law that would apply not to State actions, but to private business transactions. In that connection, it was pointed out that treating the matters dealt with in the draft article, and in draft article 19, as declarations would serve the purpose of the draft convention better than treating them as reservations. The reason for that view was that declarations would not trigger a formal system of acceptances and objections, which was typical for reservations to international treaties, for instance as provided in articles 20 and 21 of the Vienna Convention on the Law of Treaties, of 1969. Moreover, declarations supported the goal of flexibility that was crucial in areas in which practice was still developing, such as electronic commerce. Recent provisions in UNCITRAL instruments supported those conclusions, such as articles 25 and 26 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) and articles 35 to 43 (38 excluded) of the United Nations Convention on the Assignment of Receivables in International Trade (New York,

2001), in the same way as final clauses in private international law instruments prepared by other international organizations, such as articles 54 to 58 of the UNIDROIT Convention on International Interests in Mobile Equipment (Cape Town, 2001) and articles 21 and 22 of the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (The Hague, 2002) concluded by the Hague Conference on Private International Law.

31. For the above reasons, the Working Group generally agreed that the text of the draft convention should distinguish between declarations pertaining to the scope of application, which the draft convention admitted and did not subject to a system of acceptances, and objections by other Contracting States, on the one hand, and reservations, on the other hand, which the draft convention did not admit.

32. It was generally suggested that the draft article should allow for declarations to be lodged at any time and not only at the time of the deposit of its instrument of ratification, acceptance, approval or accession. That change, it was said, would provide for greater flexibility in the application of the draft convention, as States would be able to exclude its application to certain other conventions at a moment later than the expression of the consent to be bound. In response, it was noted that the proposed change would introduce an excessive element of flexibility to the draft convention that in the end would be detrimental for legal certainty, and would dilute the contribution of the draft convention to harmonization of law. The Working Group nevertheless approved the proposal, as it was generally felt that in an area as rapidly evolving as the area of electronic commerce, in which technological developments rapidly changed existing patterns of business and trade practices, it was essential to afford States the flexibility required for the application of the draft convention. A rigid system of declarations that required decisions to be made by States prior to the deposit of instruments of ratification, acceptance, approval or accession might either deter States from joining the Convention, or might prompt them to act in an overly cautious manner, thereby leading States to exclude automatically the application of the draft convention in various areas.

33. The Working Group took note, in that connection, of a suggestion that matters relating to the time and form of declarations in the draft convention could be dealt with in a uniform manner in draft article 20, and decided that such a possibility might be considered once the Working Group had completed its deliberations on all declarations authorized by the draft convention.

Paragraph 1

34. In view of its general deliberations on the draft article, the Working Group agreed that the substance of draft paragraph 1, with appropriate adjustments, should become a separate provision and should be placed after the current draft article 20. The Working Group further agreed that the title of article 18 should be along the lines of “Declarations on the scope of application”.

Paragraphs 2 and 3

35. In response to a question, it was observed that the intended effect of a declaration under draft paragraph 2 would be that, for transactions subject to the laws of a Contracting State, the provisions of the draft convention would apply to exchanges of data messages in connection with the formation or performance of

contracts between parties whose places of business were in different States, even if those States were not both parties to the Convention. However, it was suggested that the current text could also be read so as to narrow the scope of application of the draft convention. Another view was that such a possibility should instead become the general rule for determining the application of the Convention under draft article 1, as had been suggested at the Working Group's forty-third session (see A/CN.9/548, para. 86). In such case, paragraphs 1 (a) and 1 (b) of draft article 1 might become redundant. For those States in which such a broader scope of application might create difficulties, draft article 18 might contemplate a reverse exclusion, namely that a State might declare that it would apply the Convention only if both parties were located in Contracting States.

36. In respect of draft paragraph 3, it was suggested that the provision should be deleted, so as to retain the potential benefit of draft article 1, subparagraph 1 (b). It was said that draft article 1, subparagraph 1 (b) contained a useful provision to allow for an expanded geographic scope of application for the draft convention, since it did not require that the States in which the parties to the contract were located should both be Contracting States of the Convention, so long as the laws of a Contracting State applied to the underlying transaction. In response, it was stated that some States might have difficulties applying draft article 1, subparagraph 1 (b), and that it should be possible for those States to exclude that provision by virtue of a declaration under draft article 18, paragraph 3. A similar exclusion existed under the United Nations Sales Convention, and the current draft should be retained for the same reasons that applied in connection with that other convention.

37. A further proposal made was to include another possibility of exclusion in respect of draft article 1, subparagraph 1 (c). It was pointed out that draft article 1, subparagraph 1 (c) provided for the possibility of applying the draft convention when the parties had agreed that it should be applied, even if the other conditions in that provision were not met. Such a possibility did not exist in the United Nations Sales Convention, but was provided, for instance, in article 1, paragraph 2 (e), of the United Nations Convention on the Carriage of Goods by Sea (1978) and in article 1, paragraph 2, of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995). In that connection, the proposal was made that a declaration be introduced to exclude the application of draft article 1(1)(c). Such an exclusion would address the concern of a number of States whose domestic legislation allowed parties to choose the application of foreign law, but not of international conventions as such. Alternatively, it was suggested that draft article 1(1)(c) should be combined with draft article 3, which dealt with party autonomy, so as to make it clear that the draft convention could be incorporated into the parties' dealings as a set of mutually agreed upon contractual rules, rather than as a statutory text to which the parties were subject.

38. The Working Group paused to consider the various suggestions that had been made in connection with draft paragraphs 2 and 3. The Working Group became increasingly aware of the difficulty of developing a consensus on the matter within the current structure of articles 1, paragraph 1, and article 18. The Working Group acknowledged that, as currently drafted, article 1 established a number of conditions for the application of the draft convention, which might considerably limit its scope, thus depriving business from the benefit of enhanced legal certainty intended by the draft convention. Furthermore, with the possible exception of draft paragraph 2, the

system of exclusions under draft article 18 might lead to even further limitation in the scope of application of the draft convention.

39. The Working Group eventually agreed that the best approach might be to reverse the structure of draft articles 1 and 18 so as to establish the broadest possible scope of application as a departure point, while allowing States for which a broad scope of application might not be desirable to make declarations aimed at reducing the reach of the draft convention.

40. The Working Group therefore agreed that it would be preferable to replace both draft paragraphs 2 and 3 by a provision that reflected the qualifications to the scope of application of the draft convention currently contained in draft article 1, paragraph 1, along the following lines:

> "1. Any State may declare in writing at any time that it will apply this Convention only
>
> "(a) When the States referred to in article 1, paragraph 1 are Contracting States to this Convention;
>
> "(b) When the rules of private international law lead to the application of the law of a Contracting State; or
>
> "(c) When the parties have agreed that it applies."

41. It was noted that, under this approach, which had been contemplated in the first version of the draft convention (A/CN.9/WG.IV/WP.95, annex), the draft convention would be given a broad scope of application (see paras. 23-25 above), but Contracting States would retain the possibility of limiting the scope of application by way of declarations. In doing so, States might choose the elements that they deemed appropriate and would not be bound to use all of the elements mentioned in subparagraphs (a) to (c) of the new draft paragraph 1 of article 18.

42. The Working Group approved the substance of the revised paragraph 1 and referred it to the drafting group.

Paragraph 4

43. The Working Group generally agreed that the exclusion contemplated in the draft paragraph was necessary in view of the Working Group's tentative agreement to retain variant B of draft article 1, paragraph 4. However, the Working Group agreed that it was important to afford States that excluded the application of draft article 1, paragraph 4, the possibility of extending the application of the provisions of the draft convention, on an individual basis, to electronic communications exchanged in connection with other international conventions that might be specifically identified by declarations submitted by Contracting States. Thus, the Working Group agreed that the draft paragraph should be reformulated along the following lines:

> "Any State may declare in writing at any time that it will not be bound by [*relevant provisions reflecting variant B of current article 1, paragraph 4*] of this Convention, except as otherwise stated in a declaration submitted under article 19."

44. The Working Group approved the substance of the draft paragraph, as revised, and referred it to the drafting group. The Working Group acknowledged that the cross-references made in this and other provisions it had agreed to amend needed to be carefully reviewed by the drafting group in the light of the Working Group's final decisions on the placement of various provisions, including draft paragraph 4.

Paragraph 5

45. The Working Group agreed that, for the purpose of ensuring flexibility in the application of the draft convention, the possibility of unilateral exclusions should be retained despite the fact that the draft convention was expected to contain a common list of exclusions under draft article 2 (see paras. 59-69). The Working Group therefore agreed to remove the square brackets around the draft paragraph and to refer it to the drafting group.

Paragraph 6

46. The Working Group agreed that draft paragraph 6 had become redundant, in view of its deliberations on draft paragraph 1, and agreed to delete it.

Article 19 [Y]. Communications exchanged under other international conventions

47. The text of the draft article was as follows:

> "1. Except as otherwise stated in a declaration made in accordance with paragraph 3 of this article, [each Contracting State declares that it shall apply the provisions of this Convention] [the provisions of this Convention shall apply] to the use of electronic communications in connection with the [negotiation] [formation] or performance of a contract [or agreement] to which any of the following international conventions, to which the State is or may become a Contracting State, apply:
>
> > "[Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)]
> >
> > "Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980)
> >
> > "United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)
> >
> > "United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991)
> >
> > "United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995)
> >
> > "United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).
>
> "2. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will also apply this Convention to the exchange by means of data messages of any communications, declarations, demands, notices or requests under any other

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

"3. Any State may declare in writing at any time that it will not apply this Convention to international contracts falling within the scope of [any of the conventions referred to in paragraph 1 of this article][any international agreements, treaties or conventions, including any of the conventions referred to in paragraph 1 of this article, to which the State is a Contracting Party and which are identified in that State's declaration]."

General comments

48. The Working Group noted that the draft article was intended to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments, which had been the object of a survey contained in an earlier note by the Secretariat (see A/CN.9/WG.IV/WP.94). At the fortieth session of the Working Group, there had been general agreement to proceed in that manner, to the extent that the issues were common, which was the case at least with regard to most issues raised under the instruments listed in draft paragraph 1 (see A/CN.9/527, paras. 33-48).

49. The draft article, it was noted, was intended to remove doubts as to the relationship between the rules contained in the draft convention and rules contained in other international conventions. It was not the purpose of the draft article to amend any other international convention. Through the draft article, the Contracting States could use the provisions of the draft convention to remove possible legal obstacles to electronic commerce that might arise from the interpretation of those conventions and to facilitate their application in cases where the parties conducted their transactions through electronic means.

Paragraph 1

50. The Working Group agreed that the benefit of legal certainty intended by the draft article should be automatically effective upon ratification, acceptance, approval or accession and should not require a separate declaration by the Contracting State (see A/CN.9/548, para. 52). Therefore, the Working Group agreed to retain only the words "the provisions of this Convention shall apply", removing the square brackets around them, and to delete the phrase "[each Contracting State declares that it shall apply the provisions of this Convention]".

51. The view was expressed that the relationship between the draft convention and other international instruments beyond those listed in the draft paragraph was not entirely clear, as the matter was dealt with in two different parts of the draft convention, namely draft articles 1, paragraph 4, and draft article 19. That uncertainty, it was said, was aggravated by the Working Group's tentative agreement to retain variant B of draft article 1, paragraph 4. The Working Group agreed that, to address those concerns, it would be useful to insert variant B of draft article 1, paragraph 4 as a new paragraph 2 in draft article 19 and reformulate it along the following lines:

"The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract

to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of article 19 applies, except as otherwise stated in a declaration submitted by a State under article 18, paragraph 2."

52. The Working Group further agreed that the opening phrase of the current paragraph 1 of draft article 19 ("Except as otherwise stated in a declaration made in accordance with paragraph 3 of this article") would not be necessary and could be deleted.

53. The Working Group was informed that Working Group II (Arbitration) had pronounced itself in favour of including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the 1958 New York Convention") in the list in paragraph 1. Since the 1958 New York Convention used the expression "arbitration agreement", rather than "contract", the Working Group agreed that the square brackets around the words "or agreement", as well as around the title of that convention, should be removed. The Working Group noted, however, that in order to include the New York Convention in draft article 19, it might be necessary to include a provision on electronic equivalents of "original" documents in the draft convention, since article IV, paragraph (1) (b) of the 1958 New York Convention required that the party seeking recognition and enforcement of a foreign arbitral award must submit, inter alia, an original or a duly authenticated copy of the arbitration agreement. The Working Group agreed to defer a final decision on the matter until it had considered the new paragraphs 4 and 5 of draft article 9 (see paras. 129-139 below).

Paragraph 2

54. The Working Group agreed that the current text of the draft paragraph had become redundant in view of the Working Group's tentative agreement to retain variant B of draft article 1, paragraph 4, and to incorporate the latter in draft article 19. Instead, draft article 19 should now contain a provision that established a link to the declarations contemplated in the revised version of draft article 18, paragraph 2, in a manner that made it possible for States that made such a declaration to limit its consequences by adding specific conventions to the list of international instruments to which they would apply the provisions of the draft convention. Such a new provision, it was agreed, could read as follows:

"A State that made a declaration pursuant to article 18, paragraph 2, may also declare that, notwithstanding such declaration, it will apply the provisions of this Convention to any international agreement, treaty or convention, which is identified in that State's declaration, and to which the State is a Contracting Party."

55. The Working Group generally agreed to the principle reflected in the new draft provision. For purposes of clarity and economy of language, it decided that the substance of the new draft paragraph (h) and of the new draft article 18, paragraph 2 (see above, paras. 43-44), should be combined in a single provision in draft article 19. Doing so would ensure that all declarations concerned with the relationship between the draft convention and other international conventions were placed in the same part of the draft convention.

Paragraph 3

56. The Working Group considered at some length the question of whether a declaration submitted under the draft paragraph had necessarily to exclude the application of the draft convention to the use of electronic communications in connection with all contracts to which another international convention applied, or whether a State could exclude only certain types or categories of contracts covered by another international convention. There was strong support for the latter proposition. It was said that a system of limited exclusions would promote the wider use of the draft convention and would not deprive contracts covered by other international conventions of the legal certainty offered by its provisions only because a State concluded that the rules of the draft convention were not suitable for a particular type of contract covered by the same international convention. However, the view that eventually prevailed was contrary to that proposition on the grounds that such a system of modulated exclusions might render the application of the draft convention excessively complex and might jeopardize the objectives of legal certainty and predictability the draft convention aimed to achieve.

57. Subject to the deletion of the words "[any of the conventions referred to in paragraph 1 of this article]", to the removal of the square brackets around the immediately following phrase and to aligning the language in the draft paragraph with the language used in draft paragraph 1, the Working Group approved the substance of the draft paragraph.

Conclusion on draft article 19

58. Subject to the above amendments and additions, the Working Group approved the substance of the draft article, as revised, and referred it to the drafting group.

Article 2. Exclusions

59. The text of the draft article was as follows:

"1. This Convention does not apply to electronic communications relating to contracts concluded for personal, family or household purposes.

"[2. This Convention does not apply to electronic communications that relate to any of the following:

"[(a) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;

"[(b) Contracts that create or transfer rights in immovable property, except for rental rights;

"[(c) Contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

"[(d) Contracts of suretyship granted by, and on collateral securities furnished by, persons acting for purposes outside their trade, business or profession;

"[(e) Contracts governed by family law or by the law of succession;

"[(f) Bills of exchange, promissory notes and other negotiable instruments;

"[(g) Documents relating to the carriage of goods;

"[*Other exclusions that the Working Group may decide to add.*]

Paragraph 1

60. The Working Group approved the substance of the draft paragraph and referred it to the drafting group.

Paragraph 2

61. Strong support was expressed for the proposed exclusions under draft subparagraph 2 (a). It was stated that the financial service sector was subject to well-defined regulations or industry standards that addressed issues relating to electronic commerce in an effective way for the worldwide functioning of that sector and that no benefit would be derived from their inclusion in the draft convention. It was also stated that, given the inherently cross-border nature of financial transactions, the relegation of such an exclusion to country-based declarations under draft article 18 would be inadequate to reflect that reality. The Working Group approved the substance of the draft subparagraph (a) and referred it to the drafting group.

62. The Working Group proceeded to consider at some length the provisions contained in draft subparagraphs (b), (c), (d) and (e).

63. There was strong support for the deletion of subparagraphs (b), (c), (d) and (e). States that felt that electronic communications should not be authorized in those cases would always have the option of making individual exclusions by declarations under draft article 18. It was argued that such a system would allow States to limit the application of the draft convention as deemed best, while the adoption of a list of exemptions would have the effect to impose those exclusions even for States that saw no reason for preventing the parties to the transactions listed in those subparagraphs from using electronic communications.

64. In response, strong support was expressed for retaining those provisions, which were said to be justified by sound reasons of public policy. Several States had special rules on the extent to which electronic communications could be admitted in connection with transactions such as those referred to in subparagraphs (b) to (d). Moreover, some of those matters were clearly foreign to the trade-law mandate of UNCITRAL and should not be perceived as being covered by the draft convention. Leaving the matters referred to in those subparagraphs for unilateral exclusions by way of declarations under draft article 18 would not be conducive to enhancing legal certainty. A list of explicit exclusions would not be detrimental to promoting electronic communications in international trade in view of the limited impact that those transactions had on commerce as a whole.

65. The preponderant view within the Working Group, however, was in favour of the deletion of subparagraphs (b), (c), (d) and (e) from the list of exclusions as those matters were regarded as being territory-specific issues that should be better dealt at

the State level. It was also said that some States already admitted the use of electronic communications in connection with some, if not all, of the matters contemplated in those subparagraphs. Retaining those provisions, however, might block those developments and would hinder the adaptation of the law to technological evolution. The rationale for specific exclusions was also questioned. In respect of subparagraph (c), for instance, it was stated that, as currently drafted, the provision might have the undesirable effect, inter alia, of hindering the international development of electronic public procurement. Another difficulty of the draft provision was the reference to "tribunals" which might be read to encompass arbitral bodies. In response it was suggested that possible ambiguities might be resolved by using a more descriptive expression, such as "national judicial authorities".

66. Having considered the various views expressed, the Working Group decided to delete subparagraphs (b), (c), (d) and (e) from paragraph 2 of article 2 of the draft convention. The Working Group deferred the discussion of draft subparagraphs (f) and (g) to the discussion of paragraphs (4) and (5) of article 9 of the draft convention (see paras. 129-139 below).

Proposed additional paragraph and organization of the draft article

67. It was proposed that a reference be inserted in article 2 of the draft convention to indicate that specific matters and types of transactions besides those listed in draft article 2 might be excluded from the scope of the draft convention by way of declarations made under article 18 paragraph 2 of the draft convention. Such a provision could read as follows:

> "States may make declarations for further exclusions of the scope of application of this Convention on specific matters according to article 18, paragraph 2, of this Convention."

68. The Working Group approved the substance of the proposed new paragraph and referred it to the drafting group. It was noted that explanatory notes or an official commentary to the draft convention should indicate that possible exclusions might cover matters typically excluded from domestic legislation on electronic transactions, such as any of those referred to in the subparagraphs that the Working Group had agreed to delete.

69. A suggestion was also made that paragraph 1 and 2 of draft article 2 be merged into one single paragraph. The Working Group agreed that the drafting group should consider that matter.

Article 3. Party autonomy

70. The text of the draft article was as follows:

> "The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions [either by an explicit exclusion or impliedly, through contractual terms that vary from its provisions]."

71. The Working Group noted that the draft article was a standard clause in that it restated the principle of party autonomy as it appeared in other uniform law instruments. The sentence in square brackets had been proposed at the Working

Group's forty-third session to specify the manner in which parties could derogate from the draft convention (A/CN.9/548, paras. 122-123).

72. While there was some support for retaining the words in square brackets, the Working Group agreed that those words added little to the draft article and might in fact give rise to uncertainty as to the ability of the parties to derogate from the provisions of the draft convention by means other than those expressly mentioned in the draft article.

73. Without prejudice to the general validity of the rule reflected in the draft article, it was suggested that there were areas where party autonomy could be limited or even excluded in favour of mandatory rules. Possible areas included draft article 8, paragraph 2, and draft article 9. It was also suggested that the entire chapter II of the draft convention should be made mandatory for the parties.

74. In that connection, the view was expressed that party autonomy should not be allowed to go so far as to allow the parties to derogate from rules based on public policy considerations, such as relaxing statutory signature requirements in favour of methods of authentication that provided a lesser degree of reliability than electronic signatures, which were 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.

75. It was further said that the draft article should not be read to the effect that parties could deviate from provisions on the scope of application of the draft convention and make the Convention applicable to matters that had been the subject of an exclusion by a Contracting State. In response, it was noted that other UNCITRAL instruments, such as United Nations Sales Convention contained a rule on party autonomy such as the one in the draft article and that it was generally understood that party autonomy applied only to provisions that created rights and obligations for the parties, and not to the provisions of an international convention that were directed to Contracting States.

76. The prevailing view within the Working Group was that the right of a party to derogate from the application of the draft convention should not be restricted. It was noted that the draft convention was only intended to provide functional equivalence in order to meet general form requirements and that it did not affect mandatory rules that required, for instance, the use of specific methods of authentication in a particular context. In any event, States remained free to make declarations excluding certain matters under draft article 18 (see above, paras. 43-44).

77. 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 draft article should be retained, without the sentence within square brackets. The Working Group approved the substance of the draft article and referred it to the drafting group.

Article 4. Definitions

78. The text of the draft article was as follows:

"For the purposes of this Convention:

"[(a) "Communication" means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the [negotiation] [formation] or performance of a contract;

"[(b) "Electronic communication" means any communication that the parties make by means of data messages;]

"(c) "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;

"(d) "Originator" of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;

"(e) "Addressee" of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

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

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

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

"[(i) "Person" means natural persons only, whereas "party" includes both natural persons and legal entities;]

[*Other definitions that the Working Group may wish to add.*]"

Subparagraph (a) "communication"

79. It was noted that the new definition was intended to avoid the repetition elsewhere of the various purposes for which electronic communications were exchanged ("declaration, demand, notice, request, including offer and acceptance of an offer"). The Working Group agreed to delete the reference to the term "negotiation" and retain the term "formation". With that change, the Working Group approved the draft definition and referred it to the drafting group.

Subparagraph (b) "electronic communication"

80. The Working Group noted that the new definition established a link between the purposes for which electronic communications might be used and the notion of

"data messages", which was important to retain since it encompassed a wide range of techniques beyond purely "electronic" techniques. The Working Group approved the draft definition and referred it to the drafting group.

Subparagraph (c) "data message"

81. The suggestion was made to add the word "magnetic" before the word "optical" and provide for other examples of means by which information could be generated, sent, received or stored, such as fax and Internet. However, it was also suggested that the list of examples should be deleted since some of them, such as telegraph or telex, referred to older technologies and were not within the scope of the draft convention. The prevailing view, however, favoured the retention of examples to indicate that the definition of "data message" covered not only electronic mail but also other techniques, even if apparently dated, which could still be used in the chain of electronic communications.

82. The Working Group agreed to retain the list of examples and add the word "magnetic" before the word "optical". With that change, the Working Group approved the draft definition and referred it to the drafting group. The Working Group agreed that any explanatory notes or official commentary on the draft convention might clarify, as appropriate, that the list was merely illustrative and that other techniques, such as the Internet, might fall under the definition of "data message".

Subparagraphs (d) and (e) "originator" and "addressee"

83. The Working Group approved the draft definitions and referred them to the drafting group.

Subparagraph (f) "information system"

84. The Working Group agreed to defer the consideration of that definition until it had considered draft article 10, paragraph 2 (see paras. 145-161 below).

Subparagraph (g) "automated information system"

85. The Working Group agreed to substitute the term "automated message system" for the term "automated information system" to avoid confusion with the definition in subparagraph (f). With that change, the Working Group approved the draft definition and referred it to the drafting group.

Subparagraph (h) "place of business"

86. The view was expressed that the draft definition should be deleted and that the draft convention should leave it to national laws to define the term "place of business". However, the prevailing view was that the draft convention should define the term in view of the role played by the notion of "place of business" in the draft convention, where it appeared in several articles. The views were divided, however, as to which of the two alternatives contained in square brackets should be chosen.

87. With the aim of achieving a consensus on the matter, it was suggested that the second alternative could be retained, using the words "any place" instead of "the place", and "non-transitory establishment" instead of "stable establishment". There

was strong support for that proposal. However, concern was expressed that the suggested changes would render the definition tautological, since a "place of business" would then mean a "non-transitory" establishment other than a "temporary" provision of goods and services. In response, it was noted that there would be no tautology, since the notion of "non-transitory", which was already inherent in the word "stable" in the second option in the current text, qualified the word "establishment", whereas the words "other than temporary provision of goods and services" referred to "economic activity". The Working Group concurred with that view.

88. With those changes, the Working Group approved the draft definition and referred it to the drafting group.

Subparagraph (i) "person" and "party"

89. Views were divided as to desirability of the definitions of "person" and "party". The suggestion was made to replace the word "individual" for "person", and "person" for "party" as the term "person" in many jurisdictions traditionally encompassed both natural and legal persons. However, the prevailing view favoured the deletion of both definitions. The Working Group agreed nevertheless that it could consider using the words "natural person", as appropriate, in those substantive provisions of the draft convention that required a distinction between legal entities and natural persons.

Article 5. Interpretation

90. The text of the draft article was 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]".

"by virtue of the rules of private international law"

91. The Working Group noted that the closing phrase had been placed in square brackets at the request of the Working Group at an earlier session (see A/CN.9/527, paras. 125-126) because 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. It was suggested, however, that since the draft convention, in its present form, did not contain any conflict-of-laws rules, the risk no longer existed and, therefore, the language in square brackets could be retained. The Working Group agreed to delete the square brackets. With that change, the Working Group approved the substance of the draft article and referred it to the drafting group.

Article 6. Location of the parties

92. The text of the draft article was as follows:

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

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

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

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

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

General comments

93. It was noted that the draft article offered elements that allowed the parties to ascertain the location of the places of business of their counterparts. That facilitated a determination, among other elements, as to the international or domestic character of a transaction and the place of contract formation. The Working Group noted that there had been considerable debate on the draft provision over the years. The current draft convention no longer contemplated a positive duty for the parties to disclose their places of business or provide other information, but merely created a presumption in favour of a party's indication of its place of business, which was accompanied by conditions under which that indication could be rebutted and default provisions that applied if no indication had been made.

Paragraph (1)

94. The Working Group did not accept a suggestion to retain both phrases in square brackets, combined by the conjunction "or". The Working Group heard arguments for the deletion of the words in the second set of square brackets, as had happened at earlier meetings (A/CN.9/509, para. 48 and A/CN.9/528, para. 87), as well as the reiteration of earlier arguments for retaining them (see A/CN.9/509, para. 49 and A/CN.9/528, para. 88), which at the current session also focused on the need to avoid the impression that the draft convention allowed the parties to circumvent the application of a law that they regarded as undesirable.

95. The Working Group considered that the legal consequences of false or inaccurate representations made by the parties was not a matter within the purview of the draft convention and that draft article 7 made it clear that those questions, for which most legal systems would have answers, should be left for the applicable law outside the draft convention. The Working Group therefore agreed to delete the words in the second set of square brackets and proceeded to consider the other words in square brackets.

96. As regards the words in the first set of square brackets, the main arguments for their deletion included the following:

(a) Those words added little to the operation of the presumption, as they merely provided that a location would not be regarded as a place of business if the relevant party did not have a place of business at that location;

(b) Those words gave rise to uncertainty as to who bore the burden of proof concerning the accuracy or truthfulness of a party's indication of its location.

97. In response, the main arguments for retaining only the words in the first set of square brackets were:

(a) Those words were useful to clarify that the presumption created in the draft paragraph was not an absolute one, which was not self-evident from the text;

(b) Without those words, the draft paragraph might be read to give parties entire freedom to choose arbitrarily any location as their place of business. That result would be highly undesirable, since a party should not benefit from recklessly inaccurate or untruthful representations

98. An additional argument for retaining the words in the first set of square brackets was that those words were useful from the point of view of business facilitation, since they provided a sound basis for upholding a party's indication of a place of business. That might be important in connection with companies that had several places of business, with more than one having connections to a specific contract. For example, an Internet vendor maintaining several warehouses at different locations from which different goods might be shipped to fulfil a single purchase order effected by electronic means might see a need to indicate one of such locations as its place of business for any given contract. The current draft recognized that possibility, with the consequence that such an indication could only be challenged if the vendor did not have a place of business at the location it indicated. If that indication was not possible, the parties might need to enquire, in respect of each contract, which of the vendor's multiple places of business had the closest connection to the relevant contract in order to determine what was the vendor's place of business in that particular case.

99. Having considered the different views expressed, the Working Group agreed on the usefulness of retaining the first set of words in square brackets. The Working Group agreed, however, that the formulation of the text could be improved, for instance by clarifying that rebuttal of the presumption required an interested party (other than the one making the indication), to show that there was no place of business at the location indicated. With that change, the Working Group approved the substance of the draft paragraph and referred to the drafting group.

Paragraph (2)

100. It was generally understood that, given the current structure of the draft convention, the main purpose of the draft paragraph was to provide a default rule when a party that had more than one place of business failed to indicate the place of business for a particular transaction. For cases where a party had only one place of business and did not disclose it, the definition in draft article 4, subparagraph (h) already provided an answer. Thus the Working Group agreed to retain the words in square brackets with substitution of "and" for "or". It was also generally felt that the amended paragraph would also offer a default rule in situations where a party indicated more than one place of business.

101. The Working Group also agreed with the suggestion that the words "and its performance" be deleted as the place of a contract was more commonly used for the purpose of determining the place of business. Reasons for that decision included the following:

(a) Similar wording in other international instruments, in particular the United Nations Sales Convention, had in practice given rise to conflicting interpretations when the place of the contract was different from the place of the contract's performance, which was often the case (see further A/CN.9/509, para. 51);

(b) Earlier concerns as to the risk of establishing a duality of regimes by departing from the languages used in the United Nations Sales Convention (see A/CN.9/509, para. 52) no longer applied in view of the limited scope of the draft convention in its current form.

102. With those changes, the Working Group approved the substance of the draft paragraph and referred it to the drafting group.

Paragraph (3)

103. It was noted that, as currently drafted, the provision did not apply to legal entities, since only natural persons were capable of having an "habitual residence". In response, it was noted that the intent of the draft paragraph was indeed to apply only to natural persons and that it would be unwise to alter the existing wording, which was common in uniform law conventions, in particular if the Working Group were also to attempt to formulate default rules for the location of legal entities that did not have a place of business within the meaning of draft article 4, subparagraph (h). The Working Group acknowledged that there might be legal entities, such as so-called "virtual companies", whose establishment might not meet all requirements of the definition of "place of business". The Working Group agreed, however, that it would be difficult to attempt to formulate universally acceptable criteria that might be used in a default rule on location to cover those situations, in view of the variety of options available (e.g. place of incorporation, place of principal management, among others). In any event, if an entity did not have a place of business, the draft convention would not apply to its communications under article 1, which depended on transactions applying between parties having their places of business in different States.

104. Subject to replacing the term "party" with the words "natural person" the Working Group approved the substance of the provision and referred it to the drafting group.

Paragraph (4)

105. Support was expressed for maintaining the first set of words within square brackets, mainly for the following reasons:

(a) Businesses were increasingly regarding their technology and equipment as significant assets, a fact that spoke against discarding categorically the location of equipment, which may be the largest asset of the business, as a possible element for determining a place of business;

(b) The draft convention should offer a default rule for determining the place of business of a legal entity that did not have a place of business in the meaning of draft article 4, subparagraph (h), similarly to what draft paragraph 3 did in respect of natural persons. The location of equipment and technology supporting an information system could be used as an optional connecting factor to determine the place of business for those legal entities.

106. That proposal was objected to mainly on the following grounds:

(a) There might be considerable difficulty in identifying the appropriate connecting factors—among the many theoretically available—that would justify establishing a link between a "virtual company" and a given place. Location of equipment technology was only one of these factors and not necessarily the most significant;

(b) It would be contradictory for the Working Group to have agreed on a certain number of factors to define "place of business", on the one hand, and to proceed to formulate other criteria for location for cases falling short of those factors. The definition of place of business adopted in the draft convention, it was said, was not compatible with the nature of virtual companies.

107. The Working Group concluded that it was not appropriate to include a provision on the presumption on the place of business of a virtual company in the draft convention and that the matter at this early stage was better left to the elaboration of emerging jurisprudence. The Working Group agreed that it would be better to replace the current draft paragraph by a provision clarifying that the location of the equipment and technology supporting an information system was not a relevant criterion for the identification of the place of business. The new formulation, which the Working Group approved and referred to the drafting group, was as follows:

> "A location is not a place of business merely because that is where: (a) equipment and technology supporting an information system used by a person in connection with the formation of a contract is located; or (b) such information system may be accessed by other persons."

108. In that connection, it was suggested that the words "the equipment and technology supporting an information system" should be replaced with words such as "the equipment and technology supporting the communications of the parties". It was suggested that the proposed language would focus on the functionality of the

system (i.e. to enable the communications between the parties) and not on the system as such.

109. The Working Group agreed, however, that the objective of locating a place of business was better served by the reference to information systems, which had the advantage of focusing on the means used by a business entity to support the negotiation of contracts and the provision of goods and services. Replacing that notion with the broader notion of "communications between the parties" might encompass all systems used in the chain of communications, such as various information service providers (ISPs) and web servers, even if unrelated to the negotiating parties. Moreover, the current wording was based on terms used in the UNCITRAL Model Law on Electronic Commerce, and should be kept for the sake of uniformity between the draft convention and domestic legislation already enacted on the basis of the Model Law.

110. Subject to the above amendments, the Working Group approved the substance of the draft paragraph and referred it to the drafting group.

Paragraph (5)

111. It was noted that, unlike the basic factual assumption of the draft paragraph, in some countries the assignment of domain names was only made after verification of the accuracy of the information provided by the applicant, including its location in the country to which the relevant domain name related. For those countries, it was said, it might be appropriate to rely, at least in part, on domain names for the purpose of article 7 (see also A/CN.9/509, para. 58).

112. The Working Group did not accept that proposal for the following main reasons:

(a) Differences in national standards and procedures for the assignment of domain names would make such an element unfit for establishing a presumption;

(b) The procedures for domain-name assignment were not always transparent to the public, which made it difficult to ascertain the level of reliability of each national procedure.

113. Furthermore, the draft paragraph only prevented a court or arbitrator from inferring the location of a party from the sole fact that the party used a given domain name or address. However, nothing in the draft paragraph prevented a court or arbitrator from taking into account the assignment of a domain name as a possible element, among others, to determine a party's location, where appropriate.

114. The Working Group approved the substance of the draft paragraph and referred it to the drafting group.

Article 7. Information requirements

115. The text of the draft article was as follows:

> "Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate or false statements in that regard."

116. In the light of its earlier deliberations and the fact that the current text reflected a compromise solution to achieve a consensus on the matter (see A/CN.9/546, paras. 88-105), the Working Group did not accept a proposal to add a new paragraph in the draft article whereby the parties would have a duty to disclose their places of business. The Working Group approved the draft article and referred it to the drafting group.

Article 8. Legal recognition of electronic communications

117. The text of the draft article was as follows:

> "1. A contract or other communication shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.
>
> [2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.]"

118. The Working Group did not accept a proposal to link the validity of a contract to the use of an electronic signature, as most legal systems did not impose a general signature requirement as a condition for the validity of all types of contract.

119. There was also no support for a suggestion to add a new paragraph providing that the parties might validly use the medium of technology of their choice in communications in connection with formation or performance of contracts. While appreciating the value of a recognition of the principle of technological and media neutrality, the Working Group considered that:

(a) A positive statement of that principle in the form proposed might interfere with the operation of rules of law that required, for instance, the use of specific authentication methods in connection with certain types of contract;

(b) The structure and formulation of the draft paragraph reflected the general rule of non-discrimination in article 5 of the Model Law on Electronic Commerce and that the same reasons that led to the choice of that formulation in the Model Law also applied here.

120. It was suggested that the wording of draft paragraph 1 could mislead the reader into believing that the contract itself was a communication, which would be inconsistent with the language and definitions of the draft convention, where the contract was treated as the product of the exchange of communications. However, it was also noted that some communications in electronic form might not give rise to a contract, and that, therefore, explicit reference to both the contract and communications was needed as they both needed to be validated with respect to their electronic form.

121. The Working Group considered various suggestions intended to clarify that the rule of non-discrimination in the draft paragraph applied to two situations: (a) the particular case of contracts formed by the exchange of electronic communications; and (b) the general use of electronic means to convey any statement, declaration, demand, notice or request in connection with a contract. The Working Group eventually agreed that the current text, when read in conjunction with the definitions

of "communication" and "electronic communication" in article 4, subparagraphs (a) and (b), already covered both situations.

122. Subject to removing the square brackets around paragraph 2, which otherwise did not attract substantive comments, the Working Group approved the substance of the draft article and referred it to the drafting group.

Article 9. Form requirements

123. The text of the draft article was as follows:

"[1. Nothing in this Convention requires a contract or any other communication to be made or evidenced in any particular form.]

"2. Where the law requires that a contract or any other communication should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

"3. Where the law requires that a contract or any other communication should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

"(a) A method is used to identify the party and to indicate that party's approval of the information contained in the electronic communication; and

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

"[4. Where the law requires that a contract or any other communication should be presented or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

"[(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

"[(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.

"[5. For the purposes of paragraph 4 (a):

"[(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

"[(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.]"

Paragraph (1)

124. In the light of its earlier deliberations on the provision (see A/CN.9/546, para. 49), the Working Group agreed to retain the draft paragraph and remove the square brackets around it.

Paragraph (2)

125. In response to a question, it was noted that the words "the law", in the draft paragraph and elsewhere, had the same meaning as in corresponding provisions of the UNCITRAL Model Law on Electronic Commerce, and referred to rules based on statute, regulation or judicial precedent. The Working Group agreed, however, that it should not attempt to define "law" in the draft convention, and that the term should be explained in any explanatory notes or official commentary, as was done in paragraph 46 of Guide to Enactment of UNCITRAL Model Law on Electronic Commerce.

126. In response to another question, the Working Group noted that draft article 9 would generally apply to any form requirements under the applicable law. It was explained that public policy rules contained in domestic law barring the use of electronic communications were to be dealt with either as exclusions under draft article 2 or by the means of declarations of exclusion under draft article 18.

Paragraph 3

127. The suggestion was made that subparagraph 3 (b), which established the conditions for the reliability of an electronic signature should be deleted. The main reasons for the suggestion were the following:

(a) The corresponding provision in article 7 of the UNCITRAL Model Law on Electronic Commerce fulfilled a function in that context, where the questions of reliability of a signature and conditions for attribution of data messages were addressed in an interdependent way;

(b) Essentially, articles 7 and 13 of the Model Law together affirmed the validity of an electronic signature and allowed the attribution of a message to an originator as long as the addressee used a method agreed upon with the originator to verify the authenticity of the message, without the need to demonstrate the authenticity of the signature itself;

(c) However, the draft convention did not deal with attribution of electronic messages, as the Working Group had previously agreed (see A/CN.9/546, para. 127). Subparagraph 3 (b) could mean that even if there was no dispute about the identity of the originator or the fact of signing, a court might invalidate the entire contract because it regarded the technology or methodology as insufficient in principle for the transaction in question.

128. While there was support for the suggestion that the subparagraph should be deleted, the Working Group preferred to retain the provision. It was felt that the same risk might arise from retaining only draft subparagraph (a), since a court might then be inclined to consider only the level of security offered by the signature method for the purpose of establishing someone's identity, without being reminded of the need to take into account factors other than technology, such as the purpose

for which the electronic communication was generated or communicated, or a relevant agreement of the parties.

Paragraphs (4) and (5) "original form"

129. The Working Group noted that earlier versions of the draft convention did not contain provisions dealing with electronic equivalents of "original" paper-based documents because the draft convention was essentially concerned with matters of contract formation, and not with rules of evidence. It had been suggested that a provision on "originals" was now necessary since draft article 19 extended the provisions of the draft convention to arbitration agreements governed by the 1958 New York Convention. The Working Group was informed that the matter had been considered by Working Group II (Arbitration) at its forty-second session (Vienna, 13-17 September 2004), and had been positively received (see above, para. 53). The Working Group considered articles 9(4) and 9(5) together, as they were interlinked, and noted that the provisions were new to the draft convention.

130. In support for retaining those paragraphs, it was suggested that a provision on electronic equivalents of original paper documents was essential to support effectively the use of electronic means to conclude arbitration agreements, since the enforcement of an arbitral award and the referral of the parties to arbitration under articles II and IV of the 1958 New York Convention required that the party relying on the arbitration agreement should produce its original or a duly certified copy thereof. Without the additional provisions in draft article 9, doubts on the evidentiary value of electronic arbitration agreements would persist, leading the parties to take the safer course of action and revert to the use of paper-based contracts.

131. However, there were also objections to the proposed new paragraphs for the following main reasons:

(a) As currently drafted, those provisions were not limited to arbitration agreements and might have implications that the Working Group might not be in a position to anticipate;

(b) The standard for establishing functional equivalence did not offer an adequate level of legal certainty in view of the flexible reliability test contemplated in subparagraph 5 (b), which implied a determination on a case-by-case basis;

(c) Even if limited to arbitration agreements, those paragraphs were inappropriate, as they went beyond a purely contractual framework and interfered with the operation of domestic rules on civil procedure by imposing on courts a standard for functional equivalence that might not correspond to the standard recognized in their legal systems.

132. The Working Group noted that, although draft paragraphs 4 and 5 had been inserted to address a particular problem raised by arbitration agreements, the usefulness of those provisions extended beyond that limited field in view of possible obstacles to electronic commerce that might result from various other requirements concerning original form. Despite differing views as to the appropriateness of that conclusion, the Working Group did not agree to limit the scope of draft paragraphs 4 and 5 to arbitration agreements.

133. The Working Group proceeded to consider various alternatives to address those concerns. One of them was to delete subparagraph 5 (b) and the word "reliable" in subparagraph 4 (a) with a view to expressing the idea that there needed to be an absolute assurance of integrity of information in order for an electronic communication to replicate the function of an original paper document. That suggestion was not adopted, as the Working Group felt that the resulting formulation of draft paragraphs 4 and 5 would become ambiguous and would not necessarily mean a higher standard of integrity, since it could be argued that any "assurance" of integrity, however "reliable", might suffice.

134. Another suggestion was to make it clear that the purpose of the new provisions was not to interfere with rules on civil procedure but that the Working Group should consider reinserting in draft article 9, or preferably in draft article 2, an exclusion of contracts or acts requiring by law the involvement of courts, public authorities or professions exercising public authority. The Working Group did not agree with that suggestion and reaffirmed its earlier decision on the matter (see paras. 63-66 above). Exceptions based on public policy, where required, should be made by the State concerned by way of a declaration under draft article 18.

135. The Working Group decided to retain draft paragraphs 4 and 5 and to remove the square brackets around the text.

136. At that time, the Working Group resumed consideration of subparagraphs (f) and (g) of article 2 (see above, para. 66). It was also noted that the potential consequences of authorized duplication of documents of title and negotiable instruments—and generally any transferable instrument that entitled the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money—made it necessary to develop mechanisms to ensure the singularity or originality. Finding a solution for that problem, it was further recalled, required a combination of legal, technological and business solutions, which had not yet been fully developed and tested. The Working Group agreed that the issues raised by negotiable instruments and similar documents, in particular the need for ensuring their uniqueness, went beyond simply ensuring the equivalence between paper and electronic form and that, therefore, draft paragraphs 4 and 5 were not sufficient to render the provisions of the draft convention appropriate for those documents. The Working Group therefore agreed that the essence of article 2, subparagraphs (f) and (g) should be retained in a provision such as the following:

> "This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts and other transferable instruments that entitle the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money."

137. The suggestion was made that the following additional paragraph should be added to the draft article:

> "Paragraphs 4 and 5 do not apply where a rule of law or the agreement between the parties requires a party to present certain original documents for the purpose of claiming payment under a letter of credit, a bank guarantee or a similar instrument."

138. It was explained that the proposed addition was meant to clarify that letters of credit and their underlying transactions were not excluded from the scope of

application of the draft convention as a whole, but only from the provisions dealing with originals. That option was preferable to unilateral exclusions by declarations made under draft article 18, in view of the international nature of letters of credit and similar instruments. There were, however, strong objections to that proposal, as it was felt that more appropriate places for exclusions were, instead, draft articles 2 or 18. It was also proposed that the draft convention should give States the possibility to exclude the application of paragraphs 4 and 5 of draft article. The Working Group did not have time fully to consider the proposed amendment and the objections thereto and decided to submit the proposed additional paragraph within square brackets to the Commission for consideration.

139. The Working Group approved the substance of draft paragraphs 4 and 5 and referred it to the drafting group.

Article 10. Time and place of dispatch and receipt of electronic communications

140. The text of the draft article was as follows:

> "1. The time of dispatch of an electronic communication is the time when the electronic communication [enters an information system outside the control of the originator or of the party who sent the data message on behalf of the originator] [leaves an information system under the control of the originator or of the party who sent the data message on behalf of the originator], or, if the electronic communication message has not [entered an information system outside the control of the originator or of the party who sent the data message on behalf of the originator] [left an information system under the control of the originator or of the party who sent the data message on behalf of the originator], at the time when the electronic communication is received.
>
> "2. The time of receipt of an electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee or by any other party named by the addressee. An electronic communication is presumed to be capable of being retrieved by the addressee when the electronic communication enters an information system of the addressee unless it was unreasonable for the originator to have chosen that information system for sending the electronic communication, having regard to the content of the electronic communication and the circumstances of the case [, including any designation by the addressee of a particular information system for the purpose of receiving electronic communications.]
>
> "3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 7.
>
> "4. Paragraph 2 of this article applies notwithstanding that the place where the information system is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article."

Paragraph 1

141. It was pointed out that a communication's exit from an information system under the control of the originator and its entry into another information system not under the originator's control were two sides of the same factual situation, since a communication typically left one information system by entering another one. The formulation in the first set of square brackets, which was also used in article 15, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, was said to be preferable because it focused on an element in respect of which the parties would have easily accessible evidence, given that transmission protocols of data messages typically indicated the time of delivery of messages to the destination information system or to intermediary transmission systems, rather than the time when messages left their own systems.

142. The prevailing view, however, was in favour of the criterion used in the phrase in the second set of square brackets. It would be more logical, it was said, to provide that a communication was deemed to be dispatched when it left the originator's sphere of control or, to use the terminology of the draft convention, when it left an information system under the control of the originator. That formulation would more closely mirror the notion of "dispatch" in a non-electronic environment.

143. On the language in the second set of square brackets, it was stated that the electronic communication left the control of the originator at the moment of the dispatch, and that any rule on communications within the "same" system would be irrelevant. However, it was also noted that certain electronic communications might never leave the originator's system, such as, for instance, information posted on a web site operated by the originator. The rule in the second part of the draft paragraph was important since otherwise those situations would not be covered.

144. The Working Group decided to retain the text in the second and fourth sets of square brackets and to delete the text in the first and third sets of square brackets and referred the text to the drafting group.

Paragraph 2

145. The Working Group noted that no other provision in the draft convention had generated the same amount of debate within the Working Group as draft paragraph 2 (see A/CN.9/509, paras. 94-98; A/CN.9/528, paras. 141-151 and A/CN/9/546, paras. 61-80). The Working Group was reminded that the current text was an attempt to reach a compromise between those who favoured a rule based on the time when a communication became capable of being retrieved, and those who favoured the more objective criterion of its entry into the addressee's information system (A/CN.9/548, paras. 73 and 74).

146. The view was expressed that the problems the Working Group still faced stemmed from the varying interpretation given to the words "information system" (see also A/CN.9/546, paras. 68-69). The absence of a commonly accepted understanding of that expression made it unwise to establish a general rule on receipt of electronic communications, since it was unclear what type of legal relationship between the addressee and the information system the draft paragraph contemplated (i.e. whether a relationship of ownership or another, similar, type of relationship). A requirement for such a relationship to exist could unduly limit the type of information system that could be used to send an electronic communication

by valid means to the addressee. To avoid that problem, it was suggested that the second sentence of the draft paragraph should be redrafted to provide that an electronic communication was presumed to be capable of being retrieved by the addressee when it entered an information system that the addressee had agreed to use. That amendment, it was said, would make it clear that the agreement of the addressee was the sole relevant criterion, irrespective of the legal relationship between the addressee and the information system that the addressee had agreed to use. The proposal was also intended to eliminate the impression that the draft paragraph made an information system fully comparable to a physical address. That result would be unreasonable, since the mere ownership, for instance, of an e-mail address could not impose on the owner the same duty to check its mailbox as the owner of a place of business to collect its postal mail.

147. Although there were expressions of support for the proposal, the prevailing view was not in favour of the proposed amendment. It was said that the proposed amendment would not introduce any significant improvement over the current text, in which the word "unreasonable" already made it clear that an originator that selected an address in the absence of a consent by the addressee to use that address could not rely on the presumption of receipt. Moreover, the needs of electronic commerce would not be promoted by a rule that expressly or impliedly required prior consent for each transaction, as it would be too onerous to impose on the originator the need to show the addressee's acceptance of the use of an address for a communication.

148. In the course of that discussion, three strongly supported positions emerged in the Working Group:

(a) First, the main difficulty created by the current text was that it no longer distinguished between designated and non-designated information systems, a distinction which needed to be restored to reflect business practices (see also A/CN.9/546, para. 70);

(b) Secondly, the current text was acceptable as currently drafted, since it reflected a sound basis for a compromise solution that avoided the distinction between designated and non-designated information systems and the various problems caused by it (see A/CN.9/528, para. 148);

(c) Thirdly, the text should deal with designated systems at the most and that, even in that context, it should refrain from establishing general rules on receipt in view of the fact that measures implemented by companies and individuals to preserve the integrity, security or usability of their information systems (for instance to block "spam" mail or prevent the spread of viruses) had led in practice to repeated loss of communications.

149. The Working Group paused to consider those views, in particular the last position, which introduced a new element in its debate. The Working Group acknowledged the fact that security measures such as filters or firewalls might indeed prevent electronic communications from reaching their addressees. There was no agreement, however, on the suggestion that the risk of loss of the message should be entirely borne by the originator. At the most, the effect of such a system could be that a blocked message could not be presumed to be "capable of being retrieved".

150. In that connection, it was suggested that one of the concerns related to the apparently absolute character of the rule established in the draft paragraph. In the light of increasing concerns over security of information and communications in the business world, rules on receipt should necessarily be linked to consent to use a particular information system, and should not compel persons who had not accepted the risk of loss of communications. It was suggested that an approach better than the current one would be to recast the draft paragraph along the following lines: "The time of receipt of an electronic communication is presumed to be the time when the electronic communication becomes capable of being retrieved by the addressee at the electronic address designated by the addressee, unless retrievability could not reasonably be effected, taking into account security measures." It was argued that the use of a presumption matched with the reference to a designated address would reflect current practice and better serve business needs with its inherent flexibility.

151. While there were various expressions of support for the basic principle reflected in that proposal, there were also strong objections to it. The new formulation would not only depart significantly from article 15 of the UNCITRAL Model Law on Electronic Commerce, but would also reduce legal certainty by converting the existing rule in a rebuttable presumption and by shifting the risk of loss of messages entirely on the originator. Moreover, the proposal built upon highly subjective elements by eliminating the objective test of entry of a communication in an information system. Having no rule at all on the matter, it was said, might be a better outcome than introducing uncertainty in such an important provision.

152. The Working Group held an extensive discussion on the merits of the proposal and possible alternatives to improve its formulation. During that debate, the following areas of general agreement eventually emerged:

(a) It was important for the draft convention to deal with the issue of receipt of electronic communications, preferably by way of a general rule, followed by appropriate presumptions to facilitate factual determinations;

(b) It would be preferable if the draft paragraph would link the receipt of an electronic communication to its delivery to a location that could be more narrowly defined than the broadly understood notion of an "information system". There was strong support for using instead the term "electronic address", despite some concerns that those words had not been defined in the draft convention and were not necessarily clearer than "information system";

(c) If followed by appropriate consequences, a distinction could be made between situations in which a party expressly requested or required the use of a particular electronic address, and situations in which an electronic communication was simply sent to an electronic address owned or used by that party.

153. After extensive consultations, the following revised text was proposed as a substitute for the draft paragraph:

> "The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.
>
> "The time of receipt of an electronic communication sent to another address of the addressee is the time when it becomes capable of being

retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address.

"An electronic communication is presumed to be capable of being retrieved by the addressee when it arrives at the addressee's electronic address.

"This paragraph does not apply to an electronic communication whose capability of being retrieved or whose arrival at the electronic address is prevented [or significantly delayed] by the operation of reasonable technological measures implemented to preserve the integrity, security or usability of the addressee electronic communication system."

154. While there was wide support for using the above proposal as a new working basis, there were also strong objections to the proposed text, in particular to the second and the fourth sentences.

155. As regards the second sentence, it was argued that its text would reintroduce the notion of designated systems and would be inconsistent with article 24 of the United Nations Sales Convention, which did not draw a distinction between designated and non-designated addresses or places of business. Concerns were also expressed regarding the retrievability of the communication in a non-designated electronic address, since the combined effect of the second and third sentences would be to burden unreasonably the addressee with the obligation to check regularly multiple addresses not currently in use. The proposed new sentence would further make it easier for parties in bad faith to attempt to bind another party to the content of a communication that the addressee might otherwise reject by sending the message to an electronic address other than the one chosen by the addressee.

156. In response, it was noted that the proposed rule would be effective only when the addressee became aware of the fact that the communication had been sent to a particular address, a condition that narrowed significantly the impact of the rule, especially in comparison with the provision contained in article 15 of the UNCITRAL Model Law on Electronic Commerce. The rule in the second sentence, by requiring actual awareness of the existence of the electronic communication, was the most favourable rule for the recipient.

157. There were also concerns about the use of the term "electronic address". It was suggested that a definition should be added in draft article 4 to make it clear that the term was not limited to e-mail addresses, but open to any future technological development. It was stated that, as used in the draft provision, the term "electronic address" referred to "a portion or location in an information system that a person uses for receiving electronic messages." The Working Group agreed on that understanding, but preferred not to include a definition in draft article 4, leaving the concept to be elucidated in any explanatory notes or official commentary to the draft convention.

158. The Working Group did not agree to a proposal to insert additional words whereby the recipient of a communication in a non-designated electronic address would only be deemed to have received a communication sent to an address different from the one designated if the addressee did not choose not to give effect to the communication. It was noted that the proposed additional text dealt with validity of communications and fell outside the scope of the draft convention.

159. Likewise, the Working Group did not accept a proposal to insert the words "during business hours" in the third sentence of the proposed new text of draft paragraph 2. It was noted that, like article 24 of the United Nations Sales Convention, the draft paragraph should not be concerned with national public holidays and customary working hours, elements that led to problems and to legal uncertainty in an instrument that applied to international transactions. Moreover, the legal effect of retrieval did not fall within the scope of the draft convention, but was left for applicable national law. It was also reminded that the presumption could be rebutted if the communication was not capable of being retrieved.

160. Despite some support for the adoption of the fourth sentence of the proposed new draft paragraph, the widely prevailing view was that the sentence in question was not needed and should be deleted. It was noted that the presumption established in the third sentence of the proposed new text of draft paragraph 2 could be rebutted in cases when security or other devices would prevent the communication from being retrieved. It was further argued that the operation of the presumption would allow greater flexibility in the assessment of facts, should there be arguments as to whether a communication had been received or not. The Working Group agreed, however, that any explanatory notes or official commentary on the draft convention should emphasize the issue referred to in that sentence.

161. Subject to those deliberations, the Working Group decided to approve the revised new text of draft paragraph 2 and referred it to the drafting group.

Paragraph 3

162. Concerns were expressed that the current provision would ultimately attribute legal value to all electronic communications by deeming them to have been received at the addressee's place of business, even if they were sent to a non-designated electronic address. It was suggested that the draft paragraph should be amended to limit its scope to electronic communications delivered to a designated electronic address.

163. In response, it was pointed out that the scope of the provision was to avoid duality of places of business in case the communication was retrieved in a place other than the place of business for the purpose of determining the application of the draft convention. It was noted that the provision only clarified that the location of an information system supporting an electronic address was irrelevant for determining where a communication was received. Such a clarification was useful in an electronic environment, and had become even more important in view of the amendments adopted in draft paragraph 2, since electronic communications could be retrieved from nearly any location from which a party was able to access its electronic address, unlike the normal situation for postal communications that were usually delivered at a party's premises.

164. The Working Group approved the draft paragraph and referred it to the drafting group.

Paragraph 4

165. The Working Group agreed to insert the words "supporting an electronic address" after the words "information system" and referred the provision to the drafting group.

Conclusion

166. Subject to the above amendments, the Working Group approved the substance of the draft article and referred it to the drafting group.

Article 11. Invitations to make offers

167. The text of the draft article was as follows:

> "A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance."

168. The Working Group was reminded that the draft provision, as currently drafted, reflected a consensus view on the matter that had developed after extensive debate (see A/CN.9/509, paras. 74-85; A/CN.9/528, para. 109-120; A/CN.9/546, paras. 106-116).

169. The view was expressed that the notion of invitation to make an offer was not known in some legal systems, and it therefore would be preferable to replace that notion with words such as "is not an offer". In response, it was observed that the notion of invitation to make an offer was common in uniform international trade law texts, being used in the United Nations Sales Convention.

170. It was proposed to replace the term "parties", which could be read as to imply the existence of a contract, with the more neutral term "persons". It was also noted that the term "parties" in draft article 11 clearly referred to the parties to a communication, regardless of whether a contract was eventually formed. The term "persons" was not suitable in the present context, since in the draft convention it meant "natural persons".

171. The Working Group considered that there was no need to formulate specific rules to deal with offers of goods through Internet auctions and similar transactions, which in many legal systems had been regarded as binding offers to sell the goods to the highest bidder. It was felt that such a possibility was already covered by the phrase "unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance".

172. The Working Group approved draft article 11 and referred it to the drafting group.

Article 12. Use of automated information systems for contract formation

173. The text of the draft article was as follows:

> "A contract formed by the interaction of an automated information system and a person, or by the interaction of automated information systems, shall not be denied validity or enforceability on the sole ground that no person reviewed each of the individual actions carried out by the systems or the resulting contract."

174. The Working Group approved draft article 12 and referred it to the drafting group.

Article 13. Availability of contract terms

175. The text of the draft article was as follows:

"[Variant A

"Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other contracting party those electronic communications that contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.]

"[Variant B

"A party offering goods or services through an information system that is generally accessible to persons making use of information systems shall make the electronic communication or communications which contain the contract terms available to the other party [for a reasonable period of time] in a way that allows for its or their storage and reproduction.]"

176. The Working Group noted that variant A had been added pursuant to a request by the Working Group in view of the controversy around the draft article (see A/CN.9/546, paras. 130-135). The Working Group also noted that variant B, had been retained in square brackets, as there was no consensus on the need for the provision within the Working Group (see A/CN.9/509, paras. 123-125, and A/CN.9/546, paras. 130-135).

177. Some support was expressed for the deletion of draft article 13. It was stated that draft article 13 in either variant would impose on the Contracting Parties requirements more stringent than those applying in the paper world, without any reason for such differentiated treatment. It was also noted that the provision was not necessary since articles 14 and 19 of the United Nations Sales Convention would provide the necessary regulatory framework for the cases, of insufficient definition of the proposal and of subsequent alteration of the terms of the proposal respectively. It was further noted that the text in variant B echoed provisions aimed at consumer protection, which were clearly out of the scope of the draft convention.

178. However, there was also strong support for the adoption of variant B. It was argued that this text would encourage good business practice. It was also stated that the policy scope of the article of improving transparency of contractual terms and legal certainty would be achieved without imposing an excessive burden on the Contracting Parties. It was further noted that the provision would be equally beneficial for business-to-business and for business-to-consumer commerce. It was suggested that the rule should be expanded to cover also subsequent changes in contractual conditions.

179. The countervailing view was that the determination of the consequences for the breach of the rule was a matter falling under domestic law. It was also noted that the application of variant B of draft article 13 could lead to the non-enforceability of provisions expressly agreed by the parties.

180. The eventually prevailing view favoured the adoption of variant A. It was stated that such "safe harbour" provision would constitute a useful reminder of the applicable domestic and international rules while avoiding the creation of any substantive rule that would exceed the scope of the draft convention.

181. The Working Group approved the removal of square brackets from the text of variant A and the deletion of the text in square brackets of variant B and referred the text of draft article 13 to the drafting group.

Article 14. Error in electronic communications

182. The text of the draft article was as follows:

> "[1. Where a person makes an error in an electronic communication exchanged with the automated information system of another party and the automated information system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the electronic communication in which the error was made if:
>
> "[(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as practicable after having learned of the error and indicates that he or she made an error in the electronic communication;
>
> "[(b) The person, or the party on whose behalf that person was acting, takes reasonable steps, including steps that conform to the other party's instructions, to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy the goods or services; and
>
> "[(c) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.]
>
> "[2. Nothing in this article affects the application of any rule of law that may govern the consequences of any errors made during the [negotiation] [formation] or performance of the type of contract in question other than an error that occurs in the circumstances referred to in paragraph 1.]"

General remarks

183. The Working Group was reminded of its earlier discussions on the draft article (A/CN.9/509, paras. 104-111 and A/CN.9/548, paras. 14-26).

184. In the light of its earlier deliberations (see, in particular, A/CN.9/509, para. 108), the Working Group did not accept proposals to reformulate the article as a positive obligation to provide for a method for correcting errors prior to the dispatch of the communication. As at earlier meetings, it was felt that such a prescriptive provision was incompatible with the enabling nature of the draft convention. The Working Group affirmed its earlier decision that, if retained, the draft article should merely provide for consequences in the absence of means to correct input errors (A/CN.9/548, para. 19).

185. There were strong objections to the retention of the draft article, even in its current form, mainly for reasons that had already been expressed at earlier occasions:

(a) The draft convention should not deal with a complex substantive issue such as error and mistake, since that might interfere with well-established notions of contract law (A/CN.9/548, para 15; see also A/CN.9/509, para. 106);

(b) The draft article was more appropriate for consumer protection than for the practical requirements of commercial transactions, which would not be promoted by a provision that allowed the parties to later withdraw from their offers or bids on the basis that they had been the result of a mistake (A/CN.9/548, para. 16; see also A/CN.9/509, para. 110);

(c) Provisions allowing the withdrawal of communication because of input errors would create serious difficulties for trial courts, since the only evidence of the error would be the assertion of the interested party that he or she made an error in the electronic communication.

186. Despite those objections, the prevailing view was in favour of retaining a provision along the lines of the article for the following main reasons:

(a) The draft article addressed a type of error specific to electronic commerce, in view of the relatively higher risk of human errors being made in communications exchanged with automated message systems (A/CN.9/509, para. 105; A/CN.9/548, para. 17);

(b) The draft article would provide a uniform rule much needed in view of the differing and possibly conflicting solutions that might be provided for under domestic laws;

(c) The draft article did not in any way aggravate the evidentiary difficulties that already existed in a paper-based environment, in which allegations of error had nevertheless to be carefully assessed by the courts in the light of all relevant circumstances, including the overall credibility of a party's assertions.

187. Having eventually decided to retain the draft article, the Working Group proceeded to consider its various elements.

Paragraph 1: notion of error and time for withdrawal

188. Concerns were expressed regarding the notion of error in the draft article essentially because:

(a) As presently drafted, the provision appeared to cover an excessively wide range of situations, not all of which were related to the use of electronic communications;

(b) The unqualified reference to "error" in the draft provision might encompass any type of error, including errors such as misunderstanding of the terms of a contract or simply poor business judgement; and

(c) The draft provision might be misused by parties acting in bad faith, who could withdraw a contractual offer or an acceptance if they were no longer interested in a transaction, merely by alleging that they had made a mistake.

189. In response, it was observed that the draft provision was intended to deal with input errors or single keystroke errors occurring in an electronic communication exchanged with an automated message system of another party. The right to withdrawal, it was said, was only given in that situation if the system did not allow for the correction of errors. That by itself was a considerable limitation to the specific scope of the draft article.

190. With a view to addressing the concerns that had been expressed, it was suggested that the word "input" should be used to qualify the notion of "error" in the draft article. It was argued that the qualification would better reflect the policy scope of the provision, which was to provide an instrument to redress errors relating to inputting wrong data in communications exchanged with an automated message system. It was added that such wording would also make it clear that the draft article did not deal with other types of error, which should be left for the general doctrine of error under domestic law.

191. However, it was argued that, if that was the case, the draft article should also clearly provide that the right to withdraw the communication would apply only at the moment of reviewing the communication before dispatch, and that the party would not be able to withdraw its communications after confirmation of the communication. The countervailing view, which the Working Group eventually adopted, was that such a limitation was not appropriate. In practice, a party might only become aware that it had made an error at a later stage, for instance, when it received goods of a type or in a quantity different from what it had originally intended to order.

192. The Working Group agreed that, for purposes of clarity, the words "natural person" should be used in the draft article where appropriate.

Paragraph 1: "withdrawal of communication" or "correction of error"

193. There was support for the suggestion that the term "withdraw" should be replaced by the term "correct" since: (a) the term "correct" would describe better the process of correcting the communication vitiated by an input error; (b) by limiting the remedy to the correction of an input error, the proposed amendment would also limit the possibility for a party to allege an error as an excuse to withdraw from an unfavourable contract. Another proposal was to use the words "correct or withdraw". That would cover both situations where correction was the appropriate remedy for the error (such as tipping the wrong quantity in an order) and situations where withdrawal would be a better remedy (such as when a person unintentionally hit a wrong key or an "I agree" button and sent a message he or she did not intend to send).

194. While there was support to those proposals, the prevailing view favoured using the word "withdraw" only since:

(a) The typical consequence of an error in most legal systems was to make it possible for the party in error to avoid the effect of the transaction resulting from its error, but not necessarily to restore the original intent and enter into a new transaction (see A/CN.9/548, para. 25);

(b) Withdrawal equated to nullification of a communication, while correction required the possibility to modify the previous communication.

A provision mandating the right to correct would introduce additional costs for system providers and give remedies with no parallel in the paper world, a result which the Working Group had previously agreed to avoid; and

(c) The proposed amendment might cause practical difficulties, as operators of automated message systems might more readily provide an opportunity to nullify a communication already recorded than an opportunity to correct errors after a transaction was concluded.

Paragraph 1: withdrawal "in whole or in part"

195. The suggestion was made that the draft paragraph should provide for the possibility to withdraw only the part of the declaration where the error had been made, if the information system so allowed. It was stated that the proposal had the dual scope of granting to parties the possibility to redress errors in electronic communications, when no means of correcting errors were made available, and of preserving as much as possible the effects of the contract, by correcting only the portion vitiated by the error, in line with the general principle of preservation of contracts. Such an addition, it was argued, would limit the right of withdrawal that would otherwise be unqualified also in case of minor errors.

196. The prevailing view, however, was not in favour of the proposed additions, since it was considered that the possibility to withdraw only the vitiated part of the communication was implicit, at least by way of interpretation, in the right to withdraw the entire communication. Moreover, it could be difficult to distinguish the erroneous portion of the communication from the rest.

Paragraph 1 (a)

197. It was suggested that the words "or the party on whose behalf that person was acting" should be deleted from paragraphs 1 (a), 1 (b) and 1 (c), since those words: (a) implied a reference to the law of agency or other similar doctrines, matters that were outside the scope of the draft convention; and (b) were in any event irrelevant for the qualification of the error as human error.

198. The countervailing view, which the Working Group adopted, was that the existing wording was useful, since it merely clarified that the person who made the error might not necessarily be the same party to whom the transaction would be attributed. Moreover, the Working Group had earlier agreed that the text should reflect the principle that in such cases the right to correct the mistake belonged to the party on whose behalf the individual inputting the data was acting (see A/CN.9/548, para. 22).

199. It was also noted that the words in question were too vague and could endanger legal certainty if a party were allowed to invoke an error after some time had passed since the dispatch of the communication. The expression should therefore be qualified by words such as "but not later than when the contract is actually concluded" or "prior to the confirmation of an order". There was not sufficient support for those proposals, since the Working Group considered that instances might occur where the person remained unaware of the error until the delivery of the goods, and that in such a case a time limit for the withdrawal of the declaration would bar the remedy.

200. The Working Group accepted a drafting suggestion to replace the phrase "as soon as practicable" with the words "as soon as possible".

Paragraph 1 (b) and (c)

201. There was strong support for deleting paragraphs 1 (b) and 1 (c), since they departed from the consequences of avoidance of contracts under some legal systems and created obstacles for the party in error to avoid the contract (see A/CN.9/548, para. 23). In substance, domestic law already provided a solution for the concerns that those provisions intended to address by principles such as the theory of unjust enrichment.

202. The prevailing view, however, was in favour of retaining those provisions, since (a) they offered a harmonized solution for the limited problem addressed in the draft article that was potentially more common in the use of electronic communications; and (b) dealing with that particular problem in the draft convention was preferable to leaving the matter to be addressed by notions that might vary under different legal systems.

203. Another argument for retaining those provisions was that they provided a useful remedy for cases in which the automated message system proceeded to deliver physical or virtual goods or services immediately upon conclusion of the contract, with no possibility to stop the process. Paragraphs 1 (b) and 1 (c) provided a fair basis for the exercise of the right of withdrawal and would also tend to limit abuses by parties acting in bad faith.

Paragraph 2

204. It was suggested that the draft paragraph should be redrafted so as to clarify that it referred to rules of law relating not only to consequences of errors, but also to the conditions for invoking an error. The Working Group did not concur with that suggestion, as it felt that the draft paragraph, as currently drafted, covered both situations.

205. The Working Group decided to delete the word "negotiation" and retain only the word "formation", removing the square brackets around it. The Working Group also decided to insert the word "input" between the words "other than an" and "error" in order to emphasize the limited scope of the draft article. Lastly, the Working Group decided to remove the square brackets around draft paragraph 2.

Conclusion

206. With the above-mentioned amendments, the Working Group approved the draft article and referred it to the drafting group. It was agreed that any explanatory notes or official commentary to the draft convention should explain the notion of "input error" and other basic concepts underlying the draft article.

Annex

Draft Convention on the use of electronic communications in international contracts

CHAPTER I. SPHERE OF APPLICATION

Article 1. Scope of application

1. This Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States.

2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract.

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

Article 2. Exclusions

1. This Convention does not apply to electronic communications relating to any of the following:

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

(b) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary.

2. This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.

Article 3. Party autonomy

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

CHAPTER II. GENERAL PROVISIONS

Article 4. Definitions

For the purposes of this Convention:

(a) "Communication" means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;

(b) "Electronic communication" means any communication that the parties make by means of data messages;

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

(d) "Originator" of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;

(e) "Addressee" of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

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

(g) "Automated message 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 person each time an action is initiated or a response is generated by the system;

(h) "Place of business" means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.

Article 5. Interpretation

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

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

Article 6. Location of the parties

1. For the purposes of this Convention, a party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.

2. If a party has not indicated a place of business and has more than one place of business, then, subject to paragraph 1 of this article, the place of business for the purposes of this Convention is that which has the closest relationship to the

relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

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

4. A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.

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

Article 7. Information requirements

Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate or false statements in that regard.

CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

Article 8. Legal recognition of electronic communications

1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

2. Nothing in this Convention requires a party to use or to accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.

Article 9. Form requirements

1. Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.

2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party's approval of the information contained in the electronic communication; and

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

4. Where the law requires that a communication or a contract should be presented or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.

5. For the purposes of paragraph 4 (a):

(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

[6. Paragraphs 4 and 5 do not apply where a rule of law or the agreement between the parties requires a party to present certain original documents for the purpose of claiming payment under a letter of credit, a bank guarantee or a similar instrument.]

Article 10. Time and place of dispatch and receipt of electronic communications

1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.

4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.

Article 11. Invitations to make offers

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

Article 12. Use of automated message systems for contract formation

A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed each of the individual actions carried out by the systems or the resulting contract.

Article 13. Availability of contract terms

Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other contracting party those electronic communications that contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.

Article 14. Error in electronic communications

1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the electronic communication in which the input error was made if:

(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication;

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

(c) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

2. Nothing in this article affects the application of any rule of law that may govern the consequences of any errors made during the formation or performance of the type of contract in question other than an input error that occurs in the circumstances referred to in paragraph 1.

CHAPTER IV. FINAL PROVISIONS

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Article 18. Declarations on the scope of application

1. Any State may declare, in accordance with article 20, that it will apply this Convention only:

(a) When the States referred to in article 1, paragraph 1, are Contracting States to this Convention;

(b) When the rules of private international law lead to the application of the law of a Contracting State; or

(c) When the parties have agreed that it applies.

2. Any State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 20.

Article 19. Communications exchanged under other international conventions

1. The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

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

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

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991);

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

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

2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract or agreement to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 20, that it will not be bound by this paragraph.

3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or

performance of any contract or agreement to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.

4. Any State may declare that it will not apply provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 20.