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Legal aspects of electronic commerce

Explanatory note on the Convention on the Use of Electronic Communications in International Contracts

Note by the Secretariat

Addendum

1. The Commission approved the final draft of the United Nations Convention on the Use of Electronic Communications in International Contracts ("the Convention") at its thirty-eighth session (Vienna, 4-15 July 2005). The Convention was subsequently adopted by the General Assembly and opened for signature on … .

2. When it approved the final draft for adoption by the General Assembly, at its thirty-eighth session, the Commission requested the Secretariat to prepare explanatory notes on the Convention and present them to the Commission at its thirty-ninth session (see A/60/17, para. 165).

3. Annex I to this note contains article-by-article remarks on the Convention. The Commission may wish to take note of the explanatory notes and request their publication by the Secretariat, together with the final text of the Convention.

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IV. Article-by-article remarks

PREAMBLE

The States Parties to this Convention,

Reaffirming **their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,**

Noting **that the increased use of electronic communications improves the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,**

Considering **that problems created by uncertainty as to the legal value of the use of electronic communications in international contracts constitute an obstacle to international trade,**

Convinced **that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes,**

Being of the opinion **that uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological neutrality and functional equivalence, to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law,**

Desiring **to provide a common solution to remove legal obstacles to the use of electronic communications in a manner acceptable to States with different legal, social and economic systems,**

Have agreed as follows:

1. Essential objectives of the Convention

1. The preamble is intended to serve as a statement of the general principles on which the Convention is based and which, under article 5, may be used in filling the gaps left in the Convention.

2. The essential objective of the Convention is reflected in the fifth paragraph of the Preamble, that is, to establish uniform rules intended to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments with a view to enhancing legal certainty and commercial predictability.

2. Main principles on which the Convention is based

3. The sixth paragraph of the Preamble makes reference to two principles that have guided the entire work of UNCITRAL in the area of electronic commerce: technological neutrality and functional equivalence.

Technological neutrality

4. The principle of technological neutrality means that the Convention is intended to provide for the coverage of all factual situations where information is generated, stored or transmitted in the form of electronic communications, irrespective of the technology or the medium used. For that purpose, the rules of the Convention are "neutral" rules; that is, they do not depend on or presuppose the use of particular types of technology and could be applied to communication and storage of all types of information.

5. Technological neutrality is particularly important in view of the speed of technological innovation and development, and helps ensure that the law is able to accommodate future developments and does not quickly become dated. One of the consequences of the approach taken by the Convention, similarly to the UNCITRAL Model Law on Electronic Commerce,[1] which preceded the Convention, is the adoption of new terminology, aimed to avoiding any reference to particular technical means of transmission or storage of information. Indeed, language that directly or indirectly excludes any form or medium by way of a limitation in the scope of the Convention would run counter to the purpose of providing truly technologically neutral rules. Lastly, technological neutrality encompasses also "media neutrality": the focus of the Convention is to facilitate "paperless" means of communication by offering criteria under which they can become equivalents of paper documents, but the Convention is not intended to alter traditional rules on paper-based communications or create separate substantive rules for electronic communications.

6. The concern to promote media neutrality raises other important points. In the world of paper documents it is impossible to guarantee absolute security against fraud and transmission errors. The same risk exists in principle for electronic communications. Conceivably, the law could attempt to mirror the stringent security measures that are used in communication between computers. However, it may be more appropriate to graduate security requirements in steps similar to the degrees of legal security encountered in the paper world, and to respect the gradation, for example, of the different levels of hand-written signature seen in documents of simple contracts and notarized acts. Hence the flexible notion of reliability "appropriate for the purpose for which the electronic communication was generated" as set out in article 9 (see A/CN.9/608/Add.2, paras. 33-37).

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[1] For the text of the Model Law, see General Assembly resolution 51/162 of 16 December 1996, annex. The text is also published in the *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website (http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm).

Functional equivalence

7. The Convention is based on the recognition that legal requirements prescribing the use of traditional paper-based documentation constitute a significant obstacle to the development of modern means of communication. An electronic communication, in and of itself, cannot be regarded as an equivalent of a paper document because it is of a different nature and does not necessarily perform all conceivable functions of a paper document. Indeed, while paper-based documents are readable by the human eye, electronic communications are not—unless printed to paper or displayed on a screen. The Convention deals with possible impediments to the use of electronic commerce posed by domestic or international form requirements by way of an extension of the scope of notions such as "writing", "signature" and "original", with a view to encompassing computer-based techniques.

8. In pursuing that purpose. the Convention relies on the "functional equivalent approach" already used by UNCITRAL in the Model Law on Electronic Commerce. The functional equivalent approach is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques. The Convention does not attempt to define a computer-based equivalent to any particular kind of paper document. Instead, it singles out basic functions of paper-based form requirements, with a view to providing criteria which, once they are met by data messages, enable such data messages to enjoy the same level of legal recognition as corresponding paper documents performing the same function.

9. The Convention is intended to permit States to adapt their domestic legislation to developments in communications technology applicable to trade law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements.

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 160-163
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10
WG.IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, para. 82

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.

1. Substantive scope of application

10. The primary purpose of the Convention is to facilitate international trade by removing possible legal obstacles or uncertainty concerning the use of electronic communications in connection with the formation or performance of contracts concluded between parties located in different countries. However, the Convention does not deal with substantive law issues related to the formation of contracts or with the rights and obligations of the parties to a contract concluded by electronic means. By and large, international contracts are subject to domestic law, except for the very few types of contract to which a uniform law applies, such as sales contracts falling under the United Nations Sales Convention. In preparing the Convention, UNCITRAL therefore was mindful of the need to avoid creating a duality of regimes for contract formation: a uniform regime for electronic contracts under the new Convention and a different, not harmonized regime, for contract formation by any other means (A/CN.9/527, para. 76).

11. UNCITRAL nevertheless recognized that a strict separation between technical and substantive issues in the context of electronic commerce is not always feasible or desirable. Since the Convention is intended to offer practical solutions to issues related to the use of electronic means of communication for commercial contracting, a few substantive rules were needed beyond the mere reaffirmation of the principle of functional equivalence (A/CN.9/527, para. 81). Examples of provisions that highlight the interplay between technical and substantive rules include article 6 (location of parties), article 9 (form requirements), article 10 (time and place of dispatch and receipt of electronic communications), article 11 (invitations to make offers) and article 14 (errors in electronic communications). As much as possible, however, these provisions focus only on particular issues raised by the use of electronic communications, leaving aspects of substantive law to other regimes such as the United Nations Sales Convention (A/CN.9/527, paras. 77 and 102).

"in connection with the formation or performance of a contract"

12. The Convention applies to any exchange of electronic communications related to the formation or performance of a contract. The Convention is meant also to apply to communications that are made at a time when no contract—and possibly not even negotiation of a contract—has yet come into being (A/CN.9/548, para. 84). Article 11, dealing with invitations to make offers, is an example of such a case. However, the Convention is not confined to the context of contract formation, as electronic communications are used for the exercise of a variety of rights arising out of the contract (such as notices of receipt of goods, notices of claims for failure to perform or notices of termination) or even for performance, as in the case of electronic fund transfers (A/CN.9/509, para. 35).

13. The focus of the Convention is on the relations between the parties to an existing or contemplated contract. Thus, the Convention is not intended to apply to the exchange of communications or notices between the parties to a contract and third parties, merely because those communications have a "connection" to a contract covered by the Convention when the dealings between those parties are not themselves subject to the Convention. For example, if domestic law requires notification to a public authority in respect of a contract to which the Convention applies (for instance, in order to obtain an export licence), the Convention does not

apply to the form in which the domestic notification can be made (A/CN.9/548, para. 83).

14. In the context of the Convention, the word "contract" should be understood broadly so as to cover any form of legally binding agreement between two parties that is not explicitly or implicitly excluded from the Convention, whether or not the word "contract" is used by the law or the parties to refer to the agreement in question. Thus, the Convention applies to an arbitration agreement in electronic form, even though the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[2] (the "New York Convention") and most domestic laws do not use the word "contract" to refer to them (see A/60/17, para. 23).

"parties" and "places of business"

15. As used in the Convention, the word "parties" includes both natural persons and legal entities. However, a few provisions of the Convention refer specifically to "natural persons" (for instance, art. 14).

16. The Convention applies to international contracts regardless of their nature and qualification under domestic law. However, the reference to "places of business" in article 1 provides a general indication of the trade-related nature of the contracts to which the Convention is intended to apply (see further paras. 27-31 below).

2. Geographic scope of application

17. The Convention is only concerned with international contracts so as not to interfere with domestic law (A/CN.9/509, para. 31; A/CN.9/528, para. 33). For the purposes of the Convention, a contract is international if the parties have their places of business in different States, but the Convention does not require that both States should be Contracting States of the Convention, so long as the law of a Contracting State applies to the dealings of the parties (A/CN.9/571, para. 19).

18. The definition of the geographic scope of application of the Convention differs, therefore, from the general rule in article 1 (a) of the United Nations Sales Convention, which—for those States that have excluded the application of the United Nations Sales Convention by virtue of the rules of private international law—makes that Convention applicable only if both parties are located in Contracting States. However, the definition of the Convention's geographic field of application is not entirely new, and has been used, for example, in article 1 of the Uniform Law on the International Sale of Goods adopted by the Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964).[3]

19. In the context of the United Nations Sales Convention, the need for both countries involved to be Contracting States was introduced to allow the parties to determine easily whether or not the Convention applies to their contract, without

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[2] United Nations, *Treaty Series*, vol. 330, No. 4739.

[3] For the text of the Convention, see the *Final Act of the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods*, published in the "*Records and Documents of the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2-25 April 1964*," vol. I, Records, pp. 327-330.

having to resort to rules of private international law to identify the applicable law. The possibly narrower geographic field of application offered by that option was compensated for by the advantage of the enhanced legal certainty it provided. UNCITRAL had initially contemplated for the new Convention a rule similar to paragraph 1 (a) of article 1 of the United Nations Sales Convention to ensure consistency between the two texts (A/CN.9/509, para. 38). However, as the deliberations progressed and the impact of the Convention became clearer, the need for parallelism between the Convention and the United Nations Sales Convention was questioned since it was felt that their respective scopes of application were in any event independent of each other (A/CN.9/548, para. 89).

20. Two main reasons eventually led UNCITRAL to do away with the requirement of double participation in the Convention. First, it was felt that the application of the Convention would be simplified and its practical reach greatly enhanced if it were simply to apply to international contracts, that is, contracts between parties in two different States, without the cumulative requirement that both those States should also be Contracting States of the Convention (A/CN.9/548, para. 87). Second, UNCITRAL considered that, to the extent that several provisions of the Convention are intended to support or facilitate the operation of other laws in an electronic environment (such as, for example, arts. 8 and 9), requiring that both parties be located in Contracting States would lead to the undesirable result that a court in a Contracting State might be mandated to interpret the provisions of its own laws (for instance, in respect of form requirements) in different ways, depending on whether or not both parties to an international contract were located in contracting States of the Convention (A/CN.9/548, para. 87; see also A/CN.9/571, para. 17).

21. Contracting States may however reduce the reach of the Convention by declarations made under article 19, for example by declaring that they will apply the Convention only to electronic communications exchanged between parties located in Contracting States (see A/CN.9/608/Add.4, paras. 27-37).

3. Relationship to private international law

22. It was understood by UNCITRAL that the Convention applies when the law of a Contracting State is the law applicable to the dealings between the parties. Whether the law of a Contracting State applies to a transaction is a question to be determined by the rules of private international law of the forum State, if the parties have not validly chosen the applicable law (A/60/17, para. 20). Accordingly, if a party seizes the court of a non-Contracting State, the court would refer to the private international law rules of the State in which it is located, and if those rules designate the law of a Contracting State to the Convention, the Convention would apply as part of the substantive law of that State, notwithstanding that the State of the court seized was not a Party to the Convention. If a party seizes the court of a Contracting State, the court would equally refer to its own rules of private international law and, if they designate the substantive law of that State or of any other State Party to the convention, the Convention would apply. In either case the court should take into account any possible declarations made pursuant to article 19 or 20 by the Contracting State whose law applies.

23. The Convention contains rules of private law applicable to contractual relations. Nothing in the Convention creates any obligation for States that do not ratify or accede to the Convention. The courts in a non-Contracting State will apply

the provisions of the Convention only when their own rules of private international law indicate that the law of a Contracting State is applicable, in which case the convention would apply as part of that foreign State's legal system. The application of foreign law is a common result of any system of private international law and has been traditionally accepted by most countries. The Convention has not introduced any new element to this situation (A/60/17, para. 19).

4. International nature disregarded when not apparent

24. Paragraph 2 of article 1 contains a rule similar to article 1, paragraph 2, of the United Nations Sales Convention. According to this provision, the Convention does not apply to an international contract when it is not apparent either from the contract or from the dealings between the parties that they are located in two different States. In those cases, the Convention gives way to the application of domestic law. The incorporation of this rule in the Convention is intended to protect the legitimate expectations of parties that assume to operate under their domestic regime given the absence of a clear indication to the contrary (A/CN.9/528, para. 45).

5. "Civil" or "commercial" character, as well as nationality of the parties, are irrelevant

25. As is the case for the United Nations Sales Convention, the application of the Convention does not depend on whether the parties are considered "civil" or "commercial". Therefore, for the purpose of determining the scope of the Convention, it does not matter whether a party is a merchant or not in a particular legal system that applies special rules to commercial contracts different from the general rules of contract law. The Convention avoids conflicts that arise between the so-called "dualistic" systems, which distinguish between the civil and commercial character of the parties or the transaction, and "monistic" legal systems, which do not make this distinction.

26. The nationality of the parties is also irrelevant. Thus, the Convention applies to nationals of non-Contracting States who have their places of business within a Contracting State and even a non-Contracting State, as long as the law applicable to the contract is the law of a Contracting State. Under certain circumstances, a contract between two nationals of the same State may also be governed by the Convention, for instance because one of the parties has its place of business or habitual residence in a different country and this fact was known to the other party.

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 16-24
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 14-27
WG.IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 71-97
WG.IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras. 32-48
WG.IV, 40th session (Vienna, 14-18 October 2002)	A/CN.9/527, paras. 73-81
WG.IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 28-40

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.

1. Contracts for personal, family or household purposes

27. As is the case for other instruments previously prepared by UNCITRAL, the Convention does not apply to contracts concluded for "personal, family or household purposes".

Rationale of exclusion

28. There was general agreement within UNCITRAL on the importance of excluding contracts negotiated for personal, family or household purposes since a number of rules in the Convention would not be appropriate in their context.

29. For example, a rule such as that contained in article 10, paragraph 2, which presumes receipt of an electronic communication from the moment that the electronic communication becomes capable of being retrieved by the addressee, might not be appropriate in the context of transactions involving consumers, because consumers could not be expected to check their electronic mails regularly nor be able to distinguish easily between legitimate commercial messages and unsolicited mail ("spam"). It was considered that individuals acting for personal, family or household purposes should not be held to the same standards of diligence as entities or persons engaged in commercial activities (A/CN.9/548, para. 101).

30. Another example of possible tension is the treatment of errors and the consequences of errors in the Convention, which is far from the level of detail that would typically be found in consumer protection rules. Also, consumer protection rules typically require vendors to make the contract terms available to consumers in an accessible manner and specify the conditions under which standard contractual terms and conditions may be enforced against a consumer and when a consumer could be presumed to have expressed his or her consent to terms and conditions incorporated by reference into the contract. None of those issues are dealt with in the Convention in a manner that would offer the degree of protection that consumers enjoy in several legal systems (A/CN.9/548, para. 102).

Exclusion not limited to consumer contracts

31. In the context of the United Nations Sales Convention, the phrase "personal, family or household purposes" is commonly understood as referring to consumer contracts. However, in the context of the Convention, which is not limited to electronic communications related to purchase transactions, the words in subparagraph 1 (a) have a broader meaning and would cover, for example, communications related to contracts governed by family law and the law of succession, such as matrimonial property contracts, to the extent that they are entered into for "personal, family or household purposes" (A/60/17, para. 29).

Absolute nature of exclusion

32. Unlike the corresponding exclusion under article 2, subparagraph (a), of the United Nations Sales Convention, the exclusion of contracts entered for personal, family or household purposes under the Convention is an absolute one, meaning that the Convention does not apply to contracts entered into for personal, family or household purposes, even if the purpose of the contract is not apparent to the other party.

33. According to its article 2, subparagraph (a), the United Nations Sales Convention does not apply to sales of goods bought for personal, family or household use "unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use". That qualification was intended to promote legal certainty. Without it, the applicability of the United Nations Sales Convention would depend entirely on the seller's ability to ascertain the purpose for which the buyer had bought the goods. As a result, the personal, family or household purpose of a sales contract cannot be held against the seller, for the purpose of excluding the applicability of the United Nations Sales Convention, if the seller did not know or could not have been expected to know (for instance, having regard to the number or nature of items bought) that the goods were being bought for such purpose. The drafters of the United Nations Sales Convention assumed that there might be situations where a sales contract would fall under that Convention, despite the fact of it having being entered into by a consumer, for example. The legal certainty gained with the provision appeared to have outweighed the risk of covering transactions intended to have been excluded. It was observed, moreover, that, as indicated in the commentary on the Convention on Contracts for the International Sale of Goods, which had been prepared at the time by the Secretariat (A/CONF.97/5),[4] article 2, subparagraph (a), of the United Nations Sales Convention was based on the assumption that consumer transactions were international transactions only in "relatively few cases" (A/CN.9/527, para. 86).

34. In the case of the Convention, however, UNCITRAL felt that the formulation of article 2, subparagraph (a), of the United Nations Sales Convention might be problematic, as the ease of access afforded by open communication systems not available at the time of the preparation of the United Nations Sales Convention, such as the Internet, greatly increased the likelihood of consumers purchasing goods

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

from sellers established in another country (A/CN.9/527, para. 87). Having recognized that certain rules of the Convention might not be appropriate in the context of consumer transactions, UNCITRAL agreed that consumers should be completely excluded from the reach of the Convention (A/CN.9/548, paras. 101-102).

2. Specific financial transactions

35. Subparagraph 1 (b) lists a number of transactions excluded from the scope of application of the Convention. They relate essentially to certain financial service markets governed by well-defined regulatory and non-regulatory rules that already address issues relating to electronic commerce in a manner that allows for their effective worldwide functioning. Given the inherently cross-border nature of these markets, UNCITRAL considered that this exclusion should not be left for country-based declarations under article 19 (A/CN.9/527, para. 95; A/CN.9/528, para. 61; A/CN.9/548, para. 109; and A/CN.9/571, para. 61).

36. It should be noted that this provision does not contemplate a broad exclusion of financial services per se, but rather specific transactions such as payment systems, negotiable instruments, derivatives, swaps, repurchase agreements (repos), foreign exchange, securities and bond markets, and possibly general procurement activities of banks and loan activities. The criterion for the exclusion in subparagraph 1 (b) is not the type of the asset being traded but the method of settlement used. In addition, not every regulated trading is excluded but trading under the auspices of a regulated exchange is (e.g. stock exchange, securities and commodities exchange, foreign currency and precious metal exchange). As a result, the use of electronic communications in connection with trading of securities, commodities, foreign currency or precious metals outside a regulated exchange is not necessarily excluded merely because it is in connection with the trading of securities (e.g. an e-mail sent by an investor to his or her broker, instructing the latter to buy or sell securities).

3. Negotiable instruments, documents of title and similar documents

37. Paragraph 2 excludes negotiable instruments and similar documents because the potential consequences of unauthorized duplication of documents of title and negotiable instruments—and generally any transferable instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money—make it necessary to develop mechanisms to ensure the singularity of those instruments.

38. The issues raised by negotiable instruments and similar documents, in particular the need for ensuring their uniqueness, go beyond simply ensuring the equivalence between paper and electronic forms, which is the main aim of the Convention and justifies the exclusion provided in paragraph 2 of this article. UNCITRAL was of the view that finding a solution for this problem required a combination of legal, technological and business solutions, which had not yet been fully developed and tested (see A/CN.9/571, para. 136; see also A/60/17, para. 27).

4. Individual exclusions

39. During the preparation of the Convention, there were suggestions to include a number of other transactions to the list of excluded matters in article 2, such as contracts that create or transfer rights in real estate (except for rental rights), contracts requiring by law the involvement of courts, public authorities or professions exercising public authority, contracts of suretyship granted by and on collateral securities furnished by persons acting for purposes outside their trade, business or profession and contracts governed by family law or by the law of succession (A/CN.9/548, para. 110).

40. The preponderant view within UNCITRAL was not in favour of the making the proposed exclusions. Some matters would automatically be excluded under article 1, paragraph 1, or article 2, subparagraph (a). Other matters were regarded as territory-specific issues that should be better dealt at the domestic level. UNCITRAL took note of the fact that some States already admitted the use of electronic communications in connection with some, if not all, of the matters contemplated in the proposed exclusions. It was felt that the adoption of an extensive list of exemptions would have the effect of imposing those exclusions even for States that saw no reason for preventing the parties to those transactions from using electronic communications (A/CN.9/571, para. 63), a result which would hinder the adaptation of the law to technological evolution (A/CN.9/571, para. 65). However, States that feel that electronic communications should not be authorized in particular cases still have the option of making individual exclusions by declarations under article 19.

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 25-30
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 59-69; see also para. 136
WG.IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 98-111; see also paras. 112-118
WG.IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras; 49-64, see also paras. 65-69 (on a related draft article since deleted)
WG.IV, 40th session (Vienna, 14-18 October 2002)	A/CN.9/527, paras. 82-98; see also paras. 99-104 (on a related draft article since deleted)

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.

1. Extent of power to derogate

41. In preparing the Convention, UNCITRAL was mindful of the fact that, in practice, solutions to the legal difficulties raised by the use of modern means of communication are mostly sought within contracts. The Convention reflects the

view of UNCITRAL that party autonomy is vital in contractual negotiations and should be broadly recognized by the Convention (A/60/17, para. 33).

42. At the same time, it was generally accepted that party autonomy does not extend to setting aside statutory requirements that impose, for instance, the use of specific methods of authentication in a particular context. This is particular important in connection with article 9 of the Convention, which provides criteria under which electronic communications and their elements (e.g. signatures) may satisfy form requirements, which are normally of a mandatory nature since they reflect decisions of public policy. Party autonomy does not allow the parties to relax statutory requirements (for example, on signature) in favour of methods of authentication that provide a lesser degree of reliability than electronic signatures, which is the minimum standard recognized by the Convention (A/CN.9/527, para. 108; see also A/CN.9/571, para. 76).

43. Nevertheless, as provided in article 8, paragraph 2, the Convention does not require the parties to accept electronic communications if they do not want to. This also means, for instance, that the parties may choose not to accept electronic signatures (A/CN.9/527, para. 108).

44. Under the Convention, party autonomy applies only to provisions that create rights and obligations for the parties, and not to the provisions of the Convention that are directed to Contracting States (A/CN.9/571, para. 75).

2. Form of derogation

45. Article 3 is intended to apply not only in the context of relationships between originators and addressees of data messages but also in the context of relationships involving intermediaries. Thus, the provisions of the Convention can be varied either by bilateral or multilateral agreements between the parties, or by system rules agreed to by the parties.

46. It was the understanding of UNCITRAL that derogations from the Convention do not need to be explicitly made but could also be made implicitly, for example by parties agreeing to contract terms at variance with the provisions of the Convention (A/60/17, para. 32; see also A/CN.9/548, para. 123).

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 31-34
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 70-77
WG.IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 119-124
WG.IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras. 70-75
WG.IV, 40th session (Vienna, 14-18 October 2002)	A/CN.9/527, paras. 105-110

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 natural 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.

47. Most of the definitions contained in article 4 are based on definitions used in the UNCITRAL Model Law on Electronic Commerce.

"Communication"

48. The definition of "communication" is intended to make clear that the Convention applies to a wide range of exchanges of information between parties to a contract, whether at the stage of negotiations, during performance or after a contract has been performed.

"Electronic communication" and "data message"

49. The definition of "electronic communication" establishes a link between the purposes for which electronic communications may be used and the notion of "data messages", which already appeared in the UNCITRAL Model Law on Electronic Commerce and has been retained in view of the wide range of techniques it encompasses, beyond purely "electronic" techniques (A/CN.9/571, para. 80).

50. The aim of the definition of "data message" is to encompass all types of messages that are generated, stored, or communicated in essentially paperless form. For that purpose, all means of communication and storage of information that might be used to perform functions parallel to the functions performed by the means listed in the definition are intended to be covered by the reference to "similar means", although, for example, "electronic" and "optical" means of communication might not be, strictly speaking, similar. For the purposes of the Convention, the word "similar" connotes "functionally equivalent". The reference to "similar means" indicates that the Convention is not intended only for application in the context of existing communication techniques but also to accommodate foreseeable technical developments.

51. The examples mentioned in the definition of "data message" highlight that this definition covers not only electronic mail but also other techniques that may still be used in the chain of electronic communications, even if some of them (such as telex or telecopy) may not appear to be novel (A/CN.9/571, para. 81). The reference to "Electronic Data Interchange (EDI)" has been retained in the definition of "data messages" for illustrative purposes only, in view of the widespread use of EDI messages in electronic communications of messages from computer to computer. According to the definition of EDI adopted by the Working Party on Facilitation of International Trade Procedures (WP.4) of the Economic Commission for Europe, which is the United Nations body responsible for the development of UN/EDIFACT technical standards, EDI means the electronic transfer from computer to computer of information using an agreed standard to structure the information.

52. The definition of "data message" focuses on the information itself, rather than on the form of its transmission. Thus, for the purposes of the Convention it is irrelevant whether data messages are communicated electronically from computer to computer, or whether data messages are communicated by means that do not involve telecommunications systems, for example, magnetic disks containing data messages delivered to the addressee by courier.

53. The notion of "data message" is not limited to communication but is also intended to encompass computer-generated records that are not meant for communication. Thus, the notion of "message" includes the notion of "record". Lastly, the definition of "data message" is also intended to cover the case of revocation or amendment. A data message is presumed to have a fixed information content but it may be revoked or amended by another data message.

"Originator" and "Addressee"

54. As used in the Convention, the notion of "party" designates the subjects of rights and obligations and should be interpreted as covering both natural persons and corporate bodies or other legal entities. Where only "natural persons" are meant, the Convention expressly uses these words.

55. The definition of "originator" should cover not only the situation where information is generated and communicated, but also the situation where such information is generated and stored without being communicated. However, the definition of "originator" is intended to eliminate the possibility that a recipient who merely stores a data message might be regarded as an originator.

56. The "addressee" under the Model Law is the person with whom the originator intends to communicate by transmitting the electronic communication, as opposed to any person who might receive, forward or copy it in the course of transmission. The "originator" is the person who generated the electronic communication even if that message was transmitted by another person. The definition of "addressee" contrasts with the definition of "originator", which is not focused on intent. It should be noted that, under the definitions of "originator" and "addressee" in the Convention, the originator and the addressee of a given electronic communication could be the same person, for example in the case where the electronic communication was intended for storage by its author. However, the addressee who stores an electronic communication by an originator is not intended to be covered by the definition of "originator".

57. The focus of the Convention is on the relationship between the originator and the addressee, and not on the relationship between either the originator or the addressee and any intermediary. The fact that the Convention does not refer expressly to intermediaries (such as servers or web hosts) does not mean that the Convention ignores their role in receiving, transmitting or storing data messages on behalf of other persons or performing other "value-added services", such as when network operators and other intermediaries format, translate, record, authenticate, certify or preserve electronic communications or provide security services for electronic transactions. However, as the convention was not conceived as a regulatory instrument for electronic business, it does not deal with the rights and obligations of intermediaries.

"Information system"

58. The definition of "information system" is intended to cover the entire range of technical means used for transmitting, receiving and storing information. For example, depending on the factual situation, the notion of "information system" could refer to a communications network, and in other instances could include an electronic mailbox or even a telecopier.

59. For the purposes of the Convention it is irrelevant whether the information system is located on the premises of the addressee or on other premises, since location of information systems is not an operative criterion under the Convention.

"Automated message systems"

60. The notion of "automated message system" refers essentially to a system for automatic negotiation and conclusion of contracts without involvement of a person, at least on one of the ends of the negotiation chain. It differs from an "information system" in that its primary use is to facilitate exchanges leading to contract formation. An automated message system may be part of an information system, but that need not necessarily be the case (A/CN.9/527, para. 113).

61. The critical element in this definition is the lack of a human actor on one or both sides of a transaction. For example, if a party orders goods through a website, the transaction would be an automated transaction because the vendor took and confirmed the order via its machine. Similarly, if a factory and its supplier do business through Electronic Data Interchange, the factory's computer, upon receiving information within certain pre-programmed parameters, will send an electronic order to the supplier's computer. If the supplier's computer confirms the order and processes the shipment because the order falls within pre-programmed parameters in the supplier's computer, this would be a fully automated transaction. If, instead, the supplier relies on a human employee to review, accept, and process the factory's order, then only the factory's side of the transaction would be automated. In either case, the entire transaction falls within the definition.

"Place of business"

62. The definition of "place of business" reflects the essential elements of the notions of "place of business", as understood in international commercial practice, and "establishment", as used in article 2, subparagraph (f), of the UNCITRAL Model Law on Cross-Border Insolvency (A/CN.9/527, para. 120). This definition has been included to support the operation of articles 1 and 6 of the Convention and is not intended to affect other substantive law relating to places of business (A/60/17, paras. 37 and 90).

63. The notion of "non-transitory" qualifies the word "establishment", whereas the words "other than the temporary provision of goods or services" qualify the nature of the "economic activity" (A/CN.9/571, para. 87).

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 35-37
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 78-89
WG.IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras. 76-77
WG.IV, 40th session (Vienna, 14-18 October 2002)	A/CN.9/527, paras. 111-122

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.

64. The principles reflected in this article have appeared in most of the UNCITRAL texts, and its formulation mirrors article 7 of the United Nations Sales Convention. The provision is aimed at facilitating uniform interpretation of the provisions in uniform instruments on commercial law. It follows a practice in private law treaties to provide self-contained rules of interpretation, without which

the reader would be referred to general rules of public international law on the interpretation of treaties that might not be entirely suitable for the interpretation of private law provisions (A/CN.9/527, para. 124).

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 38-39
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 90-91
WG.IV, 41st session (New York, 5-9 May 2003	A/CN.9/528, paras. 78-80
WG.IV, 40th session (Vienna, 14-18 October 2002)	A/CN.9/527, paras. 123-126

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 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.

1. Purpose of the article

65. The purpose of the draft article is to offer elements that allow the parties to ascertain the location of the places of business of their counterparts, thus facilitating a determination, among other elements, as to the international or domestic character of a transaction and the place of contract formation. As such, this article is one of the central provisions in the Convention.

66. Considerable legal uncertainty is caused at present by the difficulty of determining where a party to an online transaction is located. While that danger has always existed, the global reach of electronic commerce has made it more difficult than ever to determine location. This uncertainty could have significant legal consequences, since the location of the parties is important for issues such as jurisdiction, applicable law and enforcement. Accordingly, there was wide

agreement within UNCITRAL as to the need for provisions that facilitate a determination by the parties of the places of business of the persons or entities they have commercial dealings with (A/CN.9/509, para. 44).

2. Nature of presumption of location

67. At the early stages of its deliberations, UNCITRAL had considered the possibility of including a positive duty for the parties to disclose their places of business or provide other information. However, it was eventually agreed that inclusion of such an obligation would be inappropriate placed in a commercial law instrument, in view of the difficulty of setting out the consequences of failing to comply with such an obligation (A/60/17, para. 43).

68. Accordingly, the current text of the draft merely creates a presumption in favour of a party's indication of its place of business, which is accompanied by conditions under which that indication can be rebutted and default provisions that apply if no indication has been made. The article is not intended to allow parties to invent fictional places of business that do not meet the requirements of article 4, subparagraph (h) (A/60/17, para. 41). This presumption, therefore, is not absolute, and the Convention does not uphold an indication of a place of business by a party even where such an indication is inaccurate or intentionally false (A/CN.9/509, para. 47).

69. The rebuttable presumption of location established by paragraph 1 serves important practical purposes and is not meant to depart from the notion of "place of business", as used in non-electronic transactions. 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 a given contract. The current draft recognizes that possibility, with the consequence that such an indication could only be challenged if the vendor does not have a place of business at the location it indicated. Without that possibility, the parties might need to enquire, in respect of each contract, which of the vendor's multiple places of business has the closest connection to the relevant contract in order to determine what is the vendor's place of business in that particular case (A/CN.9/571, para. 98). If a party has only one place of business and has not made any indication, it would be deemed to be located at the place that meets the definition of "place of business" under article 4, subparagraph (h).

3. Plurality of places of business

70. Paragraph 2 is based on article 10, subparagraph (a), of the United Nations Sales Convention. However, unlike that provision, which refers to a place of business that has "the closest relationship to the contract and its performance", article 6, paragraph 2, of the Convention refers only to the closest relationship to the contract. In the context of the United Nations Sales Convention the cumulative reference to the contract and its performance had given rise to uncertainty, since there might be situations where a given place of business of one of the parties is more closely connected to the contract, but another of that party's places of business is more closely connected to the performance of the contract. These situations are not rare in connection with contracts entered into by large multinational companies and may become even more frequent as a result of the current trend towards

increased decentralization of business activities (A/CN.9/509, para. 51; see also A/CN.9/571, para. 101). It was felt that this minor departure from similar wording in the United Nations Sales Convention, would not generate an undesirable duality of regimes in view of the limited scope of the Convention (A/CN.9/571, para. 101).

71. The application of paragraph 2 would be triggered by the absence of a valid indication of a place of business. The default rule provided here applies not only when a party fails to indicate its place of business, but also when such indication has been rebutted under paragraph 1 (A/60/17, para. 46).

4. Place of business of natural persons

72. This paragraph does not apply to legal entities, since it is generally understood that only natural persons are capable of having a "habitual residence".

5. Limited value of communication technology and equipment for establishing place of business

73. UNCITRAL carefully avoided devising rules that would result in any given party being considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means (A/CN.9/484, para. 103).

74. Therefore, the Convention takes a cautious approach to peripheral information related to electronic messages, such as IP addresses, domain names or the geographic location of information systems, which despite their apparent objectivity have little, if any, conclusive value for determining the physical location of the parties. Paragraph 4 reflects that understanding by providing that the location of equipment and technology supporting an information system or the places from where the information system may be accessed by other parties do not by themselves constitute a place of business. However, nothing in the Convention prevents 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 (A/CN.9/571, para. 113).

75. UNCITRAL 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" in article 4, subparagraph (h). It was also noted that some business sectors increasingly regarded their technology and equipment as significant assets. However, it was felt that it would be difficult to attempt to formulate universally acceptable criteria for 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), location of equipment technology being only one—and not necessarily the most significant—of these factors. In any event, if an entity does not have a place of business, the Convention would not apply to its communications under article 1, which depends on transactions applying between parties having their places of business in different States (A/CN.9/571, para. 103).

76. Paragraph 5 reflects the fact that the current system for assignment of domain names was not originally conceived in geographical terms. Therefore, the apparent connection between a domain name and a country is often insufficient to conclude that there is a genuine and permanent link between the domain name user and the

country. Also, differences in national standards and procedures for the assignment of domain names make them unfit for establishing a presumption, while the insufficient transparency of the procedures for assigning domain names in some jurisdictions make it difficult to ascertain the level of reliability of each national procedure (A/CN.9/571, para. 112).

77. UNCITRAL nevertheless recognized that, in some countries, the assignment of domain names is only made after verification of the accuracy of the information provided by the applicant, including its location in the country to which the relevant domain name related. For those countries, it might be appropriate to rely, at least in part, on domain names for the purpose of article 6 (A/CN.9/509, para. 58; see also A/CN.9/571, para. 111). Therefore, paragraph 5 only prevents a court or arbitrator from inferring the location of a party from the sole fact that the party uses a given domain name or address. Nothing in the draft paragraph prevents 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 (A/CN.9/571, para. 113).

78. The formulation of paragraph 5 is not open-ended, as the provision is concerned with certain existing technologies in respect of which UNCITRAL was of the view that they do not offer, in and of themselves, a sufficiently reliable connection to a country so as to authorize a presumption of a party's location. It would have been unwise for UNCITRAL to rule out the possibility that new as yet undiscovered technologies may appropriately create a strong presumption as to a party's location in a country to which the technology used would be connected (A/60/17, para. 47).

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 40-47
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 92-114
WG.IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras. 81-93
WG.IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 41-59

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, incomplete or false statements in that regard.

1. Information requirements in electronic commerce

79. Article 7 reminds the parties of the need to comply with possible disclosure obligations that might exist under domestic law. UNCITRAL considered at length various proposals that contemplated a duty for the parties to disclose their places of business, among other information (A/CN.9/484, para. 103; A/CN.9/509, paras. 60-65). UNCITRAL was sensitive to possible gains in legal certainty, transparency and confidence in electronic commerce that might result from promoting good business standards, such as basic disclosure requirements (A/CN.9/546, para. 91).

80. However, the consensus that eventually emerged was that it would be preferable to address the matter from a different angle, namely by a provision that recognizes the possible existence of disclosure requirements under the substantive law governing the contract and reminds the parties of their obligations to comply with such requirements (A/60/17, para. 49).

81. UNCITRAL recognized that trading partners acting in good faith would normally be expected to provide accurate and truthful information concerning the location of their places of business. The legal consequences of false or inaccurate representations made by them are not primarily a matter of contract formation, but rather a matter of criminal or tort law. To the extent that those questions are dealt with in most legal systems, they would be governed by the applicable law outside the draft convention (A/CN.9/509, para. 48).

82. It was also felt that obligations to disclose certain information would be more appropriately placed in international industry standards or guidelines, rather than in an international convention dealing with electronic contracting. Another possible source of rules of that nature might be domestic regulatory regimes governing the provision of online services, especially under consumer protection regulations. The inclusion of disclosure requirements in the Convention was regarded as particularly problematic since the Convention could not provide for the consequences that might flow from failure by a party to comply with them. On the one hand, rendering commercial contracts invalid or unenforceable for failure to comply with the draft article was said to be an undesirable and unreasonably intrusive solution. On the other hand, providing for other types of sanctions, such as tort liability or administrative sanctions, would have been clearly outside the scope of the Convention (A/CN.9/509, para. 63; see also A/CN.9/546, paras. 92-93).

83. Another reason for deferring to domestic law on the matter was that no similar obligations exist for business transactions in a non-electronic environment so that the interest of promoting electronic commerce would not be served by subjecting it to such special obligations. Under most circumstances, the parties would have a business interest in disclosing their names and places of business, without needing to be required to do so by law. However, in particular situations, such as in certain financial markets or in business models such as Internet auction platforms, it is common for both sellers and buyers to identify themselves only through pseudonyms or codes throughout the negotiating or bidding phase. There are also systems involving trading intermediaries where the identity of the ultimate supplier is not disclosed to potential buyers. The parties in those cases may have various legitimate reasons for not disclosing their identities, including their negotiating strategy (A/CN.9/546, para. 93)

2. Nature of legal information requirements

84. The phrase “any rule of law” in this article has the same meaning as the words “the law” in article 9. They encompass statutory, regulatory and judicially created laws as well as procedural laws but do not cover laws that have not become part of the law of the State, such as lex mercatoria, even though the expression “rules of law” is sometimes used in that broader meaning.

85. Given the nature of this article, which defers to domestic law on disclosure requirements, these requirements remain applicable even if the parties attempt to escape them by excluding the application of this article (A/CN.9/546, para. 104).

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 48-50
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 115-116
WG.IV, 42nd session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 87-105 (at that time article 11)
WG.IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 60-65