Incoterms® 2010

Group I – For Non-Maritime or Maritime Transport

Ex Works (EXW)

EXW (insert named place of delivery) the Incoterms® 2010 rules

A THE SELLER'S OBLIGATIONS	B THE BUYER'S OBLIGATIONS
A1 General obligations of the seller The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract. Any document referred to in A1-A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.	**B1 General obligations of the buyer** The buyer must pay the price of the goods as provided in the contract of sale. Any document referred to in B1-B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
A2 Licences, authorizations, security clearances and other formalities Where applicable, the seller must provide the buyer, at the buyer's request, risk and	**B2 Licences, authorizations, security clearances and other formalities** Where applicable, it is up to the buyer to obtain, at its own risk and expense, any

expense, assistance in obtaining any export licence, or other official authorization necessary for the export of the goods. Where applicable, the seller must provide, at the buyer's request, risk and expense, any information in the possession of the seller that is required for the security clearance of the goods.	export and import licence or other official authorization and carry out all customs formalities for the export of the goods.
A3 Contracts of carriage and insurance a) Contract of carriage: The seller has no obligation to the buyer to make a contract of carriage. b) Contract of insurance: The seller has no obligation to the buyer to make a contract of insurance. However, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs for obtaining insurance.	**B3 Contracts of carriage and insurance** a) Contract of carriage: The buyer has no obligation to the seller to make a contract of carriage. b) Contract of insurance: The buyer has no obligation to the seller to make a contract of insurance.
A4 Delivery The seller must deliver the goods by placing them at the disposal of the buyer at the agreed point, if any, at the named place of delivery, not loaded on any collecting vehicle. If no specific point has been agreed within the named place of delivery, and if there are several points available, the seller may select the point that best suits its purpose. The seller must deliver the goods on the agreed date or within the agreed period.	**B4 Taking delivery** The buyer must take delivery of the goods when A4 and A7 have been complied with.
A5 Transfer of risks The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4 with the exception of loss or damage in the circumstances described in B5.	**B5 Transfer of risks** The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If the buyer fails to give notice in accordance with B7, then the buyer bears all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed

	period for delivery, provided that the goods have been clearly identified as the contract goods.
A6 Allocation of costs The seller must pay all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6.	**B6 Allocation of costs** The buyer must: a) pay all costs relating to the goods from the time they have been delivered as envisaged in A4; b) pay any additional costs incurred by failing either to take delivery of the goods when they have been placed at its disposal or to give appropriate notice in accordance with B7, provided that the goods have been clearly identified as the contract goods; c) pay, where applicable, all duties, taxes and other charges, as well as the costs of carrying out customs formalities payable upon export; and d) reimburse all costs and charges incurred by the seller in providing assistance as envisaged in A2.
A7 Notices to the buyer The seller must give the buyer any notice needed to enable the buyer to take delivery of the goods.	**B7 Notices to the seller** The buyer must, whenever it is entitled to determine the time within an agreed period and/or the point of taking delivery within the named place, give the seller sufficient notice thereof.
A8 Delivery document The seller has no obligation to the buyer.	**B8 Proof of delivery** The buyer must provide the seller with appropriate evidence of having taken delivery.
A9 Checking – packaging – marking The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4.	**B9 Inspection of goods** The buyer must pay the costs of any mandatory pre-shipment inspection, including inspection mandated by the authorities of the country of export.

The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract of sale is concluded. Packaging is to be marked appropriately.	
A10 Assistance with information and related costs The seller must, where applicable, in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer's request, risk and expense, any documents and information, including security-related information, that the buyer needs for the export and/or import of the goods and/or for their transport to the final destination.	**B10 Assistance with information and related costs** The buyer must, in a timely manner, advise the seller of any security information requirements so that the seller may comply with A10. The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10.

Free Carrier (FCA)

FCA (insert named place of delivery) the Incoterms® 2010 rules

A THE SELLER'S OBLIGATIONS	B THE BUYER'S OBLIGATIONS
A1 General obligations of the seller The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract. Any document referred to in A1-A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.	**B1 General obligations of the buyer** The buyer must pay the price of the goods as provided in the contract of sale. Any document referred to in B1-B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
A2 Licences, authorizations, security clearances and other formalities	**B2 Licences, authorizations, security clearances and other formalities**

Where applicable, the seller must obtain, at its own risk and expense, any export licence or other official authorization and carry out all customs formalities necessary for the export of the goods.	Where applicable, it is up to the buyer to obtain, at its own risk and expense, any import licence or other official authorization and carry out all customs formalities for the import of the goods and for their transport through any country.
A3 Contracts of carriage and insurance a) Contract of carriage The seller has no obligation to the buyer to make a contract of carriage. However, if requested by the buyer or if it is commercial practice and the buyer does not give an instruction to the contrary in due time, the seller may contract for carriage on usual terms at the buyer's risk and expense. In either case, the seller may decline to make the contract of carriage and, if it does, shall promptly notify the buyer. b) Contract of insurance The seller has no obligation to the buyer to make a contract of insurance. However, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs for obtaining insurance.	**B3 Contracts of carriage and insurance** a) Contract of carriage The buyer must contract at its own expense for the carriage of the goods from the named place of delivery, except when the contract of carriage is made by the seller as provided for in A3 a). b) Contract of insurance The buyer has no obligation to the seller to make a contract of insurance.
A4 Delivery The seller must deliver the goods to the carrier or another person nominated by the buyer at the agreed point, if any, at the named place on the agreed date or within the agreed period. Delivery is completed: a) if the named place is the seller's premises, when the goods have been loaded on the means of transport provided by the buyer. b) In any other case, when the goods are placed at the disposal of the carrier or another person nominated by the buyer on	**B4 Taking delivery** The buyer must take delivery of the goods when they have been delivered as envisaged in A4.

the seller's means of transport ready for unloading If no specific point has been notified by the buyer under B7 d) within the named place of delivery, and if there are several points available, the seller may select the point that best suits its purpose. Unless the buyer notifies the seller otherwise, the seller may deliver the goods for carriage in such a manner as the quantity and/or nature of the goods may require.	
A5 Transfer of risks The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in the circumstances described in B5.	**B5 Transfer of risks** The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If a) the buyer fails in accordance with B7 to notify the nomination of a carrier or another person as envisaged in A4 or to give notice; or b) the carrier or person nominated by the buyer as envisaged in A4 fails to take the goods into its charge, then, the buyer bears all risks of loss of or damage to the goods: (i) from the agreed date, or in the absence of an agreed date, (ii) from the date notified by the seller under A7 within the agreed period; or, if no such date has been notified, (iii) from the expiry date of any agreed period for delivery, provided that the goods have been clearly identified as the contract goods.
A6 Allocation of costs The seller must pay a) all costs relating to the goods until they have been delivered in accordance with A4,	**B6 Allocation of costs** The buyer must pay a) all costs relating to the goods from the time they have been delivered as envisaged

other than those payable by the buyer as envisaged in B6; and b) where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes, and other charges payable upon export.	in A4, except, where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes, and other charges payable upon export as referred to in A6 b); b) any additional costs incurred, either because: (i) the buyer fails to nominate a carrier or another person as envisaged in A4, or (ii) the carrier or person nominated by the buyer as envisaged in A4 fails to take the goods into its charge, or (iii) the buyer has failed to give appropriate notice in accordance with B7, provided that the goods have been clearly identified as the contract goods; and c) where applicable, all duties, taxes and other charges as well as the costs of carrying out customs formalities payable upon import of the goods and the costs for their transport through any country
A7 Notices to the buyer The seller must, at the buyer's risk and expense, give the buyer sufficient notice either that the goods have been delivered in accordance with A4 or that the carrier or another person nominated by the buyer has failed to take the goods within the time agreed.	**B7 Notices to the seller** The buyer must notify the seller of a) the name of the carrier or another person nominated as envisaged in A4 within sufficient time as to enable the seller to deliver the goods in accordance with that article; b) where necessary, the selected time within the period agreed for delivery when the carrier or person nominated will take the goods; c) the mode of transport to be used by the person nominated; and d) the point of taking delivery within the named place.
A8 Delivery document The seller must provide the buyer, at the seller's expense, with the usual proof that	**B8 Proof of delivery** The buyer must accept the proof of delivery provided as envisaged in A8.

the goods have been delivered in accordance with A4. The seller must provide assistance to the buyer, at the buyer's request, risk and expense, in obtaining a transport document.	
A9 Checking – packaging – marking The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4, as well any pre-shipment inspection mandated by the authority of the country of export. The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract of sale is concluded. Packaging is to be marked appropriately.	**B9 Inspection of goods** The buyer must pay the costs of any mandatory pre-shipment inspection, except when such inspection is mandated by the authorities of the country of export.
A10 Assistance with information and related costs The seller must, where applicable, in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer's request, risk and expense, any documents and information, including security-related information, that the buyer needs for the import of the goods and/or for their transport to the final destination. The seller must reimburse the buyer for all costs and charges incurred by the buyer in providing or rendering assistance in obtaining documents and information as envisaged in B10.	**B10 Assistance with information and related costs** The buyer must, in a timely manner, advise the seller of any security information requirements so that the seller may comply with A10. The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10. The buyer must, where applicable, in a timely manner, provide to or render assistance in obtaining for the seller, at the seller's request, risk and expense, any documents and information, including

	security-related information, that the seller needs for the transport and export of the goods and for their transport through any country.

Carriage Paid To (CPT)

CPT (insert named place of destination) the Incoterms® 2010 rules

A THE SELLER'S OBLIGATIONS	B THE BUYER'S OBLIGATIONS
A1 General obligations of the seller The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract. Any document referred to in A1-A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.	**B1 General obligations of the buyer** The buyer must pay the price of the goods as provided in the contract of sale. Any document referred to in B1-B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
A2 Licences, authorizations, security clearances and other formalities Where applicable, the seller must obtain, at its own risk and expense, any export licence or other official authorization and carry out all customs formalities necessary for the export of the goods, and for their transport through any country prior to delivery.	**B2 Licences, authorizations, security clearances and other formalities** Where applicable, it is up to the buyer to obtain, at its own risk and expense, any import licence or other official authorization and carry out all customs formalities for the import of the goods and for their transport through any country.
A3 Contracts of carriage and insurance a) Contract of carriage: The seller must contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named place of destination or, if agreed, any point at that place. The contract of carriage must be made on usual terms at the seller's expense and provide for carriage by the usual route and in a customary manner. If a specific	**B3 Contracts of carriage and insurance** a) Contract of carriage: The buyer has no obligation to the seller to make a contract of carriage. b) Contract of insurance: The buyer has no obligation to the seller to make a contract of insurance. However, the buyer must provide the seller, upon request, with the necessary information for obtaining insurance.

point is not agreed or is not determined by practice, the seller may select the point of delivery and the point at the named place of destination that best suit its purpose. b) Contract of insurance: The seller has no obligation to the buyer to make a contract of insurance. However, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs for obtaining insurance.	
A4 Delivery The seller must deliver the goods by handing them over to the carrier contracted in accordance with A3 on the agreed date or within the agreed period.	**B4 Taking delivery** The buyer must take delivery of the goods when they have been delivered as envisaged in A4 and receive them from the carrier at the named place of destination.
A5 Transfer of risks The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in the circumstances described in B5.	**B5 Transfer of risks** The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If the buyer fails to give notice in accordance with B7, it must bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery, provided that the goods have been clearly identified as the contract goods.
A6 Allocation of costs The seller must pay a) all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6; b) the freight and all other costs resulting from A3 a), including the costs of loading the goods and any charges for unloading at the place of destination that were for the seller's account under the contract of carriage; and	**B6 Allocation of costs** The buyer must, subject to the provisions of A3 a), pay a) all costs relating to the goods from the time they have been delivered as envisaged in A4, except, where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes, and other charges payable upon export as referred to in A6 c); b) all costs and charges relating to the goods while in transit until their arrival at the agreed place of destination, unless such

c) where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes and other charges payable upon export, and the costs for their transport through any country that were for the seller's account under the contract of carriage.	costs and charges were for the seller's account under the contract of carriage; c) unloading costs, unless such costs were for the seller's account under the contract of carriage; d) any additional costs incurred if the buyer fails to give notice in accordance with B7, from the agreed date or the expiry date of the agreed period for dispatch, provided that the goods have been clearly identified as the contract goods; and e) where applicable, all duties, taxes and other charges, as well as the costs of carrying out customs formalities payable upon import of the goods and the costs for their transport through any country, unless included within the cost of the contract of carriage.
A7 Notices to the buyer The seller must notify the buyer that the goods have been delivered in accordance with A4. The seller must give the buyer any notice needed in order to allow the buyer to take measures that are normally necessary to enable the buyer to take the goods. The seller must give the buyer any notice needed to enable the buyer to take delivery of the goods.	**B7 Notices to the seller** The buyer must, whenever it is entitled to determine the time for dispatching the goods and/or the named place of destination or the point of receiving the goods within that place, give the seller sufficient notice thereof.
A8 Delivery document If customary or at the buyer's request, the seller must provide the buyer, at the seller's expense, with the usual transport document[s] for the transport contracted in accordance with A3. This transport document must cover the contract goods and be dated within the period agreed for shipment. If agreed or customary, the document must also enable	**B8 Proof of delivery** The buyer must accept the transport document provided as envisaged in A8 if it is in conformity with the contract.

the buyer to claim the goods from the carrier at the named place of destination and enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier. When such a transport document is issued in negotiable form and in several originals, a full set of originals must be presented to the buyer.	
A9 Checking – packaging – marking The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4, as well as the costs of any pre-shipment inspection mandated by the authority of the country of export. The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract of sale is concluded. Packaging is to be marked appropriately.	**B9 Inspection of goods** The buyer must pay the costs of any mandatory pre-shipment inspection, except when such inspection is mandated by the authorities of the country of export.
A10 Assistance with information and related costs The seller must, where applicable, in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer's request, risk and expense, any documents and information, including security-related information, that the buyer needs for the import of the goods and/or for their transport to the final destination.	**B10 Assistance with information and related costs** The buyer must, in a timely manner, advise the seller of any security information requirements so that the seller may comply with A10. The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10.

The seller must reimburse the buyer for all costs and charges incurred by the buyer in providing or rendering assistance in obtaining documents and information as envisaged in B10.	The buyer must, where applicable, in a timely manner, provide to or render assistance in obtaining for the seller, at the seller's request, risk and expense, any documents and information, including security-related information, that the seller needs for the transport and export of the goods and for their transport through any country.

Carriage and Insurance Paid To (CIP)

CIP (insert named place of destination) the Incoterms® 2010 rules

A THE SELLER'S OBLIGATIONS	B THE BUYER'S OBLIGATIONS
A1 General obligations of the seller The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract. Any document referred to in A1-A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.	**B1 General obligations of the buyer** The buyer must pay the price of the goods as provided in the contract of sale. Any document referred to in B1-B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
A2 Licences, authorizations, security clearances and other formalities Where applicable, the seller must obtain, at its own risk and expense, any export licence or other official authorization and carry out all customs formalities necessary for the export of the goods, and for their transport through any country prior to delivery.	**B2 Licences, authorizations, security clearances and other formalities** Where applicable, it is up to the buyer to obtain, at its own risk and expense, any import licence or other official authorization and carry out all customs formalities for the import of the goods and for their transport through any country.
A3 Contracts of carriage and insurance a) Contract of carriage: The seller must contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named place of	**B3 Contracts of carriage and insurance** a) Contract of carriage: The buyer has no obligation to the seller to make a contract of carriage. b) Contract of insurance:

destination or, if agreed, any point at that place. The contract of carriage must be made on usual terms at the seller's expense and provide for carriage by the usual route and in a customary manner. If a specific point is not agreed or is not determined by practice, the seller may select the point of delivery and the point at the named place of destination that best suit its purpose. b) Contract of insurance: The seller must obtain at its own expense cargo insurance complying at least with the minimum cover as provided by Clauses (C) of the Institute Cargo Clauses (LMA/IUA) or any similar clauses. The insurance shall be contracted with underwriters or an insurance company of good repute and entitle the buyer, or any other person having an insurable interest in the goods, to claim directly from the insurer. When required by the buyer, the seller shall, subject to the buyer providing any necessary information requested by the seller, provide at the buyer's expense any additional cover, if procurable, such as cover as provided by Clauses (A) or (B) of the Institute Cargo Clauses (LMA/IUA) or any similar clauses, and/or cover complying with the Institute War Clauses and/or Institute Strikes Clauses (LMA/IUA) or any similar clauses. The insurance shall cover, at a minimum, the price provided in the contract plus 10% (i.e., 110%) and shall be in the currency of the contract. The insurance shall cover the goods from the point of delivery set out in A4 and A5 to at least the named place of destination. The seller must provide the buyer with the insurance policy or other evidence of insurance cover.	The buyer has no obligation to the seller to make a contract of insurance. However, the buyer must provide the seller, upon request, with any information necessary for the seller to procure any additional insurance requested by the buyer as envisaged in A3 b).

Moreover, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs to procure any additional insurance.	
A4 Delivery The seller must deliver the goods by handing them over to the carrier contracted in accordance with A3 on the agreed date or within the agreed period.	**B4 Taking delivery** The buyer must take delivery of the goods when they have been delivered as envisaged in A4 and receive them from the carrier at the named place of destination.
A5 Transfer of risks The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in the circumstances described in B5.	**B5 Transfer of risks** The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If the buyer fails to give notice in accordance with B7, it must bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery, provided that the goods have been clearly identified as the contract goods.
A6 Allocation of costs The seller must pay a) all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6; b) the freight and all other costs resulting from A3 a), including the costs of loading the goods and any charges for unloading at the place of destination that were for the seller's account under the contract of carriage; and c) where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes and other charges payable upon export, and the costs for their transport through any country that were for the seller's account under the contract of carriage.	**B6 Allocation of costs** The buyer must, subject to the provisions of A3 a), pay a) all costs relating to the goods from the time they have been delivered as envisaged in A4, except, where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes, and other charges payable upon export as referred to in A6 c); b) all costs and charges relating to the goods while in transit until their arrival at the agreed place of destination, unless such costs and charges were for the seller's account under the contract of carriage; c) unloading costs, unless such costs were for the seller's account under the contract of carriage; d) any additional costs incurred if the buyer fails to give notice in accordance with B7, from the agreed date or the expiry date of

	the agreed period for dispatch, provided that the goods have been clearly identified as the contract goods; and e) where applicable, all duties, taxes and other charges, as well as the costs of carrying out customs formalities payable upon import of the goods and the costs for their transport through any country, unless included within the cost of the contract of carriage.
A7 Notices to the buyer The seller must notify the buyer that the goods have been delivered in accordance with A4. The seller must give the buyer any notice needed in order to allow the buyer to take measures that are normally necessary to enable the buyer to take the goods. The seller must give the buyer any notice needed to enable the buyer to take delivery of the goods.	**B7 Notices to the seller** The buyer must, whenever it is entitled to determine the time for dispatching the goods and/or the named place of destination or the point of receiving the goods within that place, give the seller sufficient notice thereof.
A8 Delivery document If customary or at the buyer's request, the seller must provide the buyer, at the seller's expense, with the usual transport document[s] for the transport contracted in accordance with A3. This transport document must cover the contract goods and be dated within the period agreed for shipment. If agreed or customary, the document must also enable the buyer to claim the goods from the carrier at the named place of destination and enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier. When such a transport document is issued in negotiable form and in several originals,	**B8 Proof of delivery** The buyer must accept the transport document provided as envisaged in A8 if it is in conformity with the contract.

a full set of originals must be presented to the buyer.	
A9 Checking – packaging – marking The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4, as well as the costs of any pre-shipment inspection mandated by the authority of the country of export. The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract of sale is concluded. Packaging is to be marked appropriately.	**B9 Inspection of goods** The buyer must pay the costs of any mandatory pre-shipment inspection, except when such inspection is mandated by the authorities of the country of export.
A10 Assistance with information and related costs The seller must, where applicable, in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer's request, risk and expense, any documents and information, including security-related information, that the buyer needs for the import of the goods and/or for their transport to the final destination. The seller must reimburse the buyer for all costs and charges incurred by the buyer in providing or rendering assistance in obtaining documents and information as envisaged in B10.	**B10 Assistance with information and related costs** The buyer must, in a timely manner, advise the seller of any security information requirements so that the seller may comply with A10. The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10. The buyer must, where applicable, in a timely manner, provide to or render assistance in obtaining for the seller, at the seller's request, risk and expense, any documents and information, including security-related information, that the seller needs for the transport and export of the

	goods and for their transport through any country.

Delivered at Terminal (DAT)

DAT (insert named terminal at port or place of destination) the Incoterms® 2010 rules

A THE SELLER'S OBLIGATIONS	B THE BUYER'S OBLIGATIONS
A1 General obligations of the seller The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract. Any document referred to in A1-A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.	**B1 General obligations of the buyer** The buyer must pay the price of the goods as provided in the contract of sale. Any document referred to in B1-B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
A2 Licences, authorizations, security clearances and other formalities Where applicable, the seller must obtain, at its own risk and expense, any export licence and other official authorization and carry out all customs formalities necessary for the export of the goods and for their transport through any country prior to delivery.	**B2 Licences, authorizations, security clearances and other formalities** Where applicable, the buyer must obtain, at its own risk and expense, any import licence or other official authorization and carry out all customs formalities for the import of the goods.
A3 Contracts of carriage and insurance a) Contract of carriage The seller must contract at its own expense for the carriage of the goods to the named terminal at the agreed port or place of destination. If a specific terminal is not agreed or is not determined by practice, the seller may select the terminal at the agreed port or place of destination that best suits its purpose. b) Contract of insurance The seller has no obligation to the buyer to make a contract of insurance. However, the	**B3 Contracts of carriage and insurance** a) Contract of carriage The buyer has no obligation to the seller to make a contract of carriage. b) Contract of insurance The buyer has no obligation to the seller to make a contract of insurance. However, the buyer must provide the seller, upon request, with the necessary information for obtaining insurance.

seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs for obtaining insurance.	
A4 Delivery The seller must unload the goods from the arriving means of transport and must then deliver them by placing them at the disposal of the buyer at the named terminal referred to in A3 a) at the port or place of destination on the agreed date or within the agreed period.	**B4 Taking delivery** The buyer must take delivery of the goods when they have been delivered as envisaged in A4.
A5 Transfer of risks The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4 with the exception of loss or damage in the circumstances described in B5.	**B5 Transfer of risks** The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If a) the buyer fails to fulfil its obligations in accordance with B2, then it bears all resulting risks of loss of or damage to the goods; or b) the buyer fails to give notice in accordance with B7, then it bears all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery, provided that the goods have been clearly identified as the contract goods.
A6 Allocation of costs The seller must pay a) in addition to costs resulting from A3 a), all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6; and b) where applicable, the costs of customs formalities necessary for export as well as	**B6 Allocation of costs** The buyer must pay a) all costs relating to the goods from the time they have been delivered as envisaged in A4; b) any additional costs incurred by the seller if the buyer fails to fulfil its obligations in accordance with B2, or to give notice in accordance with B7, provided that the goods

all duties, taxes and other charges payable upon export and the costs for their transport through any country, prior to delivery in accordance with A4.	have been clearly identified as the contract goods; and c) where applicable, the costs of customs formalities as well as all duties, taxes and other charges payable upon import of the goods.
A7 Notices to the buyer The seller must give the buyer any notice needed in order to allow the buyer to take measures that are normally necessary to enable the buyer to take delivery of the goods.	**B7 Notices to the seller** The buyer must, whenever it is entitled to determine the time within an agreed period and/or the point of taking delivery at the named terminal, give the seller sufficient notice thereof.
A8 Delivery document The seller must provide the buyer, at the seller's expense, with a document enabling the buyer to take delivery of the goods as envisaged in A4/B4.	**B8 Proof of delivery** The buyer must accept the delivery document provided as envisaged in A8.
A9 Checking – packaging – marking The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4, as well as the costs of any pre-shipment inspection mandated by the authority of the country of export. The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract of sale is concluded. Packaging is to be marked appropriately.	**B9 Inspection of goods** The buyer must pay the costs of any mandatory pre-shipment inspection, except when such inspection is mandated by the authorities of the country of export.
A10 Assistance with information and related costs	**B10 Assistance with information and related costs**

The seller must, where applicable, in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer's request, risk and expense, any documents and information, including security-related information, that the buyer needs for the import of the goods and/or for their transport to the final destination. The seller must reimburse the buyer for all costs and charges incurred by the buyer in providing or rendering assistance in obtaining documents and information as envisaged in B10.	The buyer must, in a timely manner, advise the seller of any security information requirements so that the seller may comply with A10. The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10. The buyer must, where applicable, in a timely manner, provide to or render assistance in obtaining for the seller, at the seller's request, risk and expense, any documents and information, including security-related information, that the seller needs for the transport and export of the goods and for their transport through any country.

Delivered At Place (DAP)

DAP (insert named place of destination) the Incoterms® 2010 rules

A THE SELLER'S OBLIGATIONS	B THE BUYER'S OBLIGATIONS
A1 General obligations of the seller The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract. Any document referred to in A1-A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.	**B1 General obligations of the buyer** The buyer must pay the price of the goods as provided in the contract of sale. Any document referred to in B1-B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
A2 Licences, authorizations, security clearances and other formalities Where applicable, the seller must obtain, at its own risk and expense, any export licence and other official authorization and carry out all customs formalities necessary for the	**B2 Licences, authorizations, security clearances and other formalities** Where applicable, the buyer must obtain, at its own risk and expense, any import licence or other official authorization and carry out

export of the goods and for their transport through any country prior to delivery.	all customs formalities for the import of the goods.
A3 Contracts of carriage and insurance a) Contract of carriage The seller must contract at its own expense for the carriage of the goods to the named place of destination or to the agreed point, if any, at the named place of destination. If a specific point is not agreed or is not determined by practice, the seller may select the point at the named place of destination that best suits its purpose. b) Contract of insurance The seller has no obligation to the buyer to make a contract of insurance. However, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs for obtaining insurance.	**B3 Contracts of carriage and insurance** a) Contract of carriage The buyer has no obligation to the seller to make a contract of carriage. b) Contract of insurance The buyer has no obligation to the seller to make a contract of insurance. However, the buyer must provide the seller, upon request, with the necessary information for obtaining insurance.
A4 Delivery The seller must deliver the goods by placing them at the disposal of the buyer on the arriving means of transport ready for unloading at the agreed point, if any, at the named place of destination on the agreed date or within the agreed period.	**B4 Taking delivery** The buyer must take delivery of the goods when they have been delivered as envisaged in A4.
A5 Transfer of risks The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in the circumstances described in B5.	**B5 Transfer of risks** The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If a) the buyer fails to fulfil its obligations in accordance with B2, then it bears all resulting risks of loss of or damage to the goods; or b) the buyer fails to give notice in accordance with B7, then it bears all risks of

	loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery, provided that the goods have been clearly identified as the contract goods.
A6 Allocation of costs The seller must pay a) in addition to costs resulting from A3 a), all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6; b) any charges for unloading at the place of destination that were for the seller's account under the contract of carriage; and c) where applicable, the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export and the costs for their transport through any country, prior to delivery in accordance with A4.	**B6 Allocation of costs** The buyer must pay a) all costs relating to the goods from the time they have been delivered as envisaged in A4; b) all costs of unloading necessary to take delivery of the goods from the arriving means of transport at the named place of destination, unless such costs were for the seller's account under the contract of carriage; c) any additional costs incurred by the seller if the buyer fails to fulfil its obligations in accordance with B2 or to give notice in accordance with B7, provided that the goods have been clearly identified as the contract goods; and d) where applicable, the costs of customs formalities, as well as all duties, taxes and other charges payable upon import of the goods.
A7 Notices to the buyer The seller must give the buyer any notice needed in order to allow the buyer to take measures that are normally necessary to enable the buyer to take delivery of the goods.	**B7 Notices to the seller** The buyer must, whenever it is entitled to determine the time within an agreed period and/or the point of taking delivery within the named place of destination, give the seller sufficient notice thereof.
A8 Delivery document The seller must provide the buyer, at the seller's expense, with a document enabling the buyer to take delivery of the goods as envisaged in A4/B4.	**B8 Proof of delivery** The buyer must accept the delivery document provided as envisaged in A8.
A9 Checking – packaging – marking	**B9 Inspection of goods**

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4, as well as the costs of any pre-shipment inspection mandated by the authority of the country of export. The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract of sale is concluded. Packaging is to be marked appropriately.	The buyer must pay the costs of any mandatory pre-shipment inspection, except when such inspection is mandated by the authorities of the country of export.
A10 Assistance with information and related costs The seller must, where applicable, in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer's request, risk and expense, any documents and information, including security-related information, that the buyer needs for the import of the goods and/or for their transport to the final destination. The seller must reimburse the buyer for all costs and charges incurred by the buyer in providing or rendering assistance in obtaining documents and information as envisaged in B10.	**B10 Assistance with information and related costs** The buyer must, in a timely manner, advise the seller of any security information requirements so that the seller may comply with A10. The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10. The buyer must, where applicable, in a timely manner, provide to or render assistance in obtaining for the seller, at the seller's request, risk and expense, any documents and information, including security-related information, that the seller needs for the transport and export of the goods and for their transport through any country.

Delivered Duty Paid (DDP)

DDP (insert named place of destination) the Incoterms® 2010 rules

A THE SELLER'S OBLIGATIONS	B THE BUYER'S OBLIGATIONS
A1 General obligations of the seller The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract. Any document referred to in A1-A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.	**B1 General obligations of the buyer** The buyer must pay the price of the goods as provided in the contract of sale. Any document referred to in B1-B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
A2 Licences, authorizations, security clearances and other formalities Where applicable, the seller must obtain, at its own risk and expense, any export and import licence and other official authorization and carry out all customs formalities necessary for the export of the goods, for their transport through any country and for their import.	**B2 Licences, authorizations, security clearances and other formalities** Where applicable, the buyer must provide assistance to the seller, at the seller's request, risk and expense, in obtaining any import licence or other official authorization for the import of the goods.
A3 Contracts of carriage and insurance a) Contract of carriage The seller must contract at its own expense for the carriage of the goods to the named place of destination or to the agreed point, if any, at the named place of destination. If a specific point is not agreed or is not determined by practice, the seller may select the point at the named place of destination that best suits its purpose. b) Contract of insurance The seller has no obligation to the buyer to make a contract of insurance. However, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs for obtaining insurance.	**B3 Contracts of carriage and insurance** a) Contract of carriage The buyer has no obligation to the seller to make a contract of carriage. b) Contract of insurance The buyer has no obligation to the seller to make a contract of insurance. However, the buyer must provide the seller, upon request, with the necessary information for obtaining insurance.

A4 Delivery	**B4 Taking delivery**
The seller must deliver the goods by placing them at the disposal of the buyer on the arriving means of transport ready for unloading at the agreed point, if any, at the named place of destination on the agreed date or within the agreed period.	The buyer must take delivery of the goods when they have been delivered as envisaged in A4.
A5 Transfer of risks The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in the circumstances described in B5.	**B5 Transfer of risks** The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If a) the buyer fails to fulfil its obligations in accordance with B2, then it bears all resulting risks of loss of or damage to the goods; or b) the buyer fails to give notice in accordance with B7, then it bears all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery, provided that the goods have been clearly identified as the contract goods.
A6 Allocation of costs The seller must pay a) in addition to costs resulting from A3 a), all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6; b) any charges for unloading at the place of destination that were for the seller's account under the contract of carriage; and c) where applicable, the costs of customs formalities necessary for export and import as well as all duties, taxes and other charges payable upon export and import of the goods, and the costs for their transport	**B6 Allocation of costs** The buyer must pay a) all costs relating to the goods from the time they have been delivered as envisaged in A4; b) all costs of unloading necessary to take delivery of the goods from the arriving means of transport at the named place of destination, unless such costs were for the seller's account under the contract of carriage; and c) any additional costs incurred if it fails to fulfil its obligations in accordance with B2 or to give notice in accordance with B7,

through any country prior to delivery in accordance with A4.	provided that the goods have been clearly identified as the contract goods.
A7 Notices to the buyer The seller must give the buyer any notice needed in order to allow the buyer to take measures that are normally necessary to enable the buyer to take delivery of the goods.	**B7 Notices to the seller** The buyer must, whenever it is entitled to determine the time within an agreed period and/or the point of taking delivery within the named place of destination, give the seller sufficient notice thereof.
A8 Delivery document The seller must provide the buyer, at the seller's expense, with a document enabling the buyer to take delivery of the goods as envisaged in A4/B4.	**B8 Proof of delivery** The buyer must accept the proof of delivery provided as envisaged in A8.
A9 Checking – packaging – marking The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4, as well as the costs of any pre-shipment inspection mandated by the authority of the country of export or of import. The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract of sale is concluded. Packaging is to be marked appropriately.	**B9 Inspection of goods** The buyer has no obligation to the seller to pay the costs of any mandatory pre-shipment inspection mandated by the authority of the country of export or of import.
A10 Assistance with information and related costs The seller must, where applicable, in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer's request, risk and expense, any	**B10 Assistance with information and related costs** The buyer must, in a timely manner, advise the seller of any security information

documents and information, including security-related information, that the buyer needs for the transport of the goods to the final destination, where applicable, from the named place of destination. The seller must reimburse the buyer for all costs and charges incurred by the buyer in providing or rendering assistance in obtaining documents and information as envisaged in B10.	requirements so that the seller may comply with A10. The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10. The buyer must, where applicable, in a timely manner, provide to or render assistance in obtaining for the seller, at the seller's request, risk and expense, any documents and information, including security-related information, that the seller needs for the transport, export and import of the goods and for their transport through any country.

Group II – Only for Maritime Transport

Free Alongside Ship (FAS)

FAS (insert named port of shipment) the Incoterms® 2010 rules

A THE SELLER'S OBLIGATIONS	B THE BUYER'S OBLIGATIONS
A1 General obligations of the seller The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract. Any document referred to in A1-A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.	**B1 General obligations of the buyer** The buyer must pay the price of the goods as provided in the contract of sale. Any document referred to in B1-B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
A2 Licences, authorizations, security clearances and other formalities Where applicable, the seller must obtain, at its own risk and expense, any export licence or other official authorization and carry out	**B2 Licences, authorizations, security clearances and other formalities** Where applicable, it is up to the buyer to obtain, at its own risk and expense, any import licence or other official authorization and carry out all customs formalities for the

all customs formalities necessary for the export of the goods.	import of the goods and for their transport through any country.
A3 Contracts of carriage and insurance a) Contract of carriage The seller has no obligation to the buyer to make a contract of carriage. However, if requested by the buyer or if it is commercial practice and the buyer does not give an instruction to the contrary in due time, the seller may contract for carriage on usual terms at the buyer's risk and expense. In either case, the seller may decline to make the contract of carriage and, if it does, shall promptly notify the buyer. b) Contract of insurance The seller has no obligation to the buyer to make a contract of insurance. However, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs for obtaining insurance.	**B3 Contracts of carriage and insurance** a) Contract of carriage The buyer must contract, at its own expense for the carriage of the goods from the named port of shipment, except where the contract of carriage is made by the seller as provided for in A3 a). b) Contract of insurance The buyer has no obligation to the seller to make a contract of insurance.
A4 Delivery The seller must deliver the goods either by placing them alongside the ship nominated by the buyer at the loading point, if any, indicated by the buyer at the named port of shipment or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port. If no specific loading point has been indicated by the buyer, the seller may select the point within the named port of shipment that best suits its purpose. If the parties have agreed that delivery should take place within a period, the buyer has the option to choose the date within that period.	**B4 Taking delivery** The buyer must take delivery of the goods when they have been delivered as envisaged in A4.
A5 Transfer of risks	**B5 Transfer of risks**

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4 with the exception of loss or damage in the circumstances described in B5.	The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If a) the buyer fails to give notice in accordance with B7; or b) the vessel nominated by the buyer fails to arrive on time, or fails to take the goods or closes for cargo earlier than the time notified in accordance with B7; then the buyer bears all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery, provided that the goods have been clearly identified as the contract goods.
A6 Allocation of costs The seller must pay a) all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6; and b) where applicable, the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export.	**B6 Allocation of costs** The buyer must pay a) all costs relating to the goods from the time they have been delivered as envisaged in A4, except, where applicable, the costs of customs formalities necessary for export as well as all duties, taxes, and other charges payable upon export as referred to in A6 b); b) any additional costs incurred, either because: (i) the buyer has failed to give appropriate notice in accordance with B7, or (ii) the vessel nominated by the buyer fails to arrive on time, is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7, provided that the goods have been clearly identified as the contract goods; and c) where applicable, all duties, taxes and other charges, as well as the costs of carrying out customs formalities payable upon import of the goods and the costs for their transport through any country.

A7 Notices to the buyer	**B7 Notices to the seller**
The seller must, at the buyer's risk and expense, give the buyer sufficient notice either that the goods have been delivered in accordance with A4 or that the vessel has failed to take the goods within the time agreed.	The buyer must give the seller sufficient notice of the vessel name, loading point and, where necessary, the selected delivery time within the agreed period.
A8 Delivery document The seller must provide the buyer, at the seller's expense, with the usual proof that the goods have been delivered in accordance with A4. Unless such proof is a transport document, the seller must provide assistance to the buyer, at the buyer's request, risk and expense, in obtaining a transport document.	**B8 Proof of delivery** The buyer must accept the proof of delivery provided as envisaged in A8.
A9 Checking – packaging – marking The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4, as well as the costs of any pre-shipment inspection mandated by the authority of the country of export. The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract of sale is concluded. Packaging is to be marked appropriately.	**B9 Inspection of goods** The buyer must pay the costs of any mandatory pre-shipment inspection, except when such inspection is mandated by the authorities of the country of export.
A10 Assistance with information and related costs The seller must, where applicable, in a timely manner, provide to or render	**B10 Assistance with information and related costs** The buyer must, in a timely manner, advise the seller of any security information

assistance in obtaining for the buyer, at the buyer's request, risk and expense, any documents and information, including security-related information, that the buyer needs for the import of the goods and/or for their transport to the final destination. The seller must reimburse the buyer for all costs and charges incurred by the buyer in providing or rendering assistance in obtaining documents and information as envisaged in B10.	requirements so that the seller may comply with A10. The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10. The buyer must, where applicable, in a timely manner, provide to or render assistance in obtaining for the seller, at the seller's request, risk and expense, any documents and information, including security-related information, that the seller needs for the transport and export of the goods and for their transport through any country.

Free on Board (FOB)

FOB (insert named port of shipment) the Incoterms® 2010 rules

A THE SELLER'S OBLIGATIONS	B THE BUYER'S OBLIGATIONS
A1 General obligations of the seller The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract. Any document referred to in A1-A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.	**B1 General obligations of the buyer** The buyer must pay the price of the goods as provided in the contract of sale. Any document referred to in B1-B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
A2 Licences, authorizations, security clearances and other formalities Where applicable, the seller must obtain, at its own risk and expense, any export licence or other official authorization and carry out all customs formalities necessary for the export of the goods.	**B2 Licences, authorizations, security clearances and other formalities** Where applicable, it is up to the buyer to obtain, at its own risk and expense, any import licence or other official authorization and carry out all customs formalities for the import of the goods and for their transport through any country.

A3 Contracts of carriage and insurance	**B3 Contracts of carriage and insurance**
a) Contract of carriage The seller has no obligation to the buyer to make a contract of carriage. However, if requested by the buyer or if it is commercial practice and the buyer does not give an instruction to the contrary in due time, the seller may contract for carriage on usual terms at the buyer's risk and expense. In either case, the seller may decline to make the contract of carriage and, if it does, shall promptly notify the buyer. b) Contract of insurance The seller has no obligation to the buyer to make a contract of insurance. However, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs for obtaining insurance.	a) Contract of carriage The buyer must contract, at its own expense for the carriage of the goods from the named port of shipment, except where the contract of carriage is made by the seller as provided for in A3 a). b) Contract of insurance The buyer has no obligation to the seller to make a contract of insurance.
A4 Delivery The seller must deliver the goods either by placing them on board the vessel nominated by the buyer at the loading point, if any, indicated by the buyer at the named port of shipment or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port. If no specific loading point has been indicated by the buyer, the seller may select the point within the named port of shipment that best suits its purpose.	**B4 Taking delivery** The buyer must take delivery of the goods when they have been delivered as envisaged in A4.
A5 Transfer of risks The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4 with the exception of loss or damage in the circumstances described in B5.	**B5 Transfer of risks** The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If

	a) the buyer fails to notify the nomination of a vessel in accordance with B7; or b) the vessel nominated by the buyer fails to arrive on time to enable the seller to comply with A4, is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7; then, the buyer bears all risks of loss of or damage to the goods: (i) from the agreed date, or in the absence of an agreed date, (ii) from the date notified by the seller under A7 within the agreed period, or, if no such date has been notified, (iii) from the expiry date of any agreed period for delivery, provided that the goods have been clearly identified as the contract goods.
A6 Allocation of costs The seller must pay a) all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6; and b) where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes and other charges payable upon export.	**B6 Allocation of costs** The buyer must pay a) all costs relating to the goods from the time they have been delivered as envisaged in A4, except, where applicable, the costs of customs formalities necessary for export, as well as all duties, taxes and other charges payable upon export as referred to in A6 b); b) any additional costs incurred, either because: (i) the buyer has failed to give appropriate notice in accordance with B7, or (ii) the vessel nominated by the buyer fails to arrive on time, is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7, provided that the goods have been clearly identified as the contract goods; and

	c) where applicable, all duties, taxes and other charges, as well as the costs of carrying out customs formalities payable upon import of the goods and the costs for their transport through any country.
A7 Notices to the buyer The seller must, at the buyer's risk and expense, give the buyer sufficient notice either that the goods have been delivered in accordance with A4 or that the vessel has failed to take the goods within the time agreed.	**B7 Notices to the seller** The buyer must give the seller sufficient notice of the vessel name, loading point and, where necessary, the selected delivery time within the agreed period.
A8 Delivery document The seller must provide the buyer, at the seller's expense, with the usual proof that the goods have been delivered in accordance with A4. Unless such proof is a transport document, the seller must provide assistance to the buyer, at the buyer's request, risk and expense, in obtaining a transport document.	**B8 Proof of delivery** The buyer must accept the proof of delivery provided as envisaged in A8.
A9 Checking – packaging – marking The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4, as well as the costs of any pre-shipment inspection mandated by the authority of the country of export. The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract	**B9 Inspection of goods** The buyer must pay the costs of any mandatory pre-shipment inspection, except when such inspection is mandated by the authorities of the country of export.

of sale is concluded. Packaging is to be marked appropriately.	
A10 Assistance with information and related costs The seller must, where applicable, in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer's request, risk and expense, any documents and information, including security-related information, that the buyer needs for the import of the goods and/or for their transport to the final destination. The seller must reimburse the buyer for all costs and charges incurred by the buyer in providing or rendering assistance in obtaining documents and information as envisaged in B10.	**B10 Assistance with information and related costs** The buyer must, in a timely manner, advise the seller of any security information requirements so that the seller may comply with A10. The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10. The buyer must, where applicable, in a timely manner, provide to or render assistance in obtaining for the seller, at the seller's request, risk and expense, any documents and information, including security-related information, that the seller needs for the transport and export of the goods and for their transport through any country.

Cost and Freight (CFR)

CFR (insert named port of destination) the Incoterms® 2010 rules

A THE SELLER'S OBLIGATIONS	B THE BUYER'S OBLIGATIONS
A1 General obligations of the seller The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract. Any document referred to in A1-A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.	**B1 General obligations of the buyer** The buyer must pay the price of the goods as provided in the contract of sale. Any document referred to in B1-B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
A2 Licences, authorizations, security clearances and other formalities	**B2 Licences, authorizations, security clearances and other formalities**

Where applicable, the seller must obtain, at its own risk and expense, any export licence or other official authorization and carry out all customs formalities necessary for the export of the goods.	Where applicable, it is up to the buyer to obtain, at its own risk and expense, any import licence or other official authorization and carry out all customs formalities for the import of the goods and for their transport through any country.
A3 Contracts of carriage and insurance a) Contract of carriage The seller must contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named port of destination or, if agreed, any point at that port. The contract of carriage must be made on usual terms at the seller's expense and provide for carriage by the usual route in a vessel of the type normally used for the transport of the type of goods sold. b) Contract of insurance The seller has no obligation to the buyer to make a contract of insurance. However, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs for obtaining insurance.	**B3 Contracts of carriage and insurance** a) Contract of carriage The buyer has no obligation to the seller to make a contract of carriage. b) Contract of insurance The buyer has no obligation to the seller to make a contract of insurance. However, the buyer must provide the seller, upon request, with the necessary information for obtaining insurance.
A4 Delivery The seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port.	**B4 Taking delivery** The buyer must take delivery of the goods when they have been delivered as envisaged in A4 and receive them from the carrier at the named port of destination.
A5 Transfer of risks The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in the circumstances described in B5.	**B5 Transfer of risks** The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If the buyer fails to give notice in accordance with B7, then it bears all risks of loss of or damage to the goods from the agreed date or

	the expiry date of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods.
A6 Allocation of costs The seller must pay a) all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6; b) the freight and all other costs resulting from A3 a), including the costs of loading the goods on board and any charges for unloading at the agreed port of discharge that were for the seller's account under the contract of carriage; and c) where applicable, the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export, and the costs for their transport through any country that were for the seller's account under the contract of carriage.	**B6 Allocation of costs** The buyer must, subject to the provisions of A3 a), pay a) all costs relating to the goods from the time they have been delivered as envisaged in A4, except, where applicable, the costs of customs formalities necessary for export as well as all duties, taxes, and other charges payable upon export as referred to in A6 c); b) all costs and charges relating to the goods while in transit until their arrival at the port of destination, unless such costs and charges were for the seller's account under the contract of carriage; c) unloading costs including lighterage and wharfage charges, unless such costs and charges were for the seller's account under the contract of carriage; d) any additional costs incurred if it fails to give notice in accordance with B7, from the agreed date or the expiry date of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods; and e) where applicable, all duties, taxes and other charges, as well as the costs of carrying out customs formalities payable upon import of the goods and the costs for their transport through any country unless included within the cost of the contract of carriage.
A7 Notices to the buyer The seller must give the buyer any notice needed in order to allow the buyer to take measures that are normally necessary to enable the buyer to take the goods.	**B7 Notices to the seller** The buyer must, whenever it is entitled to determine the time for shipping the goods and/or the point of receiving the goods

	within the named port of destination, give the seller sufficient notice thereof.
A8 Delivery document The seller must, at its own expense, provide the buyer without delay with the usual transport document for the agreed port of destination. This transport document must cover the contract goods, be dated within the period agreed for shipment, enable the buyer to claim the goods from the carrier at the port of destination and, unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier. When such a transport document is issued in negotiable form and in several originals, a full set of originals must be presented to the buyer.	**B8 Proof of delivery** The buyer must accept the transport document provided as envisaged in A8 if it is in conformity with the contract.
A9 Checking – packaging – marking The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4, as well as the costs of any pre-shipment inspection mandated by the authority of the country of export. The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract of sale is concluded. Packaging is to be marked appropriately.	**B9 Inspection of goods** The buyer must pay the costs of any mandatory pre-shipment inspection, except when such inspection is mandated by the authorities of the country of export.

A10 Assistance with information and related costs	B10 Assistance with information and related costs
The seller must, where applicable, in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer's request, risk and expense, any documents and information, including security-related information, that the buyer needs for the import of the goods and/or for their transport to the final destination. The seller must reimburse the buyer for all costs and charges incurred by the buyer in providing or rendering assistance in obtaining documents and information as envisaged in B10.	The buyer must, in a timely manner, advise the seller of any security information requirements so that the seller may comply with A10. The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10. The buyer must, where applicable, in a timely manner, provide to or render assistance in obtaining for the seller, at the seller's request, risk and expense, any documents and information, including security-related information, that the seller needs for the transport and export of the goods and for their transport through any country.

Cost Insurance and Freight (CIF)

CIF (insert named port of destination) the Incoterms® 2010 rules

A THE SELLER'S OBLIGATIONS	B THE BUYER'S OBLIGATIONS
A1 General obligations of the seller The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract. Any document referred to in A1-A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.	**B1 General obligations of the buyer** The buyer must pay the price of the goods as provided in the contract of sale. Any document referred to in B1-B10 may be an equivalent electronic record or procedure if agreed between the parties or customary.
A2 Licences, authorizations, security clearances and other formalities Where applicable, the seller must obtain, at its own risk and expense, any export licence or other official authorization and carry out	**B2 Licences, authorizations, security clearances and other formalities** Where applicable, it is up to the buyer to obtain, at its own risk and expense, any import licence or other official authorization

all customs formalities necessary for the export of the goods.	and carry out all customs formalities for the import of the goods and for their transport through any country.
A3 Contracts of carriage and insurance a) Contract of carriage The seller must contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named port of destination or, if agreed, any point at that port. The contract of carriage must be made on usual terms at the seller's expense and provide for carriage by the usual route in a vessel of the type normally used for the transport of the type of goods sold. b) Contract of insurance The seller must obtain, at its own expense, cargo insurance complying at least with the minimum cover provided by Clauses (C) of the Institute Cargo Clauses (LMA/IUA) or any similar clauses. The insurance shall be contracted with underwriters or an insurance company of good repute and entitle the buyer, or any other person having an insurable interest in the goods, to claim directly from the insurer. When required by the buyer, the seller shall, subject to the buyer providing any necessary information requested by the seller, provide at the buyer's expense any additional cover, if procurable, such as cover as provided by Clauses (A) or (B) of the Institute Cargo Clauses (LMA/IUA) or any similar clauses and/or cover complying with the Institute War Clauses and/or Institute Strikes Clauses (LMA/IUA) or any similar clauses. The insurance shall cover, at a minimum, the price provided in the contract plus 10% (i.e., 110%) and shall be in the currency of the contract.	**B3 Contracts of carriage and insurance** a) Contract of carriage The buyer has no obligation to the seller to make a contract of carriage. b) Contract of insurance The buyer has no obligation to the seller to make a contract of insurance. However, the buyer must provide the seller, upon request, with any information necessary for the seller to procure any additional insurance requested by the buyer as envisaged in A3 (b).

The insurance shall cover the goods from the point of delivery set out in A4 and A5 to at least the named port of destination. The seller must provide the buyer with the insurance policy or other evidence of insurance cover. Moreover, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs to procure any additional insurance.	
A4 Delivery The seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port.	**B4 Taking delivery** The buyer must take delivery of the goods when they have been delivered as envisaged in A4 and receive them from the carrier at the named port of destination.
A5 Transfer of risks The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in the circumstances described in B5.	**B5 Transfer of risks** The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If the buyer fails to give notice in accordance with B7, then it bears all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods.
A6 Allocation of costs The seller must pay a) all costs relating to the goods until they have been delivered in accordance with A4, other than those payable by the buyer as envisaged in B6; b) the freight and all other costs resulting from A3 a), including the costs of loading the goods on board and any charges for unloading at the agreed port of discharge	**B6 Allocation of costs** The buyer must, subject to the provisions of A3 a), pay a) all costs relating to the goods from the time they have been delivered as envisaged in A4, except, where applicable, the costs of customs formalities necessary for export as well as all duties, taxes, and other charges payable upon export as referred to in A6 c); b) all costs and charges relating to the goods while in transit until their arrival at the port of destination, unless such costs and

that were for the seller's account under the contract of carriage; and c) where applicable, the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export, and the costs for their transport through any country that were for the seller's account under the contract of carriage.	charges were for the seller's account under the contract of carriage; c) unloading costs including lighterage and wharfage charges, unless such costs and charges were for the seller's account under the contract of carriage; d) any additional costs incurred if it fails to give notice in accordance with B7, from the agreed date or the expiry date of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods; and e) where applicable, all duties, taxes and other charges, as well as the costs of carrying out customs formalities payable upon import of the goods and the costs for their transport through any country unless included within the cost of the contract of carriage.
A7 Notices to the buyer The seller must give the buyer any notice needed in order to allow the buyer to take measures that are normally necessary to enable the buyer to take the goods.	**B7 Notices to the seller** The buyer must, whenever it is entitled to determine the time for shipping the goods and/or the point of receiving the goods within the named port of destination, give the seller sufficient notice thereof.
A8 Delivery document The seller must, at its own expense, provide the buyer without delay with the usual transport document for the agreed port of destination. This transport document must cover the contract goods, be dated within the period agreed for shipment, enable the buyer to claim the goods from the carrier at the port of destination and, unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier.	**B8 Proof of delivery** The buyer must accept the transport document provided as envisaged in A8 if it is in conformity with the contract.

When such a transport document is issued in negotiable form and in several originals, a full set of originals must be presented to the buyer.	
A9 Checking – packaging – marking The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A4, as well as the costs of any pre-shipment inspection mandated by the authority of the country of export. The seller must, at its own expense, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller may package the goods in the manner appropriate for their transport, unless the buyer has notified the seller of specific packaging requirements before the contract of sale is concluded. Packaging is to be marked appropriately.	**B9 Inspection of goods** The buyer must pay the costs of any mandatory pre-shipment inspection, except when such inspection is mandated by the authorities of the country of export.
A10 Assistance with information and related costs The seller must, where applicable, in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer's request, risk and expense, any documents and information, including security-related information, that the buyer needs for the import of the goods and/or for their transport to the final destination. The seller must reimburse the buyer for all costs and charges incurred by the buyer in providing or rendering assistance in obtaining documents and information as envisaged in B10.	**B10 Assistance with information and related costs** The buyer must, in a timely manner, advise the seller of any security information requirements so that the seller may comply with A10. The buyer must reimburse the seller for all costs and charges incurred by the seller in providing or rendering assistance in obtaining documents and information as envisaged in A10. The buyer must, where applicable, in a timely manner, provide to or render assistance in obtaining for the seller, at the seller's request, risk and expense, any documents and information, including security-related information, that the seller

	needs for the transport and export of the goods and for their transport through any country.

Restatement (Second) of Conflict of Laws (1971)

Current through March 2017

§ 6 Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

§ 10 Interstate and International Conflict of Laws

The rules in the Restatement of this Subject apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations. There may, however, be factors in a particular international case which call for a result different from that which would be reached in an interstate case.

§ 187 Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

- (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
- (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

§ 188 Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

Uniform Commercial Code

Current through 2016 annual meetings of the National Conference of Commissioner on Uniform State Laws and American Law Institute

§ 2-207. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

§ 1-301. Territorial Applicability; Parties' Power to Choose Applicable Law.

(a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

(b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), [the Uniform Commercial Code] applies to transactions bearing an appropriate relation to this state.

(c) If one of the following provisions of [the Uniform Commercial Code] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

(1) Section 2-402;

(2) Sections 2A-105 and 2A-106;

(3) Section 4-102;

(4) Section 4A-507;

(5) Section 5-116;

[(6) Section 6-103;]

(7) Section 8-110;

(8) Sections 9-301 through 9-307.

§ 2-102. Scope; Certain Security and Other Transactions Excluded From This Article.

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

§ 2-105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit".

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

§ 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)
(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

United Nations
1996

CONTENTS

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

(1) This Convention applies to an international undertaking referred to in article 2:

(a) If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or

(b) If the rules of private international law lead to the application of the law of a Contracting State, unless the undertaking excludes the application of the Convention.

(2) This Convention applies also to an international letter of credit not falling within article 2 if it expressly states that it is subject to this Convention.

(3) The provisions of articles 21 and 22 apply to international undertakings referred to in article 2 independently of paragraph (1) of this article.

Article 2. Undertaking

(1) For the purposes of this Convention, an undertaking is an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.

(2) The undertaking may be given:

(a) At the request or on the instruction of the customer ("principal/applicant") of the guarantor/issuer;

(b) On the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal/applicant") of that instructing party; or

(c) On behalf of the guarantor/issuer itself.

(3) Payment may be stipulated in the undertaking to be made in any form, including:

(a) Payment in a specified currency or unit of account;

(b) Acceptance of a bill of exchange (draft);

(c) Payment on a deferred basis;

(d) Supply of a specified item of value.

(4) The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person.

Article 3. Independence of undertaking

For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not:

(a) Dependent upon the existence or validity of any underlying transaction, or upon any other undertaking (including stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate); or

(b) Subject to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer's sphere of operations.

Article 4. Internationality of undertaking

(1) An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

(2) For the purposes of the preceding paragraph:

(a) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;

(b) If the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking.

CHAPTER II. INTERPRETATION

Article 5. Principles of interpretation

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 the international practice of independent guarantees and stand-by letters of credit.

Article 6. Definitions

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "Undertaking" includes "counter-guarantee" and "confirmation of an undertaking";

(b) "Guarantor/issuer" includes "counter-guarantor" and "confirmer";

(c) "Counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded from, or made by, the person issuing that other undertaking;

(d) "Counter-guarantor" means the person issuing a counter-guarantee;

(e) "Confirmation" of an undertaking means an undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from the confirmer instead of from the guarantor/issuer, upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;

(f) "Confirmer" means the person adding a confirmation to an undertaking;

(g) "Document" means a communication made in a form that provides a complete record thereof.

CHAPTER III. FORM AND CONTENT OF UNDERTAKING

Article 7. Issuance, form and irrevocability of undertaking

(1) Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned.

(2) An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.

(3) From the time of issuance of an undertaking, a demand for payment may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time.

(4) An undertaking is irrevocable upon issuance, unless it stipulates that it is revocable.

Article 8. Amendment

(1) An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (2) of article 7.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an undertaking is amended upon issuance of the amendment if the amendment has previously been authorized by the beneficiary.

(3) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, where any amendment has not previously been authorized by the beneficiary, the undertaking is amended only when the guarantor/issuer receives a notice of acceptance of the amendment by the beneficiary in a form referred to in paragraph (2) of article 7.

(4) An amendment of an undertaking has no effect on the rights and obligations of the principal/applicant (or an instructing party) or of a confirmer of the undertaking unless such person consents to the amendment.

Article 9. Transfer of beneficiary's right to demand payment

(1) The beneficiary's right to demand payment may be transferred only if authorized in the undertaking, and only to the extent and in the manner authorized in the undertaking.

(2) If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorized person is required for the actual transfer, neither the guarantor/issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it.

Article 10. Assignment of proceeds

(1) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

(2) If the guarantor/issuer or another person obliged to effect payment has received a notice originating from the beneficiary, in a form referred to in paragraph (2) of article 7, of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the undertaking.

Article 11. Cessation of right to demand payment

(1) The right of the beneficiary to demand payment under the undertaking ceases when:

(a) The guarantor/issuer has received a statement by the beneficiary of release from liability in a form referred to in paragraph (2) of article 7;

(b) The beneficiary and the guarantor/issuer have agreed on the termination of the undertaking in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (2) of article 7;

(c) The amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking;

(d) The validity period of the undertaking expires in accordance with the provisions of article 12.

(2) The undertaking may stipulate, or the guarantor/issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the guarantor/issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non-paper form, is required for the cessation of the right to demand payment, either alone or in conjunction with one of the events referred to in subparagraphs *(a)* and *(b)* of paragraph (1) of this article. However, in no

case shall retention of any such document by the beneficiary after the right to demand payment ceases in accordance with subparagraph *(c)* or *(d)* of paragraph (1) of this article preserve any rights of the beneficiary under the undertaking.

Article 12. Expiry

The validity period of the undertaking expires:

(a) At the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the undertaking, provided that, if the expiry date is not a business day at the place of business of the guarantor/issuer at which the undertaking is issued, or of another person or at another place stipulated in the undertaking for presentation of the demand for payment, expiry occurs on the first business day which follows;

(b) If expiry depends according to the undertaking on the occurrence of an act or event not within the guarantor/issuer's sphere of operations, when the guarantor/issuer is advised that the act or event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document is specified, of a certification by the beneficiary of the occurrence of the act or event;

(c) If the undertaking does not state an expiry date, or if the act or event on which expiry is stated to depend has not yet been established by presentation of the required document and an expiry date has not been stated in addition, when six years have elapsed from the date of issuance of the undertaking.

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Article 13. Determination of rights and obligations

(1) The rights and obligations of the guarantor/issuer and the beneficiary arising from the undertaking are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein, and by the provisions of this Convention.

(2) In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice.

Article 14. Standard of conduct and liability of guarantor/issuer

(1) In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.

(2) A guarantor/issuer may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct.

Article 15. Demand

(1) Any demand for payment under the undertaking shall be made in a form referred to in paragraph (2) of article 7 and in conformity with the terms and conditions of the undertaking.

(2) Unless otherwise stipulated in the undertaking, the demand and any certification or other document required by the undertaking shall be presented, within the time that a demand for payment may be made, to the guarantor/issuer at the place where the undertaking was issued.

(3) The beneficiary, when demanding payment, is deemed to certify that the demand is not in bad faith and that none of the elements referred to in subparagraphs *(a)*, *(b)* and *(c)* of paragraph (1) of article 19 are present.

Article 16. Examination of demand and accompanying documents

(1) The guarantor/issuer shall examine the demand and any accompanying documents in accordance with the standard of conduct referred to in paragraph (1) of article 14. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit practice.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer shall have reasonable time, but not more than seven business days following the day of receipt of the demand and any accompanying documents, in which to:

(a) Examine the demand and any accompanying documents;

(b) Decide whether or not to pay;

(c) If the decision is not to pay, issue notice thereof to the beneficiary.

The notice referred to in subparagraph *(c)* above shall, unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, be made by teletransmission or, if that is not possible, by other expeditious means and indicate the reason for the decision not to pay.

Article 17. Payment

(1) Subject to article 19, the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 15. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

(2) Any payment against a demand that is not in accordance with the provisions of article 15 does not prejudice the rights of the principal/applicant.

Article 18. Set-off

Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with any claim assigned to it by the principal/applicant or the instructing party.

Article 19. Exception to payment obligation

(1) If it is manifest and clear that:

(a) Any document is not genuine or has been falsified;

(b) No payment is due on the basis asserted in the demand and the supporting documents; or

(c) Judging by the type and purpose of the undertaking, the demand has no conceivable basis, the guarantor/issuer, acting in good faith, has a right, as against the beneficiary, to withhold payment.

(2) For the purposes of subparagraph *(c)* of paragraph (1) of this article, the following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary;

(e) In the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates.

(3) In the circumstances set out in subparagraphs *(a)*, *(b)* and *(c)* of paragraph (1) of this article, the principal/applicant is entitled to provisional court measures in accordance with article 20.

CHAPTER V. PROVISIONAL COURT MEASURES

Article 20. Provisional court measures

(1) Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that, with regard to a demand made, or expected to be made, by the beneficiary, one of the circumstances referred to in subparagraphs *(a)*, *(b)* and *(c)* of paragraph (1) of article 19 is present, the court, on the basis of immediately available strong evidence, may:

(a) Issue a provisional order to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking, or

(b) Issue a provisional order to the effect that the proceeds of the undertaking paid to the beneficiary are blocked,

taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

(2) The court, when issuing a provisional order referred to in paragraph (1) of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

(3) The court may not issue a provisional order of the kind referred to in paragraph (1) of this article based on any objection to payment other than those referred to in subparagraphs *(a)*, *(b)* and *(c)* of paragraph (1) of article 19, or use of the undertaking for a criminal purpose.

CHAPTER VI. CONFLICT OF LAWS

Article 21. Choice of applicable law

The undertaking is governed by the law the choice of which is:

(a) Stipulated in the undertaking or demonstrated by the terms and conditions of the undertaking; or

(b) Agreed elsewhere by the guarantor/issuer and the beneficiary.

Article 22. Determination of applicable law

Failing a choice of law in accordance with article 21, the undertaking is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued.

CHAPTER VII. FINAL CLAUSES

Article 23. Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

Article 24. Signature, ratification, acceptance, approval, accession

(1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until 11 December 1997.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 25. Application to territorial units

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention,

it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

(2) These declarations are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the place of business of the guarantor/issuer or of the beneficiary is located in a territorial unit to which the Convention does not extend, this place of business is considered not to be in a Contracting State.

(4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 26. Effect of declaration

(1) Declarations made under article 25 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

(4) Any State which makes a declaration under article 25 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary.

Article 27. Reservations

No reservations may be made to this Convention.

Article 28. Entry into force

(1) This Convention enters into force on the first day of the month following the expiration of one year from the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

(3) This Convention applies only to undertakings issued on or after the date when the Convention enters into force in respect of the Contracting State referred to in subparagraph *(a)* or the Contracting State referred to in subparagraph *(b)* of paragraph (1) of article 1.

Article 29. Denunciation

(1) A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this eleventh day of December one thousand nine hundred and ninety-five, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

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Explanatory note by the UNCITRAL secretariat on the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*

Introduction

1. The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit was adopted and opened for signature by the General Assembly by its resolution 50/48 of 11 December 1995.[1] The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL).[2]

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*This note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes. It is not an official commentary on the Convention.

[1]The draft Convention was prepared by the Working Group on International Contract Practices at its thirteenth to twenty-third sessions. (For the reports of those sessions, see the following volumes of the UNCITRAL *Yearbook: Yearbook, Volume XXI: 1990* (United Nations publication, Sales No. E.91.V.6), document A/CN.9/330; *Yearbook, Volume XXII: 1991* (United Nations publication, Sales No. E.93.V.2), documents A/CN.9/342 and A/CN.9/345; *Yearbook, Volume XXIII: 1992* (United Nations publication, Sales No. E.94.V.7), documents A/CN.9/358 and A/CN.9/361; *Yearbook, Volume XXIV: 1993* (United Nations publication, Sales No. E.94.V.16), document A/CN.9/374 and Corr.1; *Yearbook, Volume XXV: 1994* (United Nations publication, Sales No. E.95.V.20), documents A/CN.9/388 and A/CN.9/391; and "Yearbook, volume XXVI: 1995" (to be issued subsequently as a United Nations sales publication), documents A/CN.9/405 and A/CN.9/408.) The deliberations of UNCITRAL on the draft Convention are reflected in the report on the work of its twenty-eighth session (1995) (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 11-201), annex I of which contains the draft Convention as submitted by the Commission to the General Assembly.

[2]UNCITRAL is an intergovernmental body of the General Assembly that prepares international commercial law instruments designed to assist the international community in modernizing and harmonizing laws dealing with international trade. Other legal instruments prepared by UNCITRAL include the following: United Nations Convention on Contracts for the International Sale of Goods (*Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.82.V.5), part I); Convention on the Limitation Period in the International Sale of Goods, 1974 (New York) (*Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I); United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) (*Official Records of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978* (United Nations publication, Sales No. E.80.VIII.1), document A/CONF.89/13, annex I); United Nations Convention

2. The Convention is particularly designed to facilitate the use of independent guarantees and stand-by letters of credit where only one or the other of those instruments is traditionally in use. The Convention also solidifies recognition of common basic principles and characteristics shared by the independent guarantee and the stand-by letter of credit. In order to emphasize the common umbrella of rules provided for both independent guarantees and stand-by letters of credit and to overcome divergences that may exist in terminology, the Convention uses the neutral term "undertaking" to refer to both types of instruments.

3. Independent undertakings covered by the Convention are basic tools of international commerce. They are used in a variety of situations. For example, they are used to secure performance of contractual obligations including construction, supply and commercial payment obligations; to secure repayment of an advance payment in the event that such repayment is required; to secure a winning bidder's obligation to enter into a procurement contract; to ensure reimbursement of payment under another undertaking; to support issuance of commercial letters of credit and insurance coverage; and to enhance creditworthiness of public and private borrowers. Yet familiarity with one or the other instrument covered by the Convention is not universal; there is an absence of legislative provisions dealing with them, practices concerning the two types of instruments have differed in certain respects, and important questions confronting users, practitioners and courts in the daily life of these instruments are beyond the power of the parties to settle contractually.

4. By establishing a harmonized set of rules for the two types of instruments covered, the Convention will provide greater legal certainty in their use for day-to-day commercial transactions, as well as marshal credit for public borrowers. Also, by making a single legal regime available to both independent guarantees and stand-by letters of credit, the Convention will

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on the Liability of Operators of Transport Terminals in International Trade (A/CONF.152/13, annex); UNCITRAL Arbitration Rules (*Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (A/31/17), para. 57); UNCITRAL Notes on Organizing Arbitral Proceedings ("Yearbook, volume XXVIII: 1996" (to be issued subsequently as a United Nations sales publication), document A/CN.9/423); UNCITRAL Conciliation Rules (*Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106); Model Law on International Commercial Arbitration (1985) (*Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17, annex I); United Nations Convention on International Bills of Exchange and International Promissory Notes (General Assembly resolution 43/165, annex, of 9 December 1988); Model Law on International Credit Transfers (1992) (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17); annex I); UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I); and UNCITRAL Model Law on Electronic Commerce (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I).

facilitate the issuance of both instruments in combination with each other, for example, the issuance of a stand-by letter of credit to support the issuance of a guarantee, or the reverse case. The Convention will further facilitate "syndications" of lenders, by allowing them to combine more easily both types of instruments. Lenders participating in a syndication can spread credit risk among themselves, which enables them to extend larger volumes of credit.

5. The Convention gives legislative support to the autonomy of the parties to apply agreed rules of practice such as the Uniform Customs and Practice for Documentary Credits (UCP), formulated by the International Chamber of Commerce (ICC), or other rules that may evolve to deal specifically with stand-by letters of credit, and the Uniform Rules for Demand Guarantees (URDG, also formulated by ICC). In addition to being essentially consistent with the solutions found in rules of practice, the Convention supplements their operation by dealing with issues beyond the scope of such rules. It does so in particular regarding the question of fraudulent or abusive demands for payment and judicial remedies in such instances. Furthermore, the deference of the Convention to the specific terms of independent guarantees and stand-by letters of credit, including any rules of practice incorporated therein, enables the Convention to work in tandem with rules of practice such as UCP and URDG.

6. It should be noted that, strictly speaking, an independent guarantee or stand-by letter of credit is an undertaking given to a beneficiary. Accordingly, the focus of the Convention is on the relationship between the guarantor (in the case of an independent guarantee) or the issuer (in the case of a stand-by letter of credit) (hereinafter referred to as "guarantor/issuer") and the beneficiary. The relationship between the guarantor/issuer and its customer (the principal, in the case of an independent guarantee, or the applicant, in the case of a stand-by letter of credit, hereinafter referred to as "principal/applicant") largely falls outside the scope of the Convention. The same may be said of the relationship between a guarantor/issuer and its instructing party (the instructing party being, for example, a bank, requesting, on behalf of its customer, the guarantor/issuer to issue an independent guarantee).

7. Provided below is a summary of the main features and provisions of the Convention.

I. Scope of application

A. Types of instruments covered

8. The scope of application of the Convention is confined to instruments of the type understood in practice as independent guarantees (referred to as,

e.g. "demand", "first demand", "simple demand" or "bank" guarantees) or stand-by letters of credit (article 2(1)). Those instruments can be covered by the umbrella of the Convention because they share a wide area of common use. Both types of instruments, which are payable upon presentation of any stipulated documents, are used to secure against the possibility that some contingency may occur (e.g. a breach of a contract). It may be noted that another major use in particular of stand-by letters of credit is as an instrument to effectuate payment of mature indebtedness ("financial" or "direct pay" stand-by letters of credit).

9. In the undertakings covered by the Convention the guarantor/issuer promises to pay the beneficiary upon a demand for payment. The demand may, depending upon the terms of the undertaking, be either a "simple" demand or one having to be accompanied by the other documents called for in the guarantee or stand-by letter of credit. The guarantor/issuer's obligation to pay is triggered by the presentation of a demand for payment in the form, and with any supporting documents, as may be required by the independent guarantee or stand-by letter of credit. The guarantor/issuer is not called on to investigate the underlying transaction, but is merely to determine whether the documentary demand for payment conforms on its face to the terms of the guarantee or stand-by letter of credit. Because of this characteristic the instruments covered by the Convention are referred to commonly as being "independent" and "documentary" in nature.

10. Reflecting practice, various types of scenarios are envisaged in which an undertaking may be given, including at the request of the customer ("principal/applicant"), on the instruction of another entity or person ("instructing party") acting at the request of the customer of the instructing party, or on behalf of the guarantor/issuer itself (article 2(2)).

11. Full freedom is given to the parties to exclude completely the coverage of the Convention (article 1), with the result that another law becomes applicable. Since the Convention, if it is applicable, is to a large extent suppletive rather than mandatory, wide breadth is given to exclude or alter the rules of the Convention in any given case.

B. Coverage of counter-guarantees and confirmations

12. The Convention is designed to include coverage of the "counter-guarantee". A counter-guarantee is defined in the Convention (article 6*(c)*) in the same essential terms as the basic notion of "undertaking", namely, as an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking (counter-guarantee).

13. Apart from this general treatment of counter-guarantees as "undertakings", the Convention provides a specific provision on counter-guarantees in the context of fraudulent or abusive demands for payment; in that context counter-guarantees may raise questions distinct from those raised by other undertakings covered by the Convention (see paragraph 48, below).

14. The Convention also includes in its scope confirmations of undertakings, i.e. an undertaking added to that of, and authorized by, the guarantor/issuer. A confirmation gives the beneficiary an option of demanding payment from the confirmer as an alternative to demanding payment from the guarantor/issuer. By requiring authorization of the guarantor/issuer, the Convention does not recognize as confirmations "silent" confirmations, i.e. confirmations added without the assent of the guarantor/issuer.

C. Instruments outside scope of Convention

15. The Convention does not apply to "accessory" or "conditional" guarantees, i.e. guarantees in which the payment obligation of the guarantor involves more than the mere examination of a documentary demand for payment. Thus, the Convention does not annul or affect such other instruments in any way, nor does it regulate or discourage their use in any way. Whether it would be preferable to use in any given case an independent undertaking of the type covered by the Convention, or another type of instrument, would depend on the commercial circumstances at play and the particular interests of the parties involved.

16. Letters of credit other than stand-by letters of credit are not covered by the Convention. However, the Convention does recognize a right of parties to international letters of credit other than stand-by letters of credit to "opt into" the Convention (article 1(2)). That provision has been included in particular because the Convention provides a set of rules that parties to commercial letters of credit may wish in their own judgement to take advantage of, in view of the broad common ground between commercial and stand-by letters of credit, and in view of the occasional difficulties in determining whether a letter of credit is of a stand-by or commercial variety.

D. Definition of "independence"

17. While it is widely recognized that undertakings of the type covered by the Convention are "independent", there has been a lack of uniformity internationally in the understanding and recognition of that essential characteristic. The Convention will promote such uniformity by providing a definition of "independence" (article 3). That definition is phrased in terms of the undertaking not being dependent upon the existence or validity of the

underlying transaction, or upon any other undertaking. The latter reference, to other undertakings, clarifies the independent nature of a counter-guarantee from the guarantee that it relates to and of a confirmation from the stand-by letter of credit or independent guarantee that it confirms.

18. In addition, to fall within the scope of the Convention, an undertaking must not be subject to any terms or conditions not appearing in the undertaking. It is specified that, to fall within the Convention, an undertaking should not be subject to any future, uncertain act or event, with the exception of presentation of a demand and other documents by the beneficiary or of any other such act or event that falls within the "sphere of operations" of the guarantor/issuer. That is in line with the notion that the role of the guarantor/issuer in the case of independent undertakings is one of paymaster rather than investigator.

E. "Documentary" character of undertakings covered

19. As an adjunct to being "independent" from the underlying transaction, the undertakings covered by the Convention possess a "documentary" character. This means that the duties of the guarantor/issuer when faced with a demand for payment are limited to examining the demand for payment and any supporting documents to ascertain whether the demand and other documents submitted conform "facially" with what is called for under the terms of the independent guarantee or stand-by letter of credit. The effect of this rule is that undertakings possessing "non-documentary conditions" are outside the scope of the Convention. The only conditions which would not have to be documentary in nature would relate to acts or events within the sphere of operations of the guarantor/issuer. A simple example of the latter would be a determination by the guarantor/issuer as to whether a required monetary deposit had been made in a designated account maintained with that guarantor/issuer.

F. Definition of internationality

20. The Convention limits its application to undertakings that are international. Internationality is determined on the basis of the places of business, as specified in the undertaking, of any two of the following being in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer (article 4(1)). Special rules are provided for the case of an undertaking listing more than one place of business for a party, as well as for the case of a party not having a "place of business" as such, but only a habitual residence (article 4(2)).

G. Connecting factors for application of the Convention

21. The Convention applies to international undertakings in either one of two ways. The first way is linked to the location of the guarantor/issuer in a State party to the Convention ("Contracting State") (article 1(1)*(a)*). The second way in which the Convention applies is if the rules of private international law lead to the application of the law of a Contracting State (article 1(1)*(b)*).

22. The Convention provides an additional layer of harmonization of law in this field, in that its chapter VI (Conflict of laws, articles 21 and 22) supplies the rules to be followed by courts of Contracting States in identifying in any given case the law applicable to an independent guarantee or a stand-by letter of credit. Those rules apply whether or not in a particular case it turns out that the Convention is the applicable substantive law for the independent guarantee or stand-by letter of credit in question (see paragraphs 52 and 53, below).

II. Interpretation

23. The Convention contains a general rule that interpretation of the Convention should be with a view to its international character and the need to promote uniformity in its application (article 5). In addition, interpretation is to have regard for the observance of good faith in international practice. Abstracts of any court decisions or arbitral awards applying and interpreting a provision of the Convention will be included in the case collection system called case law on UNCITRAL texts (CLOUT).

III. Form and content of undertaking

24. The Convention provides rules on several aspects of the form and content of undertakings, as summarized below.

A. Issuance

25. On the question of the point of time and place of issuance (i.e. when and where the obligations of the guarantor/issuer to the beneficiary become operative), the Convention promotes certainty in an area traditionally of some uncertainty owing to the existence of differing notions. The Convention rule is that issuance occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer (e.g. when it is sent to the beneficiary)(article 7(1)). In addition, the Convention defines issuance in terms of its practical effect. Once issued, the undertaking is available for payment in accordance with its terms and is irrevocable.

26. As is customary in legal texts of UNCITRAL, the Convention establishes a flexible and forward-looking form requirement for issuance. By requiring a form that preserves a complete record of the text of the undertaking, rather than referring to "written" form, the Convention accommodates issuance in a non-paper-based medium (e.g. by means of electronic data interchange). It does so by referring to issuance in any form that preserves a complete record of the text of the undertaking and provides a generally acceptable or specifically agreed means of authentication (article 7(2)).

27. The Convention does not deal with the question of capacity to issue undertakings (i.e. who is permitted to be a guarantor/issuer). That question, which raises regulatory or other legal implications that differ from country to country, is left to national law.

B. Amendment

28. Legislative recognition is given by the Convention to the rule of practice that amendment of an undertaking requires acceptance by the beneficiary in order to take effect, unless it is otherwise stipulated (article 8(3)). The Convention takes cognizance of the possibility that an amendment might be authorized in advance by the beneficiary. In such cases, the amendment takes effect upon issuance (article 8(2)).

29. In one of the few provisions of the Convention that directly addresses the relationship between the principal/applicant and the guarantor/issuer, it is made clear that an amendment has no effect on the rights and obligations of the principal/applicant, or for that matter of an instructing party or of a confirmer, unless such other person consents to the amendment (article 8(4)).

C. Transfer and assignment

30. The Convention reflects the distinction drawn in practice between, on the one hand, transfer to another person of the original beneficiary's right to demand payment and, on the other hand, assignment of the proceeds of the undertaking, if payment is made. In the case of assignment of proceeds, as contrasted with transfer, the right to demand payment remains with the original beneficiary, the assignee being given only the right to receive the proceeds of payment if such payment occurs.

31. Regarding transfer, the Convention endorses the dual requirement, found in UCP, that the undertaking itself must state that it is transferable, and that, in addition, any actual transfer must be consented to by the guarantor/issuer (article 9). The rationale is that a change in the person who is to present the demand for payment and any accompanying documents may increase the risk assumed by the guarantor/issuer (e.g. if the guarantor/issuer would feel that the proposed transferee was less reliable or familiar than the

originally designated beneficiary). For that reason guarantor/issuers are given the opportunity to consent to any given transfer.

32. Regarding assignment of proceeds, the beneficiary of the undertaking may, unless otherwise stipulated in the undertaking or elsewhere agreed, assign the proceeds (article 10(1)). If the beneficiary assigns the proceeds and if the guarantor/issuer or another person obliged to effect payment has received a notice originating from the beneficiary, payment to the assignee discharges the obligor, to the extent of its payment, from liability under the undertaking (article 10(2)).

D. Cessation of right to demand payment

33. The Convention gives legislative effect to notions of cessation of the right to demand payment that are widely followed in practice, though not yet universally recognized in national laws or judicial precedents. Under the Convention (article 11), the events that trigger cessation include: a statement by the beneficiary releasing the guarantor/issuer; a termination of the undertaking agreed by the guarantor/issuer; full payment of the amount stipulated in the undertaking, unless the undertaking provided for automatic renewal or increase of the amount available; expiry of the validity period of the undertaking. By affirming that the presentation of the demand for payment has to occur prior to the expiry of the undertaking, the Convention will help to overcome any remaining uncertainty as to that question.

34. A degree of uncertainty still surrounds, in some jurisdictions, the question of the effect of retention of the instrument embodying the undertaking as regards definitive cessation of the right to demand payment. The Convention, in line with what is regarded widely as the best practice, provides that in no case does retention of the instrument prolong the right to demand payment if the amount available has already been paid or if the undertaking has expired (article 11(2)). Apart from those two contexts, the parties remain free to stipulate a requirement of return of the undertaking in order to terminate the right to demand payment.

E. Expiry

35. The Convention provides (article 12) that the validity period of an undertaking expires in the following ways: at the expiry date, which may be a fixed date or the last day of a fixed period stipulated in the undertaking; if expiry is linked to the occurrence of an act or event, upon presentation of the document called for in the undertaking to indicate the occurrence of the act or event, or, if no such document is called for, by presentation by the beneficiary of certification for that purpose; or after six years from issuance, if no expiry date has been stipulated or if a stipulated expiry act or event has not occurred.

IV. Rights, obligations and defences

A. Determination of rights and obligations

36. The rights and obligations of the guarantor/issuer and the beneficiary are determined by the terms and conditions of the undertaking (article 13(1)). Express reference is made in the Convention to rules of practice, general conditions or usages (e.g. UCP, URDG) to which the undertaking is specifically made subject. This is in line with a main purpose of the Convention, to give legislative support to the right of commercial parties to incorporate such rules of practice, conditions or usages. That approach ensures that the Convention will remain a living instrument, sensitive to developments in practice, including future revisions of rules of practice such as UCP and URDG and the development of other international rules of practice.

37. The flexible linking of the Convention to the needs and evolving usages and standards of commercial practice is also referred to elsewhere in the Convention. For example, in the interpretation of the terms and conditions of an undertaking and in settling questions not addressed by the Convention, regard is to be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice (article 13(2)).

38. Similarly, the standard of conduct of the guarantor/issuer, based on good faith and the exercise of reasonable care, is to be defined by reference to generally accepted standards of international practice of independent guarantees and stand-by letters of credit (article 14(1)). While the Convention leaves open the possibility of stipulating a standard somewhat lower than the generally applicable standard of care, it clearly prohibits any exemption of the guarantor from liability for lack of good faith or gross negligence.

V. Presentation of demand and payment

A. Demand by beneficiary

39. As regards the beneficiary, the process of demanding and obtaining payment involves presenting a demand for payment and any accompanying documents in accordance with the terms of the undertaking. In view of the documentary character of the demand, the form requirements of the Convention applicable to the undertaking itself (see paragraph 27, above) apply to the demand (article 15(1)). The place of presentation is at the counters of the guarantor/issuer at the place of issuance, unless some other place or person is stipulated for payment purposes (article 15(2)).

40. In addition, the Convention provides (article 15(3)) that by virtue of making a demand the beneficiary implicitly certifies that the demand is not made in bad faith and that none of the circumstances exist that would justify non-payment in accordance with the provisions of the Convention on fraudulent or abusive demands for payment (see paragraphs 47 and 48, below).

B. Examination of demand and payment

41. The duty of the guarantor/issuer is to examine the demand and any accompanying documents to determine whether they are in facial conformity with the terms and conditions of the undertaking and consistent with one another (article 16(1)). That determination is to have due regard to the applicable standard of international practice, a formulation that ensures that the Convention takes account of developments in practice as regards the notion of facial conformity.

42. In a provision expressly subject to variation by the terms of the undertaking, the guarantor/issuer is given a "reasonable time", up to a maximum of seven days, to examine the demand and to decide whether to pay (article 16(2)). Thus, what is deemed a "reasonable time" may well be less than seven days, but in no case more than seven days, unless some different period is stipulated. This takes into account that the time needed for examination of the demand would depend upon the nature of each case (e.g. volume and complexity of documents to be examined).

43. If a decision is taken not to pay, the guarantor/issuer is required to promptly so notify the beneficiary, indicating the grounds therefor (article 16(2)). If the demand is determined to be conforming, payment is to be made promptly, or at any later time stipulated in the undertaking.

44. The Convention recognizes that the guarantor/issuer may, unless the undertaking provides otherwise, discharge the payment obligation by exercising a right of set-off that is generally available under the applicable law (article 18). However, the Convention does not recognize any such right of set-off with respect to claims assigned by the principal/applicant or instructing party, as such a possibility would risk undermining the purpose of the undertaking.

C. Fraudulent or abusive demands for payment

45. A main purpose of the Convention is to establish greater uniformity internationally in the manner in which guarantor/issuers and courts respond to allegations of fraud or abuse in demands for payment under independent guarantees and stand-by letters of credit. That has been a particularly troublesome and disruptive area in practice because allegations of fraud have a

tendency to arise when there is a dispute as to the performance of an underlying contractual obligation. That difficulty and the resulting uncertainty have been compounded further because of the divergent notions and ways with which such allegations have been treated both by guarantor/issuers and by courts approached for provisional measures to block payment.

46. The Convention helps to ameliorate the problem by providing an internationally agreed general definition of the types of situations in which an exception to the obligation to pay against a facially compliant demand would be justified (article 19(1)). The definition encompasses fact patterns covered in different legal systems by notions such as "fraud" or "abuse of right". The definition refers to situations in which it is manifest and clear that any document is not genuine or has been falsified, that no payment is due on the basis asserted in the demand or that the demand has no conceivable basis.

47. For additional precision, the Convention provides illustrative examples of cases in which a demand would be deemed to have no conceivable basis (article 19(2); e.g. the underlying obligation has been undoubtedly fulfilled to the satisfaction of beneficiary; the fulfilment of the underlying obligation clearly has been prevented by wilful misconduct of beneficiary; in the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates).

48. The Convention, by entitling but not imposing a duty on the guarantor/issuer, as against the beneficiary, to refuse payment when confronted with fraud or abuse (article 19(1)), strikes a balance between different interests and considerations at play. By allowing discretion to the guarantor/issuer acting in good faith, the Convention is sensitive to the concern of guarantor/issuers over preserving the commercial reliability of undertakings as promises that are independent from underlying transactions.

49. At the same time, the Convention affirms that the principal/applicant, in the situations referred to, is entitled to provisional court measures to block payment (article 19(3)). This recognizes that it is the proper role of courts, and not of guarantors/issuers, to investigate the facts of underlying transactions. Furthermore, the Convention does not annul any rights that the principal/applicant may have in accordance with its contractual relationship with the guarantor/issuer to avoid reimbursement of payment made in contravention of the terms of that contractual relationship.

D. Provisional court measures

50. Apart from entitling a principal/applicant or an instructing party to provisional court measures blocking payment or freezing proceeds of an

undertaking in the types of cases referred to above, the Convention establishes a standard of proof to be met in order to obtain such provisional measures (article 20(1)). That standard refers to ordering of provisional measures on the basis of immediately available strong evidence of a high probability that the fraudulent or abusive circumstances are present. Reference is also made to consideration of whether the principal/applicant would be likely to suffer serious harm in the absence of the provisional measures and to the possibility of the court requiring security to be posted.

51. While authorizing provisional court measures in the cases concerned, the Convention minimizes the use of judicial procedures to interfere in undertakings by limiting the granting of provisional court measures to those types of cases, with one additional type of case. Provisional court orders blocking payment or freezing proceeds are also authorized in the case of use of an undertaking for a criminal purpose (article 20(3)).

VI. Conflict of laws

52. As noted above (paragraph 22), the Convention contains in chapter VI conflict of law rules to be applied by the courts of Contracting States in order to identify the law applicable to international undertakings as defined in article 2, regardless of whether in any given case the Convention itself would prove to be the applicable law. Those conflict of laws rules recognize a choice of law stipulated in the undertaking or demonstrated by its terms or conditions, or agreed elsewhere by the guarantor/issuer and the beneficiary (article 21).

53. In the absence of a choice of law as described above, the Convention provides for application to the undertaking of the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued (article 22).

VII. Final clauses

54. The final clauses (articles 23-29) contain the usual provisions relating to the Secretary-General of the United Nations as depositary and providing that the Convention is subject to ratification, acceptance or approval by those States that have signed it by 11 December 1997, that it is open to accession by all States that are not signatory States and that the text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.

55. In view of its largely suppletive character, as well as of the right of parties to exclude the Convention in its entirety, no reservations are permitted. The Convention enters into force one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

United Nations Convention on the Use of Electronic Communications in International Contracts

UNITED NATIONS
New York, 2007

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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Contents

United Nations Convention on the Use of Electronic Communications in International Contracts

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:

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, 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.

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 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, incomplete 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 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 intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph *(a)* above, by itself or together with further evidence.

4. Where the law requires that a communication or a contract should be made available 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 made available, that information is capable of being displayed to the person to whom it is to be made available.

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 that 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.

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 or intervened in each of the individual actions carried out by the automated message 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 party those electronic communications which 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 portion of 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; and

(b) 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 error other than as provided for in paragraph 1.

CHAPTER IV. FINAL PROVISIONS

Article 15. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 16. Signature, ratification, acceptance or approval

1. This Convention is open for signature by all States at United Nations Headquarters in New York from 16 January 2006 to 16 January 2008.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 17. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention.

Where the number of Contracting States is relevant in this Convention, the regional economic integration organization shall not count as a Contracting State in addition to its member States that are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in States members of any such organization, as set out by declaration made in accordance with article 21.

Article 18. Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 19. Declarations on the scope of application

1. Any Contracting State may declare, in accordance with article 21, that it will apply this Convention only:

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

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

2. Any Contracting State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 21.

Article 20. 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 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 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 21, 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 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 the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract 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 21.

Article 21. Procedure and effects of declarations

1. Declarations under article 17, paragraph 4, article 19, paragraphs 1 and 2, and article 20, paragraphs 2, 3 and 4, may be made at any time. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. Any State that makes a declaration under this Convention may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 22. Reservations

No reservations may be made under this Convention.

Article 23. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 24. Time of application

This Convention and any declaration apply only to electronic communications that are made after the date when the Convention or the declaration enters into force or takes effect in respect of each Contracting State.

Article 25. Denunciations

1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York this twenty-third day of November two thousand and five, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts*

I. Introduction

1. The United Nations Convention on the Use of Electronic Communications in International Contracts (hereinafter the "Electronic Communications Convention" or the "Convention") was prepared by the United Nations Commission on International Trade Law (UNCITRAL) between 2002 and 2005. The General Assembly adopted the Convention on 23 November 2005 by its resolution 60/21 and the Secretary-General opened it for signature on 16 January 2006.

2. When it approved the final draft for adoption by the General Assembly, at its thirty-eighth session (Vienna, 4-15 July 2005), UNCITRAL requested the Secretariat to prepare explanatory notes on the new instrument. At its thirty-ninth session (New York, 19 June-7 July 2006), UNCITRAL took note of the explanatory notes prepared by the Secretariat and requested the Secretariat to publish the notes together with the text of the Convention.

II. Main features of the Convention

3. The purpose of the Electronic Communications Convention is to offer practical solutions for issues related to the use of electronic means of communication in connection with international contracts.

4. The Convention is not intended to establish uniform rules for substantive contractual issues that are not specifically related to the use of electronic communications. However, a strict separation between technology-related and substantive issues in the context of electronic commerce is not always feasible or desirable. Therefore, the Convention contains a few substantive rules that extend beyond merely reaffirming the principle of functional equivalence where substantive rules are needed in order to ensure the effectiveness of electronic communications.

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*The present explanatory note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for information purposes. It is not an official commentary on the Convention.

A. Sphere of application (articles 1 and 2)

5. The Electronic Communications 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". "Electronic communication" includes any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, made by electronic, magnetic, optical or similar means in connection with the formation or performance of a contract. The word "contract" in the Convention is used in a broad way and includes, for example, arbitration agreements and other legally binding agreements whether or not they are usually called "contracts".

6. The Convention applies to international contracts, that is, contracts between parties located in two different States, but it is not necessary for both of those States to be contracting States of the Convention. However, the Convention only applies when the law of a contracting State is the law applicable to the dealings between the parties, which is to be determined by the rules on private international law of the forum State, if the parties have not validly chosen the applicable law.

7. The Convention does not apply to electronic communications exchanged in connection with contracts entered into for personal, family or household purposes. However, unlike the corresponding exclusion under article 2 *(a)* of the United Nations Convention on Contracts for the International Sale of Goods[1] (the "United Nations Sales Convention"), the exclusion of these transactions under the Electronic Communications Convention is an absolute one, meaning that the Convention would not apply to contracts entered into for personal, family or household purposes, even if the particular purpose of the contract was not apparent to the other party. Furthermore, the Convention does not apply to transactions in certain financial markets subject to specific regulation or industry standards. These transactions have been excluded because the financial service sector is already subject to well-defined regulatory controls and industry standards that address issues relating to electronic commerce in an effective way for the worldwide functioning of that sector. Lastly, the Convention does not apply to negotiable instruments or documents of title, in view of the particular difficulty of creating an electronic equivalent of paper-based negotiability, a goal for which special rules would need to be devised.

B. Location of the parties and information requirements (articles 6 and 7)

8. The Electronic Communications Convention contains a set of rules dealing with the location of the parties. The Convention does not contemplate a duty for the parties to disclose their places of business, but establishes a certain number of presumptions and default rules aimed at facilitating a determination of a party's location. It attributes primary—albeit not absolute—importance to a party's indication of its relevant place of business.

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

9. The Convention takes a cautious approach to peripheral information related to electronic messages, such as Internet Protocol 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.

C. Treatment of contracts (articles 8, 11, 12 and 13)

10. The Electronic Communications Convention affirms in article 8 the principle contained in article 11 of the UNCITRAL Model Law on Electronic Commerce[2] that contracts should not be denied validity or enforceability solely because they result from the exchange of electronic communications. The Convention does not venture into determining when offers and acceptances of offers become effective for purposes of contract formation.

11. Article 12 of the Convention recognizes that contracts may be formed as a result of actions by automated message systems ("electronic agents"), even if no natural person reviewed each of the individual actions carried out by the systems or the resulting contract. However, article 11 clarifies that the mere fact that a party offers interactive applications for the placement of orders—whether or not its system is fully automated—does not create a presumption that the party intended to be bound by the orders placed through the system.

12. Consistently with the decision to avoid establishing a duality of regimes for electronic and paper-based transactions, and consistent with the facilitative—rather than regulatory—approach of the Convention, article 13 defers to domestic law on matters such as any obligations that the parties might have to make contractual terms available in a particular manner. However, the Convention deals with the substantive issue of input errors in electronic communications in view of the potentially higher risk of mistakes being made in real-time or nearly instantaneous transactions entered into by a natural person communicating with an automated message system. Article 14 provides that a party who makes an input error may withdraw the part of the communication in question under certain circumstances.

D. Form requirements (article 9)

13. Article 9 of the Electronic Communications Convention reiterates the basic rules contained in articles 6, 7 and 8 of the UNCITRAL Model Law on Electronic

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[2]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, and 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 a United Nations publication, Sales No. E.99.V.4, and are available in electronic form on the UNCITRAL website (http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html).

Commerce concerning the criteria for establishing functional equivalence between electronic communications and paper documents—including "original" paper documents—as well as between electronic authentication methods and handwritten signatures. However, unlike the Model Law, the Convention does not deal with record retention, as it was felt that such a matter was more closely related to rules of evidence and administrative requirements than to contract formation and performance.

14. It should be noted that article 9 establishes minimum standards to meet form requirements that may exist under the applicable law. The principle of party autonomy in article 3, which is also contained in other UNCITRAL instruments, such as in article 6 of the United Nations Sales Convention, should not be understood as allowing the parties to go as far as relaxing statutory requirements on signature in favour of methods of authentication that provide a lesser degree of reliability than electronic signatures. Generally, it was understood that party autonomy did not mean that the Electronic Communications Convention empowered the parties to set aside statutory requirements on form or authentication of contracts and transactions.

E. Time and place of dispatch and receipt of electronic communications (article 10)

15. As is the case under article 15 of the UNCITRAL Model Law on Electronic Commerce, the Electronic Communications Convention contains a set of default rules on time and place of dispatch and receipt of electronic communications, which are intended to supplement national rules on dispatch and receipt by transposing them to an electronic environment. The differences in wording between article 10 of the Convention and article 15 of the Model Law are not intended to produce a different practical result, but rather are aimed at facilitating the operation of the Convention in various legal systems, by aligning the formulation of the relevant rules with general elements commonly used to define dispatch and receipt under domestic law.

16. Under the Convention, "dispatch" occurs when an electronic communication leaves an information system under the control of the originator, whereas "receipt" occurs when an electronic communication becomes capable of being retrieved by the addressee, which is presumed to happen when the electronic communication reaches the addressee's electronic address. The Convention distinguishes between delivery of communications to specifically designated electronic addresses and delivery of communications to an address not specifically designated. In the first case, a communication is received when it reaches the addressee's electronic address (or "enters" the addressee's "information system" in the terminology of the Model Law). For all cases where the communication is not delivered to a designated electronic address, receipt under the Convention only occurs when *(a)* the electronic communication becomes capable of being retrieved by the addressee (by reaching an electronic address of the addressee) and *(b)* the addressee actually becomes aware that the communication was sent to that particular address.

17. Electronic communications are presumed to be dispatched and received at the parties' places of business.

F. Relationship to other international instruments (article 20)

18. UNCITRAL hopes that States may find the Electronic Communications Convention useful to facilitate the operation of other international instruments—particularly trade-related ones. Article 20 intends to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments in a manner that obviates the need for amending individual international conventions.

19. In addition to those instruments which, for the avoidance of doubt, are listed in paragraph 1 of article 20, the provisions of the Convention may also apply, pursuant to paragraph 2 of article 20, to electronic communications exchanged in connection with contracts covered by other international conventions, treaties or agreements, unless such application has been excluded by a contracting State. The possibility of excluding this expanded application of the Convention has been added to take into account possible concerns of States that may wish to ascertain first whether the Convention would be compatible with their existing international obligations.

20. Paragraphs 3 and 4 of article 20 offer further flexibility by allowing States to add specific conventions to the list of international instruments to which they would apply the provisions of the Convention—even if the State has submitted a general declaration under paragraph 2—or to exclude certain specific conventions identified in their declarations. It should be noted that declarations under paragraph 4 of this article would exclude the application of the Convention to the use of electronic communications in respect of all contracts to which another international convention applies.

III. Summary of preparatory work

21. At its thirty-third session (New York, 17 June-7 July 2000), UNCITRAL held a preliminary exchange of views on proposals for future work in the field of electronic commerce. The three suggested topics were electronic contracting, considered from the perspective of the United Nations Sales Convention; online dispute settlement; and dematerialization of documents of title, in particular in the transport industry.

22. The Commission welcomed those suggestions. The Commission generally agreed that, upon completing the preparation of the Model Law on Electronic Signatures, the Working Group on Electronic Commerce would be expected to examine, at its thirty-eighth session, some or all of the above-mentioned topics, as

well as any additional topic, with a view to making more specific proposals for future work by the Commission at its thirty-fourth session, in 2001. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.[3]

23. The Working Group considered those proposals at its thirty-eighth session (New York, 12-23 March 2001), on the basis of a set of notes dealing with a possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89); dematerialization of documents of title (A/CN.9/WG.IV/WP.90); and electronic contracting (A/CN.9/WG.IV/WP.91). The Working Group held an extensive discussion on issues related to electronic contracting (A/CN.9/484, paras. 94-127). The Working Group concluded its deliberations by recommending to the Commission that it should start work towards the preparation of an international instrument dealing with certain issues in electronic contracting on a priority basis. At the same time, the Working Group recommended that the Secretariat be entrusted with the preparation of the necessary studies concerning three other topics considered by the Working Group: *(a)* a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments; *(b)* a further study of the issues related to transfer of rights by electronic means, in particular rights in tangible goods and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interests in such goods; and *(c)* a study discussing the UNCITRAL Model Law on International Commercial Arbitration,[4] as well as the UNCITRAL Arbitration Rules,[5] to assess their appropriateness for meeting the specific needs of online arbitration (A/CN.9/484, para. 134).

24. At the thirty-fourth session of the Commission (Vienna, 25 June-13 July 2001), there was wide support for the recommendations made by the Working Group, which were found to constitute a sound basis for future work by the Commission. Views varied, however, as regards the relative priority to be assigned to the different topics. One line of thought was that a project aimed at removing obstacles to electronic commerce in existing instruments should have priority over the other topics, in particular over the preparation of a new international instrument dealing with electronic contracting. The prevailing view, however, was in favour of the order of priority that had been recommended by the Working Group. It was pointed out, in that connection, that the preparation of an international instrument dealing with issues of electronic contracting and the consideration of appropriate ways for removing obstacles to electronic commerce in existing uniform law conventions and trade agreements were not mutually exclusive. The Commission was reminded of the common understanding reached at its thirty-third session that work to be carried out

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

[4]United Nations publication, Sales No. E.95.V.18.

[5]Ibid., Sales No. E.93.V.6.

by the Working Group could involve consideration of several topics in parallel.[6] In order to give States sufficient time to hold internal consultations, the Commission accepted that suggestion and decided that the first meeting of the Working Group on issues of electronic contracting should take place in the first quarter of 2002.[7]

25. At its thirty-ninth session (New York, 11-15 March 2002), the Working Group considered a note by the Secretariat discussing selected issues on electronic contracting, which contained in its annex I an initial draft tentatively entitled "Preliminary draft convention on [international] contracts concluded or evidenced by data messages" (see A/CN.9/WG.IV/WP.95). The Working Group further considered a note by the Secretariat transmitting comments that had been formulated by an ad hoc expert group established by the International Chamber of Commerce to examine the issues raised in document A/CN.9/WG.IV/WP.95 and the draft provisions set out in its annex I (A/CN.9/WG.IV/WP.96, annex).

26. The Working Group considered first the form and scope of the preliminary convention (see A/CN.9/509, paras. 18-40). The Working Group agreed to postpone discussion on exclusions from the Convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation. In particular, the Working Group decided to proceed with its deliberations by first taking up articles 7 and 14, both of which dealt with issues related to the location of the parties (see A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8 to 13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the Convention with a discussion of draft article 15 (A/CN.9/509, paras. 122-125). The Working Group agreed that it should consider articles 2 to 4, dealing with the sphere of application of the Convention, and articles 5 (Definitions) and 6 (Interpretation), at its fortieth session. The Working Group requested the Secretariat to prepare a revised version of the preliminary convention, based on those deliberations and decisions, for consideration by the Working Group at its fortieth session.

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

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[6] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 293.

[7] Ibid., para. 295.

been made by the Secretariat in connection with the survey, but did not have sufficient time to consider the preliminary conclusions of the survey. The Working Group requested the Secretariat to seek the views of member and observer States on the survey and the preliminary conclusions indicated therein and to prepare a report compiling such comments for consideration by the Working Group at a later stage. The Working Group requested the Secretariat to seek the views of other international organizations, including organizations of the United Nations system and other intergovernmental organizations, as to whether there were international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be included in the survey being conducted by the Secretariat (A/CN.9/509, para. 16).

28. The Commission considered the Working Group's report at its thirty-fifth session (New York, 17-28 June 2002). The Commission noted with appreciation that the Working Group had started its consideration of a possible international instrument dealing with selected issues on electronic contracting. The Commission reaffirmed its belief that an international instrument dealing with certain issues of electronic contracting might be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission commended the Working Group for the progress made in that regard. However, the Commission also took note of the varying views that had been expressed within the Working Group concerning the form and scope of the instrument, its underlying principles and some of its main features. The Commission noted, in particular, the proposal that the Working Group's considerations should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. The Commission was of the view that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues. For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions on a possible international instrument dealing with selected issues on electronic contracting until its forty-first session, to be held in New York from 5 to 9 May 2003.[8]

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

30. At its fortieth session (Vienna, 14-18 October 2002), the Working Group reviewed the survey of possible legal barriers to electronic commerce contained in document A/CN.9/WG.IV/WP.94. The Working Group generally agreed with the

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[8]Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 206.

[9]Ibid., para. 207.

analysis and endorsed the recommendations that had been made by the UNCITRAL secretariat (see A/CN.9/527, paras. 24-71). The Working Group agreed to recommend that the UNCITRAL secretariat take up the suggestions for expanding the scope of the survey so as to review possible obstacles to electronic commerce in additional instruments that had been proposed for inclusion in the survey by other organizations and to explore with those organizations the modalities for carrying out the necessary studies, taking into account the possible constraints put on the secretariat by its current workload. The Working Group invited member States to assist the UNCITRAL secretariat in that task by identifying appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments. The Working Group used the remaining time at that session to resume its deliberations on the preliminary convention (see A/CN.9/527, paras. 72-126).

31. The Working Group resumed its deliberations on the preliminary convention at its forty-first session (New York, 5-9 May 2003). The Working Group noted that a task force that had been established by the International Chamber of Commerce had submitted comments on the scope and purpose of the Convention (A/CN.9/WG.IV/WP.101, annex). The Working Group generally welcomed the work being undertaken by private-sector representatives, such as the International Chamber of Commerce, which was considered to complement usefully the work being undertaken in the Working Group to develop an international convention. The decisions and deliberations of the Working Group with respect to the Convention are reflected in chapter IV of the report on its forty-first session (see A/CN.9/528, paras. 26-151).

32. In accordance with a decision taken at its fortieth session (see A/CN.9/527, para. 93), the Working Group also held a preliminary discussion on the question of excluding intellectual property rights from the Convention (see A/CN.9/528, paras. 55-60). The Working Group agreed that the Secretariat should be requested to seek the specific advice of relevant international organizations, such as the World Intellectual Property Organization (WIPO) and the World Trade Organization, as to whether, in the view of those organizations, including contracts that involved the licensing of intellectual property rights in the scope of the Convention so as to expressly recognize the use of data messages in the context of those contracts might negatively interfere with rules on the protection of intellectual property rights. It was agreed that whether or not such exclusion was necessary would ultimately depend on the substantive scope of the Convention.

33. At its thirty-sixth session (Vienna, 30 June-11 July 2003), the Commission noted the progress made by the UNCITRAL secretariat in connection with a survey of possible legal barriers to the development of electronic commerce in international trade-related instruments. The Commission reiterated its belief in the importance of that project and its support for the efforts of the Working Group and the UNCITRAL secretariat in that respect. The Commission noted that the Working Group had recommended that the UNCITRAL secretariat expand the scope of the survey to review possible obstacles to electronic commerce in additional instruments

that had been proposed to be included in the survey by other organizations and to explore with those organizations the modalities for carrying out the necessary studies, taking into account the possible constraints put on the secretariat by its current workload. The Commission called on member States to assist the UNCITRAL secretariat in that task by inviting appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments.[10]

34. The Commission further noted with appreciation that the Working Group had continued its consideration of a preliminary convention dealing with selected issues related to electronic contracting. The Commission reaffirmed its belief that the instrument under consideration would be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission observed that the form of an international convention had been used by the Working Group thus far as a working assumption, but that did not preclude the choice of another form for the instrument at a later stage of the Working Group's deliberations.[11]

35. The Commission was informed that the Working Group had exchanged views on the relationship between the preliminary convention and the Working Group's efforts to remove possible legal obstacles to electronic commerce in existing international instruments relating to international trade (see A/CN.9/528, para. 25). The Commission expressed support for the Working Group's efforts to tackle both lines of work simultaneously.[12]

36. The Commission was informed that the Working Group had held a preliminary discussion on the question of whether intellectual property rights should be excluded from the convention (see A/CN.9/528, paras. 55-60). The Commission noted the Working Group's understanding that its work should not be aimed at providing a substantive law framework for transactions involving "virtual goods", nor was it concerned with the question of whether and to what extent "virtual goods" were or should be covered by the United Nations Sales Convention. The question before the Working Group was whether and to what extent the solutions for electronic contracting being considered in the context of the preliminary convention could also apply to transactions involving licensing of intellectual property rights and similar arrangements. The Secretariat was requested to seek the views of other international organizations on the question, in particular WIPO.[13]

37. At its forty-second session (Vienna, 17-21 November 2003), the Working Group began its deliberations by holding a general discussion on the scope of the preliminary convention. The Working Group, inter alia, noted that a task force had been established by the International Chamber of Commerce to develop contractual

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[10]Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 211.

[11]Ibid., para. 212.

[12]Ibid., para. 213.

[13]Ibid., para. 214.

rules and guidance on legal issues related to electronic commerce, tentatively called "e-Terms 2004". The Working Group welcomed the work being undertaken by the International Chamber of Commerce, which was considered to complement usefully the work being undertaken in the Working Group to develop an international convention. The Working Group was of the view that the two lines of work were not mutually exclusive, in particular since the convention dealt with requirements that were typically found in legislation, and legal obstacles, being statutory in nature, could not be overcome by contractual provisions or non-binding standards. The Working Group expressed its appreciation to the International Chamber of Commerce for the interest in carrying out its work in cooperation with UNCITRAL and confirmed its readiness to provide comments on drafts that the International Chamber of Commerce would be preparing (see A/CN.9/546, paras. 33-38).

38. The Working Group proceeded to review articles 8 to 15 of the revised preliminary convention contained in the annex to a note by the Secretariat (A/CN.9/WG.IV/WP.103). The Working Group agreed to make several amendments to those provisions and requested the Secretariat to prepare a revised draft for future consideration (see A/CN.9/546, paras. 39-135).

39. The Working Group continued its work on the preliminary convention at its forty-third session (New York, 15-19 March 2004) on the basis of a note by the Secretariat that contained a revised version of the preliminary convention (A/CN.9/WG.IV/WP.108). The deliberations of the Working Group focused on draft articles X, Y and 1 to 4 (see A/CN.9/548, paras. 13-123). The Working Group agreed that it should endeavour to complete its work on the convention with a view to enabling its review and approval by the Commission in 2005.

40. At its thirty-seventh session (New York, 14-25 June 2004), the Commission took note of the reports of the Working Group on the work of its forty-second and forty-third sessions (A/CN.9/546 and A/CN.9/548, respectively). The Commission was informed that the Working Group had undertaken a review of articles 8 to 15 of the revised text of the preliminary convention at its forty-second session. The Commission noted that the Working Group, at its forty-third session, had reviewed articles X and Y as well as articles 1 to 4 of the convention and that the Working Group had held a general discussion on draft articles 5 to 7 bis. The Commission expressed its support for the efforts by the Working Group to incorporate in the convention provisions aimed at removing possible legal obstacles to electronic commerce that might arise under existing international trade-related instruments. The Commission was informed that the Working Group had agreed that it should endeavour to complete its work on the convention with a view to enabling its review and approval by the Commission in 2005. The Commission expressed its appreciation for the Working Group's endeavours and agreed that a timely completion of the Working Group's deliberations on the convention should be treated as a matter of importance.[14]

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[14]Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 71.

41. The Working Group resumed its deliberations at its forty-fourth session (Vienna, 11-22 October 2004), on the basis of a newly revised preliminary convention contained in the annex to a note by the Secretariat (A/CN.9/WG.IV/WP.110). The Working Group reviewed and adopted draft articles 1 to 14, 18 and 19 of the convention. The relevant decisions and deliberations of the Working Group are reflected in its report on the work of its forty-fourth session (A/CN.9/571, paras. 13-206). At that time, the Working Group also held an initial exchange of views on the preamble and the final clauses of the 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 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 Working Group requested the Secretariat to circulate the revised version of the convention to Governments for their comments, with a view to consideration and adoption of the convention by the Commission at its thirty-eighth session, in 2005.

42. A number of Governments and international organizations submitted written comments on the convention (see A/CN.9/578 and Add. 1-17). UNCITRAL considered the convention and the comments received at its thirty-eighth session (Vienna, 4-15 July 2005). UNCITRAL agreed to make a few substantive amendments to the draft text and submitted it to the General Assembly for adoption. The deliberations of UNCITRAL are reflected in the report on the work of its thirty-eighth session.[15]

43. The General Assembly adopted the Convention on 23 November 2005 and the Secretary-General opened it for signature, from 16 January 2006 to 16 January 2008, by its resolution 60/21, which read as follows:

> *The General Assembly*,
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> *Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,
>
> *Considering* that problems created by uncertainties as to the legal value of electronic communications exchanged in the context of 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

[15]Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 12-167.

that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and may help States gain access to modern trade routes,

Recalling that, at its thirty-fourth session, in 2001, the Commission decided to prepare an international instrument dealing with issues of electronic contracting, which should also aim at removing obstacles to electronic commerce in existing uniform law conventions and trade agreements, and entrusted its Working Group IV (Electronic Commerce) with the preparation of a draft,[16]

Noting that the Working Group devoted six sessions, from 2002 to 2004, to the preparation of the draft Convention on the Use of Electronic Communications in International Contracts, and that the Commission considered the draft Convention at its thirty-eighth session, in 2005, [17]

Being aware that all States and interested international organizations were invited to participate in the preparation of the draft Convention at all the sessions of the Working Group and at the thirty-eighth session of the Commission, either as members or as observers, with a full opportunity to speak and make proposals,

Noting with satisfaction that the text of the draft Convention was circulated for comments before the thirty-eighth session of the Commission to all Governments and international organizations invited to attend the meetings of the Commission and the Working Group as observers, and that the comments received were before the Commission at its thirty-eighth session,[18]

Taking note with satisfaction of the decision of the Commission at its thirty-eighth session to submit the draft Convention to the General Assembly for its consideration,[19]

Taking note of the draft Convention approved by the Commission,[20]

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for preparing the draft Convention on the Use of Electronic Communications in International Contracts;[20]

2. *Adopts* the United Nations Convention on the Use of Electronic Communications in International Contracts, which is contained in the annex to the present resolution, and requests the Secretary-General to open it for signature;

3. *Calls upon* all Governments to consider becoming party to the Convention.

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[16]Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 291-295.

[17]Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), chap. III.

[18]A/CN.9/578 and Add.1-17.

[19]*Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 167.

[20]Ibid., annex I.

IV. Article-by-article remarks

PREAMBLE

1. Essential objectives of the Convention

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

45. The essential objective of the Convention is reflected in the fourth 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

46. The fifth 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

47. The principle of technological neutrality means that the Electronic Communications 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.

48. Technological neutrality is particularly important in view of the speed of technological innovation and development, and helps to 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, which preceded the Convention, is the adoption of new terminology, aimed at 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.

49. 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 handwritten 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.

Functional equivalence

50. 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 they are 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.

51. 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 electronic communications, enable such electronic communications to enjoy the same level of legal recognition as corresponding paper documents performing the same function.

52. 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
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10
Working Group 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. Substantive scope of application

53. The primary purpose of the Electronic Communications 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 Electronic Communications 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 (see A/CN.9/527, para. 76).

54. UNCITRAL nevertheless recognized that a strict separation between technical and substantive issues in the context of electronic commerce was not always feasible or desirable. Since the Convention was 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 (see A/CN.9/527, para. 81). Examples of provisions that highlight the interplay between technical and substantive rules include article 6 (Location of the 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 (Error 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 (see A/CN.9/527, paras. 77 and 102).

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

55. The Electronic Communications 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 (see 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 (see A/CN.9/509, para. 35).

56. 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 (see A/CN.9/548, para. 83).

57. 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 arbitration agreements in electronic form, even though the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[21] and most domestic laws do not use the word "contract" to refer to them.[22]

"parties" and "places of business"

58. As used in the Electronic Communications 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).

59. 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. 70-74 below).

2. Geographic scope of application

60. The Electronic Communications Convention is only concerned with international contracts so as not to interfere with domestic law (see A/CN.9/509, para. 31 and 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 (see A/CN.9/571, para. 19).

61. 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

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

[22]*Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 23.

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 Electronic Communications 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 as an annex to the Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964).[23]

62. 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 that Convention applied to their contract, without 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 Electronic Communications Convention a rule similar to paragraph 1 *(a)* of article 1 of the United Nations Sales Convention to ensure consistency between the two texts (see A/CN.9/509, para. 38). However, as the deliberations progressed and the impact of the Electronic Communications Convention became clearer, the need for parallelism between that 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 (see A/CN.9/548, para. 89).

63. Two main reasons eventually led UNCITRAL to do away with the requirement of double participation in the Electronic Communications 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 (see A/CN.9/548, para. 87). Secondly, UNCITRAL considered that, to the extent that several provisions of the Convention were 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 (see A/CN.9/548, para. 87; see also A/CN.9/571, para. 17).

64. 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.

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[23]United Nations, *Treaty Series*, vol. 834, No. 11929.

3. Relationship to private international law

65. It was understood by UNCITRAL that the Electronic Communications Convention applied when the law of a contracting State was 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.[24] 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 is 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.

66. 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.[25]

4. International nature disregarded when not apparent

67. Paragraph 2 of article 1 of the Electronic Communications Convention contains a rule similar to article 1, paragraph 2, of the United Nations Sales Convention. According to this provision, the Electronic Communications 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 (see A/CN.9/528, para. 45).

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

68. As is the case for the United Nations Sales Convention, the application of the Electronic Communications Convention does not depend on whether the parties are

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[24]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 20.

[25]Ibid., para. 19.

considered "civil" or "commercial". Therefore, for the purpose of determining the scope of the Electronic Communications 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 that distinction.

69. 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
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 14-27
Working Group IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 71-97
Working Group IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras. 32-48
Working Group IV, 40th session (Vienna, 14-18 October 2002)	A/CN.9/527, paras. 73-81
Working Group IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 28-40

Article 2. Exclusions

1. Contracts for personal, family or household purposes

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

Rationale of exclusion

71. 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.

72. 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 mail 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 (see A/CN.9/548, para. 101).

73. 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. They often set forth conditions for the enforcement of standard contractual terms and conditions against consumers and specify the conditions under which 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 (see A/CN.9/548, para. 102).

Exclusion not limited to consumer contracts

74. 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 Electronic Communications Convention, which is not limited to electronic communications related to purchase transactions, the words in subparagraph 1 *(a)* of article 2 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".[26]

Absolute nature of exclusion

75. 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 Electronic Communications 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.

76. 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

[26]Ibid., para. 29.

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 draft Convention on Contracts for the International Sale of Goods, which had been prepared at the time by the Secretariat,[27] article 2, subparagraph *(a),* of the United Nations Sales Convention was based on the assumption that consumer sales were international transactions only in "relatively few cases" (see A/CN.9/527, para. 86).

77. In the case of the Electronic Communications 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 from a seller established in another country (see A/CN.9/527, para. 87). Having recognized that certain rules of the Electronic Communications 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 (see A/CN.9/548, paras. 101 and 102).

2. Specific financial transactions

78. Paragraph 1 *(b)* of article 2 lists a number of transactions excluded from the scope of application of the Electronic Communications Convention. They relate essentially to certain financial service markets governed by well-defined regulatory and contractual 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 those markets, UNCITRAL considered that this exclusion should not be left for country-based declarations under article 19 (see A/CN.9/527, para. 95; A/CN.9/528, para. 61; A/CN.9/548, para. 109; and A/CN.9/571, para. 62).

79. 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),

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[27] *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees* (United Nations publication, Sales No. E.81.IV.3), part one, sect. D, art. 2, commentary.

foreign exchange, securities and bond markets. The criterion for the exclusion in paragraph 1 *(b)* of article 2 is not the type of the asset being traded but the method of settlement used. In addition, not every regulated trading activity is excluded but trading under the auspices of a regulated exchange is (e.g. stock exchange, securities and commodities exchange, foreign currency exchange 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

80. Paragraph 2 of article 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.

81. 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 Electronic Communications Convention and justifies the exclusion provided in paragraph 2 of the 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).[28]

4. Individual exclusions

82. During the preparation of the Electronic Communications Convention, there were suggestions to include a number of other transactions to the list of excluded matters in article 2, such as contracts that created or transferred 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 (see A/CN.9/548, para. 110).

83. The preponderant view within UNCITRAL was not in favour of the proposed exclusions. Some matters would automatically be excluded under article 1, paragraph 1, or article 2, paragraph 1 *(a)*. Other matters were regarded as territory-specific issues that should be better dealt with at the domestic level. UNCITRAL

[28]Ibid., para. 27.

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 (see A/CN.9/571, para. 63), a result which would hinder the adaptation of the law to technological evolution (see 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
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 59-69; see also para. 136
Working Group IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 98-111; see also paras. 112-118 (on a related draft article since deleted)
Working Group 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)
Working Group 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

1. Extent of power to derogate

84. In preparing the Electronic Communications Convention, UNCITRAL was mindful of the fact that, in practice, solutions to the legal difficulties raised by the use of modern means of communication were 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.[29]

85. At the same time, it was generally accepted that party autonomy did not extend to setting aside statutory requirements that imposed, for instance, the use of specific methods of authentication in a particular context. This is particularly important

[29]Ibid., para. 33.

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 (see A/CN.9/527, para. 108; see also A/CN.9/571, para. 76).

86. 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 (see A/CN.9/527, para. 108).

87. 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 (see A/CN.9/571, para. 75).

2. *Form of derogation*

88. 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 Electronic Communications Convention can be varied either by bilateral or multilateral agreements between the parties, or by system rules agreed to by them.

89. It was the understanding of UNCITRAL that derogations from the Convention did 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 (see A/CN.9/548, para. 123).[30]

References to preparatory work

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

[30]Ibid., para. 32.

CHAPTER II. GENERAL PROVISIONS

Article 4. Definitions

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

"Communication"

91. The definition of "communication" is intended to make clear that the Electronic Communications 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"

92. 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 (see A/CN.9/571, para. 80).

93. 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.

94. 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 (see 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 of the Economic Commission for Europe, which is the United Nations body responsible for the development of technical standards related to United Nations rules for Electronic Data Interchange for Administration, Commerce and Transport (UN/EDIFACT), EDI means the electronic

transfer from computer to computer of information using an agreed standard to structure the information.

95. The definition of "data message" focuses on the information itself, rather than on the form of its transmission. Thus, for the purposes of the Electronic Communications 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.

96. 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"

97. 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.

98. The "addressee" under the Electronic Communications Convention 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 communication 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 transmitted by someone else is not intended to be covered by the definition of "originator".

99. 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.

100. 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 those words.

"Information system"

101. 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.

102. For the purposes of the Electronic Communications 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"

103. 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 (see A/CN.9/527, para. 113).

104. 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 EDI, 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"

105. 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[31] (see A/CN.9/527, para. 120). This definition has been included to support the operation of articles 1 and 6 of the Electronic Communications Convention and is not intended to affect other substantive law relating to places of business.[32]

106. 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" (see A/CN.9/571, para. 87).

References to preparatory work

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

Article 5. Interpretation

107. The principles reflected in article 5 of the Electronic Communications Convention 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 (see A/CN.9/527, para. 124).

References to preparatory work

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

[31]United Nations publication, Sales No. E.99.V.3.

[32]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 37.

Article 6. Location of the parties

1. Purpose of the article

108. The purpose of article 6 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 Electronic Communications Convention.

109. 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 would facilitate a determination by the parties of the places of business of the persons or entities they had commercial dealings with (see A/CN.9/509, para. 44).

2. Nature of presumption of location

110. 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 in a commercial law instrument, in view of the difficulty of setting out the consequences of failing to comply with such an obligation.[33]

111. Accordingly, article 6 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 by 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)*.[34] 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 (see A/CN.9/509, para. 47).

112. The rebuttable presumption of location established by paragraph 1 of article 6 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

[33]Ibid., para. 43.

[34]Ibid., para. 41.

business for a given contract. Article 6 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 (see 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

113. Paragraph 2 of article 6 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 Electronic Communications 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 (see 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 Electronic Communications Convention (see A/CN.9/571, para. 101).

114. The application of paragraph 2 of article 6 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 of the article.[35]

4. Place of business of natural persons

115. 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 communications technology and equipment for establishing place of business

116. 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 (see A/CN.9/484, para. 103).

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[35]Ibid., para. 46.

117. Therefore, the Electronic Communications Convention takes a cautious approach to peripheral information related to electronic messages, such as Internet Protocol 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 of article 6 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 Electronic Communications 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 (see A/CN.9/571, para. 113).

118. 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)* of the Convention. 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 and 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 (see A/CN.9/571, para. 103).

119. Paragraph 5 of article 6 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 makes it difficult to ascertain the level of reliability of each national procedure (see A/CN.9/571, para. 112).

120. UNCITRAL nevertheless recognized that, 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 might be appropriate to rely, at least in part, on domain names for the purpose of article 6 (see 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 this 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 (see A/CN.9/571, para. 113).

121. The formulation of paragraph 5 of article 6 is not open-ended, as the provision is concerned with certain existing technologies in respect of which UNCITRAL was of the view that they did 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.[36]

References to preparatory work

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

Article 7. Information requirements

1. Information requirements in electronic commerce

122. Article 7 of the Electronic Communications Convention 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 (see A/CN.9/484, para. 103; see also 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 (see A/CN.9/546, para. 91).

123. 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 recognized the possible existence of disclosure requirements under the substantive law governing the contract and reminded the parties of their obligations to comply with such requirements.[37]

124. 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 were 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 Electronic Communications Convention (see A/CN.9/509, para. 48).

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[36]Ibid., para. 47.

[37]Ibid., para. 49.

125. 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 Convention 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 (see A/CN.9/509, para. 63; see also A/CN.9/546, paras. 92 and 93).

126. Another reason for deferring to domestic law on the matter was that no similar obligations existed 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 (see A/CN.9/546, para. 93).

2. Nature of legal information requirements

127. The phrase "any rule of law" in article 7 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.

128. Given the nature of article 7, 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 the article (see A/CN.9/546, para. 104).

References to preparatory work

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

CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

Article 8. Legal recognition of electronic communications

1. Non-discrimination of electronic communications

129. Paragraph 1 of article 8 of the Electronic Communications Convention restates the general principle of non-discrimination that is contained in article 5 of the UNCITRAL Model Law on Electronic Commerce. This provision means that there should be no disparity of treatment between electronic communications and paper documents, but is not intended to override any of the requirements contained in article 9 of the Convention. By stating that information "shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication", article 8, paragraph 1, merely indicates that the form in which certain information is presented or retained cannot be used as the only reason for which that information would be denied legal effectiveness, validity or enforceability. However, this provision should not be misinterpreted as establishing the absolute legal validity of any given electronic communication or of any information contained therein (see A/CN.9/546, para. 41).

130. No specific rule has been included in the Convention on the time and place of formation of contracts in cases where an offer or the acceptance of an offer is expressed by means of an electronic communications message, in order not to interfere with national law applicable to contract formation. UNCITRAL was of the view that such a provision would exceed the aim of the Convention, which is limited to providing that electronic communications would achieve the same degree of legal certainty as paper-based communications. The combination of existing rules on the formation of contracts with the provisions contained in article 10 of the Convention is designed to dispel uncertainty as to the time and place of formation of contracts in cases where the offer or the acceptance are exchanged electronically (see also paras. 171-196 below).

2. Consent to use electronic communications

131. Provisions similar to paragraph 2 of article 8 have been included in a number of national laws relating to electronic commerce to highlight the principle of party autonomy and make it clear that the legal recognition of electronic communications does not require a party to use or accept them[38] (see also A/CN.9/527, para. 108).

132. However, the consent to use electronic communications does not need to be expressly indicated or be given in any particular form. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic

[38]Ibid., para. 52.

communications, such an explicit contract should not be necessary. Indeed, such a requirement would itself be an unreasonable barrier to electronic commerce. Under the Electronic Communications Convention, the consent to use electronic communications is to be found from all circumstances, including the parties' conduct. Examples of circumstances from which it may be found that a party has agreed to conduct transactions electronically include the following: handing out a business card with a business e-mail address; inviting a potential client to visit a company's website or accessing someone's website to place an order; and advertising goods over the Internet or through e-mail.

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 51-53
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 117-122
Working Group IV, 42nd session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 44 and 45
Working Group IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras. 94-108; see also paras. 121-131 (on related draft provisions subsequently deleted)
Working Group IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 86-92; see also paras. 66-73 (on related draft provisions subsequently deleted)

Article 9. Form requirements

1. General remarks

133. Like the UNCITRAL Model Law on Electronic Commerce, on which it is based, the Electronic Communications Convention relies on what has become known as the "functional equivalence approach" with a view to determining how the purposes or functions of paper-based documents could be fulfilled through electronic-commerce techniques. For example, a paper document may serve any of the following functions: to ensure that a record would be legible by all; to ensure that a record would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts.

134. In respect of all of the above-mentioned functions of paper, electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met. However, the adoption of the functional-equivalent approach should

not result in imposing on users of electronic commerce more stringent standards of security (and the costs associated with them) than in a paper-based environment.

135. The functional-equivalent approach has been taken in article 9 of the Convention with respect to the concepts of "writing", "signature" and "original" but not with respect to other legal concepts dealt with by domestic law. For example, the Convention does not attempt to create a functional equivalent of existing storage requirements, because record storage requirements often serve administrative and regulatory objectives in connection with matters not directly related to the formation or performance of private contracts (such as taxation, monetary regulation, or customs controls). In view of the public policy considerations related to those objectives and the varying degree of technological development in different countries, it was felt that record storage should be left outside the scope of the Convention.

2. Freedom of form

136. Paragraph 1 of article 9 of the Electronic Communications Convention reflects the general principle of freedom of form, as stated in article 11 of the United Nations Sales Convention, with a view to making it clear that the reference to possible form requirements under other law does not imply that the Electronic Communications Convention itself establishes any form requirement.

137. Nevertheless, the Convention recognizes that form requirements exist and that they may limit the ability of the parties to choose their means of communication. The Convention offers criteria under which electronic communications can meet general form requirements. However, nothing in the Convention implies that the parties have an unlimited right to use the technology or medium of their choice in connection with formation or performance of any type of contract, so as not to interfere with the operation of rules of law that may require, for instance, the use of specific authentication methods in connection with particular types of contract (see A/CN.9/571, para. 119).

138. The Convention does not link the validity of an electronic communication or a contract concluded through electronic means to the use of an electronic signature, as most legal systems do not impose a general signature requirement as a condition for the validity of all types of contract (see A/CN.9/571, para. 118)

3. Notion of legal requirement

139. In certain common law countries the words "the law" would normally be interpreted as referring to common law rules, as opposed to statutory requirements, while in some civil law jurisdictions the word "the law" is typically used to refer narrowly to legislation enacted by Parliament. In the context of the Electronic Communications Convention, however, the words "the law" refer to those various sources of law and are intended to encompass not only statutory or regulatory law, including international conventions or treaties ratified by a contracting State, but also judicially created law and other procedural law.

140. However, the words "the law" do not include areas of law that have not become part of the law of a State and are sometimes referred to by expressions such as "*lex mercatoria*" or "law merchant".[39] This is a corollary of the principle of party autonomy. To the extent that trade usages and practices develop through industry standards, model contracts and guidelines, it should be left for the drafters and users of those instruments to consider when and under what circumstances electronic communications should be admitted or promoted in the context of those instruments. Parties who incorporate into their contracts standard industry terms that do not expressly contemplate electronic communications remain free to adapt the standard terms to their concrete needs.

141. Although the article does not refer to the "applicable" law, it is understood, in the light of criteria used to define the geographic field of application of the Convention, that the "law" referred to in this article is the law that applies to the dealings between the parties in accordance with the relevant rules of private international law.

4. Relationship to article 5

142. As indicated above, the principle of party autonomy does not empower the parties to displace legal form requirements by agreeing to use a standard lower than what is provided in article 9. The provisions on general form requirements in the Electronic Communications Convention are only facilitative in nature. The consequences of parties using different methods would simply be that they would not be able to meet the form requirements contemplated under article 9 (see A/CN.9/548, para. 122).

5. Written form

143. Paragraph 2 of article 9 of the Electronic Communications Convention defines the basic standard that electronic communications need to meet in order to satisfy a requirement that information be retained or presented "in writing" (or that the information be contained in a "document" or other paper-based instrument).

144. In the preparation of the Convention, UNCITRAL paid attention to the functions traditionally performed by various kinds of "writings" in a paper-based environment. National laws require the use of "writings" for various reasons, such as: *(a)* to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; *(b)* to help the parties be aware of the consequences of their entering into a contract; *(c)* to provide that a document would be legible by all; *(d)* to provide that a document would remain unaltered over time and provide a permanent record of a transaction; *(e)* to allow for the reproduction of a document so that each party would hold a copy of the same data; *(f)* to allow for the authentication of data by means of a signature; *(g)* to provide that a document would be in a form acceptable to public authorities and courts;

[39]Ibid., para. 58.

(h) to finalize the intent of the author of the "writing" and provide a record of that intent; *(i)* to allow for the easy storage of data in a tangible form; *(j)* to facilitate control and subsequent audit for accounting, tax or regulatory purposes; or *(k)* to bring legal rights and obligations into existence in those cases where a "writing" is required for validity purposes.

145. However, it would be inappropriate to adopt an overly comprehensive notion of the functions performed by a "writing". The requirement of written form is often combined with other concepts distinct from writing, such as signature and original. Thus, the requirement of a "writing" should be considered as the lowest layer in a hierarchy of form requirements, which provides distinct levels of reliability, traceability and integrity with respect to paper documents. The requirement that data be presented in written form (which can be described as a "threshold requirement") should thus not be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act". For example, under certain national laws, a written document that is neither dated nor signed, and the author of which either is not identified in the written document or is identified by a mere letterhead, would still be regarded as a "writing" although it might be of little evidential weight in the absence of other evidence (e.g. testimony) regarding its authorship. Also, the concept of writing does not necessarily denote inalterability since a "writing" in pencil might still be considered a "writing" under certain existing legal definitions. In general, notions such as "evidence" and "intent of the parties to bind themselves" are to be tied to the more general issues of reliability and authentication of the data and should not be included in the definition of a "writing".

146. The purpose of article 9, paragraph 2, is not to establish a requirement that, in all instances, electronic communications should fulfil all conceivable functions of a writing. Rather than focusing upon specific functions that a "writing" may fulfil in a particular context, article 9 focuses on the basic notion of the information being reproduced and read. That notion is expressed in article 9 in terms that were found to provide an objective criterion, namely that the information in an electronic communication must be accessible so as to be usable for subsequent reference. The use of the word "accessible" is meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained. The word "usable" is intended to cover both human use and computer processing. The notion of "subsequent reference" was preferred to notions such as "durability" or "non-alterability", which would have established too harsh standards, and to notions such as "readability" or "intelligibility", which might constitute too subjective criteria.

6. Signature requirements

147. The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures has created a need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use of such modern techniques, to which the Electronic Communications Convention generally refers with the expression "electronic

signature". The risk that diverging legislative approaches might be taken in various countries with respect to electronic signatures calls for uniform legislative provisions to establish the basic rules of what is inherently an international phenomenon, where legal harmony as well as technical interoperability are desirable objectives.

Notion and types of electronic signatures

148. In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. The potential for fraud is considerable, due to the ease of intercepting and altering information in electronic form without detection and the speed of processing multiple transactions. The purpose of various techniques currently available on the market or still under development is to offer the technical means by which some or all of the functions identified as characteristic of handwritten signatures can be performed in an electronic environment. Such techniques may be referred to broadly as "electronic signatures".

149. In considering uniform rules on electronic signatures, UNCITRAL has examined various electronic signature techniques currently being used or still under development. The common purpose of those techniques is to provide functional equivalents to *(a)* handwritten signatures; and *(b)* other kinds of authentication mechanisms used in a paper-based environment (e.g. seals or stamps). The same techniques may perform additional functions in the sphere of electronic commerce, which are derived from the functions of a signature but correspond to no strict equivalent in a paper-based environment.

150. Electronic signatures may take the form of "digital signatures" based on public-key cryptography, which are often generated within a "public-key-infrastructure" where the functions of creating and verifying the digital signature are supported by certificates issued by a trusted third party.[40] However, there are various other devices, also covered in the broad notion of "electronic signature", which may currently be used, or considered for future use, with a view to fulfilling one or more of the above-mentioned functions of handwritten signatures. For example, certain techniques would rely on authentication through a biometric device based on handwritten signatures. In such a device, the signatory would sign manually, using a special pen, either on a computer screen or on a digital pad. The handwritten signature would then be analysed by the computer and stored as a set of numerical values, which could be appended to a data message and displayed by the relying party for authentication purposes. Such an authentication system would presuppose that samples of the handwritten signature had been previously analysed and stored by the biometric device. Other techniques would involve the use of personal identification numbers (PINs), digitized versions of handwritten signatures and other methods, such as clicking an "OK box".

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[40]For a detailed description of digital signatures and their applications, see the *Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures*, paras. 31-62 (United Nations publication, Sales No. E.02.V.8).

Technological neutrality

151. Article 9, paragraph 3, is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the Electronic Communications Convention, the following functions of a signature were considered: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; and to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that is signed. For example, a signature might attest to the intent of a party to be bound by the content of a signed contract, to endorse authorship of a text, to associate itself with the content of a document written by someone else or to show when and at what time a person had been at a given place.

152. Alongside the traditional handwritten signature, there are several procedures (e.g. stamping and perforation), sometimes also referred to as "signatures", that provide varying levels of certainty. For example, some countries generally require that contracts for the sale of goods above a certain amount should be "signed" in order to be enforceable. However, the concept of signature adopted in that context is such that a stamp, perforation or even a typewritten signature or a printed letterhead might be regarded as sufficient to fulfil the signature requirement. At the other end of the spectrum, there are requirements that combine the traditional handwritten signature with additional security procedures such as the confirmation of the signature by witnesses.

153. In theory, it may seem desirable to develop functional equivalents for the various types and levels of signature requirements in existence, so that users would know exactly the degree of legal recognition that could be expected from the use of the various means of authentication. However, any attempt to develop rules on standards and procedures to be used as substitutes for specific instances of "signatures" might create the risk of tying the legal framework provided by the Convention to a given state of technical development.

154. Therefore, the Convention does not attempt to identify specific technological equivalents to particular functions of handwritten signatures. Instead, it establishes the general conditions under which electronic communications would be regarded as authenticated with sufficient credibility and would be enforceable in the face of signature requirements. Focusing on the two basic functions of a signature, paragraph 3 *(a)* of article 9 establishes the principle that, in an electronic environment, the basic legal functions of a signature are performed by way of a method that identifies the originator of an electronic communication and indicates the originator's intention in respect of the information contained in the electronic communication.

155. Given the pace of technological innovation, the Convention provides criteria for the legal recognition of electronic signatures irrespective of the technology used, for example, digital signatures relying on asymmetric cryptography; biometric

devices (enabling the identification of individuals by their physical characteristics, whether by hand or face geometry, fingerprint reading, voice recognition or retina scan, etc.); symmetric cryptography; the use of PINs; the use of "tokens" as a way of authenticating electronic communications through a smart card or other device held by the signatory; digitized versions of handwritten signatures; signature dynamics; and other methods, such as clicking an "OK box".

Extent of legal recognition

156. The provisions of article 9, paragraph 3, are only intended to remove obstacles to the use of electronic signatures and do not affect other requirements for the validity of the electronic communication to which the electronic signature relates. Under the Convention, the mere signing of an electronic communication by means of a functional equivalent of a handwritten signature is not intended, in and of itself, to confer legal validity on the electronic communication. Whether an electronic communication that fulfils the requirement of a signature has legal validity is to be settled under the law applicable outside the Convention.

157. For the purposes of paragraph 3 of article 9, it is irrelevant whether the parties are linked by prior agreement setting forth procedures for electronic communication (such as a trading partner agreement) or whether they had no prior contractual relationship regarding the use of electronic commerce. The Convention is thus intended to provide useful guidance both in a context where national laws would leave the question of authentication of electronic communications entirely to the discretion of the parties and in a context where requirements for signature, which are usually set by mandatory provisions of national law, should not be made subject to alteration by agreement of the parties.

158. The place of origin of an electronic signature, in and of itself, should in no way be a factor determining whether and to what extent foreign certificates or electronic signatures should be recognized as capable of being legally effective in a contracting State. Determination of whether, or the extent to which, an electronic signature is capable of being legally effective should not depend on the place where the electronic signature was created or where the infrastructure (legal or otherwise) that supports the electronic signature is located, but on its technical reliability.

Basic conditions for functional equivalence

159. According to paragraph 3 *(a)* of article 9, an electronic signature must be capable of identifying the signatory and indicating the signatory's intention in respect of the information contained in the electronic communication.

160. The formulation of paragraph 3 *(a)* differs slightly from the wording of article 7, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, where reference is made to an indication of the signatory's "approval" of the information contained in the electronic communication. It was noted that there might be instances where the law required a signature, but that signature did not have the function of

indicating the signing party's approval of the information contained in the electronic communication. For example, many countries have requirements of law for notarization of a document by a notary or attestation by a commissioner for oaths. In such cases, the signature of the notary or commissioner merely identifies the notary or commissioner and associates the notary or commissioner with the contents of the document, but does not indicate the approval by the notary or commissioner of the information contained in the document. Similarly, some laws require the execution of a document to be witnessed by witnesses, who may be required to append their signatures to that document. The signatures of the witnesses merely identify them and associate them with the contents of the document witnessed, but do not indicate their approval of the information contained in the document.[41] The current formulation of paragraph 3 *(a)* was agreed upon to make it abundantly clear that the notion of "signature" in the Convention does not necessarily and in all cases imply a party's approval of the entire content of the communication to which the signature is attached.[42]

Reliability of signature method

161. Paragraph 3 *(b)* of article 9 establishes a flexible approach to the level of security to be achieved by the method of identification used under paragraph 3 *(a)*. The method used under paragraph 3 *(a)* should be as reliable as is appropriate for the purpose for which the electronic communication is generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee.

162. Legal, technical and commercial factors that may be taken into account in determining whether the method used under paragraph 3 *(a)* is appropriate, include the following: *(a)* the sophistication of the equipment used by each of the parties; *(b)* the nature of their trade activity; *(c)* the frequency at which commercial transactions take place between the parties; *(d)* the kind and size of the transaction; *(e)* the function of signature requirements in a given statutory and regulatory environment; *(f)* the capability of communication systems; *(g)* compliance with authentication procedures set forth by intermediaries; *(h)* the range of authentication procedures made available by any intermediary; *(i)* compliance with trade customs and practice; *(j)* the existence of insurance coverage mechanisms against unauthorized communications; *(k)* the importance and the value of the information contained in the electronic communication; *(l)* the availability of alternative methods of identification and the cost of implementation; *(m)* the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the electronic communication was communicated; and *(n)* any other relevant factor.

163. Paragraph 3 *(b)*(i) establishes a "reliability test" with a view to ensuring the correct interpretation of the principle of functional equivalence in respect of

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[41]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 61.

[42]Ibid., paras. 63 and 64.

electronic signatures. The "reliability test", which appears also in article 7, paragraph 1 *(b),* of the UNCITRAL Model Law on Electronic Commerce, reminds courts 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, in ascertaining whether the electronic signature used was sufficient to identify the signatory. Without paragraph 3 *(b)* of article 9 of the Convention, the courts in some States might be inclined to consider, for instance, that only signature methods that employed high-level security devices are adequate to identify a party, despite an agreement of the parties to use simpler signature methods.[43]

164. However, UNCITRAL considered that the Convention should not allow a party to invoke the "reliability test" to repudiate its signature in cases where the actual identity of the party and its actual intention could be proved.[44] The requirement that an electronic signature needs to be "as reliable as appropriate" should not lead a court or trier of fact to invalidate the entire contract on the ground that the electronic signature was not appropriately reliable if there is no dispute about the identity of the person signing or the fact of signing, that is, no question as to authenticity of the electronic signature. Such a result would be particularly unfortunate, as it would allow a party to a transaction in which a signature was required to try to escape its obligations by denying that its signature (or the other party's signature) was valid—not on the ground that the purported signer did not sign, or that the document it signed had been altered, but only on the ground that the method of signature employed was not "as reliable as appropriate" in the circumstances. In order to avoid these situations, paragraph 3 *(b)*(ii) validates a signature method—regardless of its reliability in principle—whenever the method used is proven in fact to have identified the signatory and indicated the signatory's intention in respect of the information contained in the electronic communication.[45]

165. The notion of "agreement" in paragraph 3 *(b)* of article 9 is to be interpreted as covering not only bilateral or multilateral agreements concluded between parties directly exchanging electronic communications (e.g. "trading partners agreements", "communication agreements" or "interchange agreements") but also agreements involving intermediaries such as networks (e.g. "third-party service agreements"). Agreements concluded between users of electronic commerce and networks may incorporate "system rules", i.e. administrative and technical rules and procedures to be applied when communicating electronic communications.

7. Electronic originals

166. If "original" were defined as a medium on which information was fixed for the first time, it would be impossible to speak of "original" electronic communications, since the addressee of an electronic communication would always receive a

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[43]Ibid., para. 66.

[44]Ibid., para. 67.

[45]Ibid., paras. 65-67.

copy thereof. However, paragraphs 4 and 5 of article 9 of the Electronic Communications Convention should be put in a different context. The notion of "original" in paragraph 4 is useful since in practice many disputes relate to the question of originality of documents, and in electronic commerce the requirement for presentation of originals constitutes one of the main obstacles that the Convention attempts to remove. Although in some jurisdictions the concepts of "writing", "original" and "signature" may overlap, the Convention approaches them as three separate and distinct concepts.

167. Paragraphs 4 and 5 of article 9 are also useful in clarifying the notions of "writing" and "original", in particular in view of their importance for purposes of evidence. Examples of documents that might require an "original" are trade documents such as weight certificates, agricultural certificates, quality or quantity certificates, inspection reports, insurance certificates, etc. While such documents are not negotiable or used to transfer rights or title, it is essential that they be transmitted unchanged, that is in their "original" form, so that other parties in international commerce may have confidence in their contents. In a paper-based environment, these types of document are usually only accepted if they are "original" to lessen the chance that they have been altered, which would be difficult to detect in copies. Various technical means are available to certify the contents of an electronic communication to confirm its "originality". Without this functional equivalent of originality, the sale of goods using electronic commerce would be hampered since the issuers of such documents would be required to retransmit their electronic communication each and every time the goods are sold, or the parties would be forced to use paper documents to supplement the electronic commerce transaction.

168. Paragraphs 4 and 5 should be regarded as stating the minimum acceptable form requirement to be met by an electronic communication in order for it to be regarded as the functional equivalent of an original. These provisions should be regarded as mandatory, to the same extent that existing provisions regarding the use of paper-based original documents would be regarded as mandatory. The indication that the form requirements stated in paragraphs 4 and 5 are to be regarded as the "minimum acceptable" should not, however, be construed as inviting States to establish requirements stricter than those contained in the Convention by way of declarations made under article 19, paragraph 2.

169. Paragraphs 4 and 5 emphasize the importance of the integrity of the information for its originality and set out criteria to be taken into account when assessing integrity by reference to systematic recording of the information, assurance that the information was recorded without lacunae and protection of the data against alteration. It links the concept of originality to a method of authentication and puts the focus on the method of authentication to be followed in order to meet the requirement. It is based on the following elements: a simple criterion as to "integrity" of the data; a description of the elements to be taken into account in assessing the integrity; and an element of flexibility in the form of a reference to the surrounding circumstances. As regards the words "the time when it was first generated in

its final form" in paragraph 4 *(a),* it should be noted that the provision is intended to encompass the situation where information was first composed as a paper document and subsequently transferred on to a computer. In such a situation, paragraph 4 *(a)* is to be interpreted as requiring assurances that the information has remained complete and unaltered from the time when it was composed as a paper document onwards, and not only as from the time when it was translated into electronic form. However, where several drafts were created and stored before the final message was composed, paragraph 4 *(a)* should not be misinterpreted as requiring assurance as to the integrity of the drafts.

170. Paragraph 5 of article 9 sets forth the criteria for assessing integrity, taking care to except necessary additions to the first (or "original") electronic communication such as endorsements, certifications, notarizations etc. from other alterations. As long as the contents of an electronic communication remain complete and unaltered, necessary additions to that electronic communication would not affect its "originality". Thus, when an electronic certificate is added to the end of an "original" electronic communication to attest to the "originality" of that electronic communication, or when data is automatically added by computer systems at the start and the finish of an electronic communication in order to transmit it, such additions would be considered as if they were a supplemental piece of paper with an "original" piece of paper, or the envelope and stamp used to send that "original" piece of paper.

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 54-76
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 123-139
Working Group IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 120-122 (on the relationship between articles 3 and 9)
Working Group IV, 42nd session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 46-58
Working Group IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 112-121

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

1. Purpose of the article

171. When the parties deal through more traditional means, the effectiveness of the communications they exchange depends on various factors, including the time of their receipt or dispatch, as appropriate. Although some legal systems have general rules on the effectiveness of communications in a contractual context, in many legal systems general rules are derived from the specific rules that govern the

effectiveness of offer and acceptance for purposes of contract formation. The essential question before UNCITRAL was how to formulate rules on time of receipt and dispatch of electronic communications that adequately transpose to the context of the Electronic Communications Convention the existing rules for other means of communication.

172. Domestic rules on contract formation often distinguish between "instantaneous" and "non-instantaneous" communications of offer and acceptance or between communications exchanged between parties present at the same place at the same time (*inter praesentes*) or communications exchanged at a distance (*inter absentes*). Typically, unless the parties engage in "instantaneous" communication or are negotiating face-to-face, a contract will be formed when an "offer" to conclude the contract has been expressly or tacitly "accepted" by the party or parties to whom it was addressed.

173. Leaving aside the possibility of contract formation through performance or other actions implying acceptance, which usually involves a finding of facts, the controlling factor for contract formation where the communications are not "instantaneous" is the time when an acceptance of an offer becomes effective. There are currently four main theories for determining when an acceptance becomes effective under general contract law, although they are rarely applied in pure form or for all situations.

174. Pursuant to the "declaration" theory, a contract is formed when the offeree produces some external manifestation of its intent to accept the offer, even though this may not yet be known to the offeror. According to the "mailbox rule", which is traditionally applied in most common law jurisdictions, but also in some countries belonging to the civil law tradition, acceptance of an offer is effective upon dispatch by the offeree (for example, by placing a letter in a mailbox). In turn, under the "reception" theory, which has been adopted in several civil law jurisdictions, the acceptance becomes effective when it reaches the offeror. Lastly, the "information" theory requires knowledge of the acceptance for a contract to be formed. Of all these theories, the "mailbox rule" and the reception theory are the most commonly applied for business transactions.

175. In preparing article 10 of the Electronic Communications Convention, UNCITRAL recognized that contracts other than sales contracts governed by the rules on contract formation in the United Nations Sales Convention are in most cases not subject to a uniform international regime. Different legal systems use various criteria to establish when a contract is formed and UNCITRAL took the view that it should not attempt to provide a rule on the time of contract formation that might be at variance with the rules on contract formation of the law applicable to any given contract (see A/CN.9/528, para. 103; see also A/CN.9/546, paras. 119-121). Instead, the Convention offers guidance that allows for the application, in the context of electronic contracting, of the concepts traditionally used in international conventions and domestic law, such as "dispatch" and "receipt" of communications. To the extent that those traditional concepts are essential for the application of rules

on contract formation under domestic and uniform law, UNCITRAL considered that it was very important to provide functionally equivalent concepts for an electronic environment (see A/CN.9/528, para. 137).

176. However, article 10, paragraph 2, does not address the efficacy of the electronic communication that is sent or received. Whether a communication is unintelligible or unusable by a recipient is therefore a separate issue from whether that communication was sent or received. The effectiveness of an illegible communication, or whether it binds any party, are questions left to other law.

2. "Dispatch" of electronic communications

177. Paragraph 1 of article 10 of the Electronic Communications Convention follows in principle the rule set out in article 15 of the UNCITRAL Model Law on Electronic Commerce, although it provides that the time of dispatch is when the electronic communication leaves an information system under the control of the originator rather than the time when the electronic communication enters an information system outside the control of the originator.[46] The definition of "dispatch" as the time when an electronic communication left an information system under the control of the originator—as distinct from the time when it entered another information system—was chosen so as to mirror more closely the notion of "dispatch" in a non-electronic environment (see A/CN.9/571, para. 142), which is understood in most legal systems as the time when a communication leaves the originator's sphere of control. In practice, the result should be the same as under article 15, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, since the most easily accessible evidence to prove that a communication has left an information system under the control of the originator is the indication, in the relevant transmission protocol, of the time when the communication was delivered to the destination information system or to intermediary transmission systems.

178. Article 10 also covers situations where an electronic communication has not left an information system under the control of the originator. This hypothesis, which is not covered in article 15 of the UNCITRAL Model Law on Electronic Commerce, may happen, for example, when the parties exchange communications through the same information system or network, so that the electronic communication never really enters a system under the control of another party. In such cases, dispatch and receipt of the electronic communication coincide.

3. "Receipt" of electronic communications

179. 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. This is presumed to occur when the electronic communication reaches the addressee's electronic address. Paragraph 2 of article 10 is based on a similar rule in article 15, paragraph 2, of the UNCITRAL Model Law on Electronic Commerce, although with a different wording.

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[46]Ibid., para. 78.

"Capable of being retrieved"

180. Paragraph 2 of article 10 is conceived as a set of presumptions, rather than a firm rule on receipt of electronic communications. Paragraph 2 aims at achieving an equitable allocation of the risk of loss of electronic communications. It takes into account the need to offer the originator an objective default rule to establish whether a message can be seen as having been received or not. At the same time, however, paragraph 2 recognizes that concerns over security of information and communications in the business world have led to the increased use of security measures such as filters or firewalls which might prevent electronic communications from reaching their addressees. Using a notion common to many legal systems, and reflected in domestic enactments of the UNCITRAL Model Law on Electronic Commerce, this paragraph requires that an electronic communication be capable of being retrieved in order to be deemed to have been received by the addressee. This requirement is not contained in the Model Law, which focuses on timing and defers to national law on whether electronic communications need to meet other requirements (such as "processability") in order to be deemed to have been received.[47]

181. The legal effect of retrieval falls outside the scope of the Convention and is left for the applicable law. Like article 24 of the United Nations Sales Convention, paragraph 2 is not concerned with national public holidays and customary working hours, elements that would have led to problems and to legal uncertainty in an instrument that applied to international transactions (see A/CN.9/571, para. 159).

182. By the same token, the Electronic Communications Convention does not intend to overrule provisions of domestic law under which receipt of an electronic communication may occur at the time when the communication enters the sphere of the addressee, irrespective of whether the communication is intelligible or usable by the addressee. Nor is the Convention intended to run counter to trade usages, under which certain encoded messages are deemed to be received even before they are usable by, or intelligible for, the addressee. It was felt that the Convention should not create a more stringent requirement than currently existed in a paper-based environment, where a message can be considered to be received even if it is not intelligible for the addressee or not intended to be intelligible to the addressee (for example, where encrypted data is transmitted to a depository for the sole purpose of retention in the context of protection of intellectual property rights).

183. Despite the different wording used, the effect of the rules on receipt of electronic communications in the Electronic Communications Convention is consistent with article 15 of the UNCITRAL Model Law on Electronic Commerce. As is the case under article 15 of the Model Law, the Convention retains the objective test of entry of a communication into an information system to determine when an electronic communication is presumed to be "capable of being retrieved" and therefore

[47]See, on this particular point, a comparative study conducted by the Secretariat contained in document A/CN.9/WG.IV/WP.104/Add.2, paras. 10-31, available at http://www.uncitral.org/uncitral/en/commission/working_groups/4Electronic_Commerce.html.

"received". The requirement that an electronic communication should be capable of being retrieved, which is presumed to occur when the communication reaches the addressee's electronic address, should not be seen as adding an extraneous subjective element to the rule contained in article 15 of the Model Law. In fact "entry" in an information system is understood under article 15 of the Model Law as the time when an electronic communication "becomes available for processing within that information system",[48] which is arguably also the time when the communication becomes "capable of being retrieved" by the addressee.

184. Whether or not an electronic communication is indeed "capable of being retrieved" is a factual matter outside the Convention. UNCITRAL took note of the increasing use of security filters (such as "spam" filters) and other technologies restricting the receipt of unwanted or potentially harmful communications (such as communications suspected of containing computer viruses). The presumption that an electronic communication becomes capable of being retrieved by the addressee when it reaches the addressee's electronic address may be rebutted by evidence showing that the addressee had in fact no means of retrieving the communication[49] (see also A/CN.9/571, paras. 149 and 160).

"Electronic address"

185. Similar to a number of domestic laws, the Convention uses the term "electronic address", instead of "information system", which was the expression used in the Model Law. In practice, the new terminology, which appears in other international instruments such as the Uniform Customs and Practices for Documentary Credits ("UCP 500") Supplement for Electronic Presentation ("eUCP"),[50] should not lead to any substantive difference. Indeed, the term "electronic address" may, depending on the technology used, refer to a communications network, and in other instances could include an electronic mailbox, a telecopy device or another specific "portion or location in an information system that a person uses for receiving electronic messages" (see A/CN.9/571, para. 157).

186. The notion of "electronic address", like the notion of "information system", should not be confused with information service providers or telecommunications carriers that might offer intermediary services or technical support infrastructure for the exchange of electronic communications (see A/CN.9/528, para. 149).

"Designated" and "non-designated" electronic addresses

187. The Electronic Communications Convention retains the distinction made in article 15 of the Model Law between delivery of messages to specifically

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[48]See the *Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce* (United Nations publication, Sales No. E.99.V.4), para. 103.

[49]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 80.

[50]See James E. Byrne and Dan Taylor, *ICC Guide to the eUCP: Understanding the Electronic Supplement to the UCP 500*, (Paris, ICC Publishing S.A., 2002) (ICC publication No. 639), p. 54.

designated electronic addresses and delivery of messages to an address not specifically designated. In the first case, the rule of receipt is essentially the same as under article 15, paragraph (2) *(a)*(i), of the Model Law, that is, a message is received when it reaches the addressee's electronic address (or "enters" the addressee's "information system" in the terminology of the Model Law). The Convention does not contain specific provisions as to how the designation of an information system should be made, or whether the addressee could make a change after such a designation.

188. In distinguishing between designated and non-designated electronic addresses, paragraph 2 aims at establishing a fair allocation of risks and responsibilities between originator and addressee. In normal business dealings, parties who own more than one electronic address could be expected to take the care of designating a particular one for the receipt of messages of a certain nature and to refrain from disseminating electronic addresses they rarely use for business purposes. By the same token, however, parties should be expected not to address electronic communications containing information of a particular business nature (e.g. acceptance of a contract offer) to an electronic address they know or ought to know would not be used to process communications of such a nature (e.g. an e-mail address used to handle consumer complaints). It would not be reasonable to expect that the addressee, in particular large business entities, should pay the same level of attention to all the electronic addresses it owns (see A/CN.9/528, para. 145).

189. One noticeable difference between the Electronic Communications Convention and the UNCITRAL Model Law on Electronic Commerce, however, concerns the rules for receipt of electronic communications sent to a non-designated address. The Model Law distinguishes between communications sent to an information system other than the designated one and communications sent to any information system of the addressee in the absence of any particular designation. In the first case, the Model Law does not regard the message as being received until the addressee actually retrieves it. The rationale behind this rule is that if the originator chooses to ignore the addressee's instructions and sends the electronic communication to an information system other than the designated system, it would not be reasonable to consider the communication as having been delivered to the addressee until the addressee has actually retrieved it. In the second situation, however, the underlying assumption of the Model Law was that for the addressee it was irrelevant to which information system the electronic communication would be sent, in which case it would be reasonable to presume that it would accept electronic communications through any of its information systems.

190. In this particular situation, the Convention follows the approach taken in a number of domestic enactments of the Model Law and treats both situations in the same manner. Thus for all cases where the message is not delivered to a designated electronic address, receipt under the Convention only occurs when *(a)* the electronic communication becomes capable of being retrieved by the addressee (by reaching an electronic address of the addressee) and *(b)* the addressee actually becomes aware that the communication was sent to that particular address.

191. In cases where the addressee has designated an electronic address, but the communication was sent elsewhere, the rule in the Convention is not different in result from article 15, paragraph (2) *(a)*(ii), of the Model Law, which itself requires, in those cases, that the addressee retrieves the message (which in most cases would be the immediate evidence that the addressee has become aware that the electronic communication has been sent to that address).

192. The only substantive difference between the Convention and the Model Law, therefore, concerns the receipt of communications in the absence of any designation. In this particular case, UNCITRAL agreed that practical developments since the adoption of the Model Law justified a departure from the original rule. It also considered, for instance, that many persons have more than one electronic address and could not be reasonably expected to anticipate receiving legally binding communications at all addresses they maintain.[51]

Awareness of delivery

193. The addressee's awareness that the electronic communication has been sent to a particular non-designated address is a factual manner that could be proven by objective evidence, such as a record of notice given otherwise to the addressee, or a transmission protocol or other automatic delivery message stating that the electronic communication had been retrieved or displayed at the addressee's computer.

4. Place of dispatch and receipt

194. The purpose of paragraphs 3 and 4 of article 10 is to deal with the place of receipt of electronic communications. The principal reason for including these rules is to address a characteristic of electronic commerce that may not be treated adequately under existing law, namely, that very often the information system of the addressee where the electronic communication is received, or from which the electronic communication is retrieved, is located in a jurisdiction other than that in which the addressee itself is located. Thus, the rationale behind the provision is to ensure that the location of an information system is not the determinant element, and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt and that this place can be readily ascertained by the originator.

195. Paragraph 3 contains a firm rule and not merely a presumption. Consistent with its objective of avoiding a duality of regimes for online and offline transactions and taking the United Nations Sales Convention as a precedent, where the focus was on the actual place of business of the party, the phrase "deemed to be" has been chosen deliberately to avoid attaching legal significance to the use of a server in a particular jurisdiction other than the jurisdiction where the place of

[51]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 82.

business is located simply because that was the place where an electronic communication had reached the information system where the addressee's electronic address is located.[52]

196. The effect of paragraph 3 therefore is to introduce a distinction between the deemed place of receipt and the place actually reached by an electronic communication at the time of its receipt under paragraph 2. This distinction is not to be interpreted as apportioning risks between the originator and the addressee in case of damage or loss of an electronic communication between the time of its receipt under paragraph 2 and the time when it reached its place of receipt under paragraph 3. Paragraph 3 establishes a rule on location to be used where another body of law (e.g. on formation of contracts or conflict of laws) requires determination of the place of receipt of an electronic communication.

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 77-84
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 140-166
Working Group IV, 42nd session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 59-86
Working Group IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras. 132-151
Working Group IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 93-98

Article 11. Invitations to make offers

1. Purpose of the article

197. Article 11 of the Electronic Communications Convention is based on article 14, paragraph 1, of the United Nations Sales Convention. Its purpose is to clarify an issue that has raised considerable debate since the advent of the Internet, namely the extent to which parties offering goods or services through open, generally accessible communication systems, such as an Internet website, are bound by advertisements made in this way (see A/CN.9/509, para. 75).

198. In a paper-based environment, advertisements in newspapers, radio and television, catalogues, brochures, price lists or other means not addressed to one or more specific persons, but generally accessible to the public, are regarded as invitations to submit offers (according to some legal writers, even in those cases where they are directed to a specific group of customers), since in such cases the intention to be bound is considered to be lacking. By the same token, the mere display of goods in shop windows and on self-service shelves is usually regarded as an

[52]Ibid., para. 83.

invitation to submit offers. This understanding is consistent with article 14, paragraph 2, of the United Nations Sales Convention, which provides that a proposal other than a proposal addressed to one or more specific persons is to be considered as merely an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal (see A/CN.9/509, para. 76).

199. In keeping with the principle of media neutrality, UNCITRAL took the view that the solution for online transactions should not be different from the solution used for equivalent situations in a paper-based environment. UNCITRAL therefore agreed that, as a general rule, a company that advertises goods or services on the Internet or through other open networks should be considered as merely inviting those who accessed the site to make offers. Thus, an offer of goods or services through the Internet does not prima facie constitute a binding offer (see A/CN.9/509, para. 77).

2. Rationale for the rule

200. If the United Nations Sales Convention's notion of "offer" is transposed to an electronic environment, a company that advertises its goods or services on the Internet or through other open networks should be considered to be merely inviting those who access the site to make offers. Thus, an offer of goods or services through the Internet would not prima facie constitute a binding offer.

201. The difficulty that may arise in this context is how to strike a balance between a trader's possible intention (or lack thereof) of being bound by an offer, on the one hand, and the protection of relying on parties acting in good faith, on the other. The Internet makes it possible to address specific information to a virtually unlimited number of persons and current technology permits contracts to be concluded nearly instantaneously, or at least creates the impression that a contract has been so concluded.

202. In legal literature, it has been suggested that that the "invitation to treat" model might not be appropriate for uncritical transposition to an Internet environment (see A/CN.9/WG.IV/WP.104/Add.1, paras. 4-7). One possible criterion for distinguishing between a binding offer and an invitation to treat may be based on the nature of the applications used by the parties. Legal writings on electronic contracting have proposed a distinction between websites offering goods or services through interactive applications and those that use non-interactive applications. If a website only offers information about a company and its products and any contact with potential customers lies outside the electronic medium, there would be little difference from a conventional advertisement. However, an Internet website that uses interactive applications may enable negotiation and immediate conclusion of a contract (in the case of virtual goods even immediate performance). Legal writings on electronic commerce have proposed that such interactive applications might be regarded as an offer "open for acceptance while stocks last", as opposed to an "invitation to treat". This proposition is at least at first sight consistent with legal thinking for traditional transactions. Indeed, the notion of offers to the public that are

binding upon the offeror "while stocks last" is recognized also for international sales transactions.

203. In support of this approach, it has been argued that parties acting upon offers of goods or services made through the use of interactive applications might be led to assume that offers made through such systems were firm offers and that by placing an order they might be validly concluding a binding contract at that point in time. Those parties, it has been said, should be able to rely on such a reasonable assumption in view of the potentially significant economic consequences of contract frustration, in particular in connection with purchase orders for commodities or other items with highly fluctuating prices. Attaching consequence to the use of interactive applications, it was further said, might help enhance transparency in trading practices by encouraging business entities to state clearly whether or not they accepted to be bound by acceptance of offers of goods or services or whether they were only extending invitations to make offers (see A/CN.9/509, para. 81).

204. UNCITRAL considered these arguments carefully. The final consensus was that the potentially unlimited reach of the Internet called for caution in establishing the legal value of these "offers". It was found that attaching a presumption of binding intention to the use of interactive applications would be detrimental for sellers holding a limited stock of certain goods, if the seller were to be liable to fulfil all purchase orders received from a potentially unlimited number of buyers (see A/CN.9/546, para. 107). In order to avert that risk, companies offering goods or services through a website that uses interactive applications enabling negotiation and immediate processing of purchase orders for goods or services frequently indicate in their websites that they are not bound by those offers. UNCITRAL felt that, if this was already the case in practice, the Convention should not reverse it (see A/CN.9/509, para. 82; see also A/CN.9/528, para. 116).

3. Notion of interactive applications and intention to be bound in case of acceptance

205. The general principle that offers of goods or services that are accessible to an unlimited number of persons are not binding applies even when the offer is supported by an interactive application. Typically an "interactive application" is a combination of software and hardware for conveying offers of goods and services in a manner that allows for the parties to exchange information in a structured form with a view to concluding a contract automatically. The expression "interactive applications" focuses on what is apparent to the person accessing the system, namely that it is prompted to exchange information through that information system by means of immediate actions and responses having an appearance of automaticity.[53] It is irrelevant how the system functions internally and to what extent it is really automated (e.g. whether other actions, by human intervention or through the use of other equipment, might be required in order to effectively conclude a contract or process an order) (see A/CN.9/546, para. 114).

[53]Ibid., para. 87.

206. UNCITRAL recognized that in some situations it may be appropriate to regard a proposal to conclude a contract that was supported by interactive applications as evidencing the party's intent to be bound in case of acceptance. Some business models are indeed based on the rule that offers through interactive applications are binding offers. In those cases, possible concerns about the limited availability of the relevant product or service are often addressed by including disclaimers stating that the offers are for a limited quantity only and by the automatic placement of orders according to the time they were received (see A/CN.9/546, para. 112). UNCITRAL also noted that some case law seemed to support the view that offers made by so-called "click-wrap" agreements and in Internet auctions may be interpreted as binding (see A/CN.9/546, para. 109; see also A/CN.9/WG.IV/WP.104/Add.1, paras. 11-17). However, the extent to which such intent indeed exists is a matter to be assessed in the light of all the circumstances (for example, disclaimers made by the vendor or the general terms and conditions of the auction platform). As a general rule, UNCITRAL considered that it would be unwise to presume that persons using interactive applications to make offers always intended to make binding offers, because that presumption would not reflect the prevailing practice in the marketplace (see A/CN.9/546, para. 112).

207. It should be noted that a proposal to conclude a contract only constitutes an offer if a number of conditions are fulfilled. For a sales contract governed by the United Nations Sales Convention, for example, the proposal must be sufficiently definite by indicating the goods and expressly or implicitly fixing or making provision for determining the quantity and the price.[54] Article 11 of the Electronic Communications Convention is not intended to create special rules for contract formation in electronic commerce. Accordingly, a party's intention to be bound would not suffice to constitute an offer in the absence of those other elements (see A/CN.9/546, para. 111).

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 85-88
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 167-172
Working Group IV, 42nd session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 106-116
Working Group IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras. 109-120
Working Group IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 74-85

[54]United Nations Sales Convention, article 14, paragraph 1.

Article 12. Use of automated message systems for contract formation

1. Purpose of the article

208. Automated message systems, sometimes called "electronic agents", are being used increasingly in electronic commerce and have caused scholars in some legal systems to revisit traditional legal theories of contract formation to assess their adequacy to contracts that come into being without human intervention.

209. Existing uniform law conventions do not seem in any way to preclude the use of automated message systems, for example for issuing purchase orders or processing purchase applications. This seems to be the case in connection with the United Nations Sales Convention, which allows the parties to create their own rules, for example in an EDI trading partner agreement regulating the use of "electronic agents". The UNCITRAL Model Law on Electronic Commerce also lacks a specific rule on the matter. While nothing in the Model Law seems to create obstacles to the use of fully automated message systems, it does not deal specifically with those systems, except for the general rule on attribution in article 13, paragraph 2 *(b)*.

210. Even if no modification appeared to be needed in general rules of contract law, UNCITRAL considered that it would be useful for the Electronic Communications Convention to make provisions to facilitate the use of automatic message systems in electronic commerce. A number of jurisdictions have found it necessary or at least useful to enact similar provisions in domestic legislation on electronic commerce (see A/CN.9/546, paras. 124-126). Article 12 of the Convention embodies a non-discrimination rule intended to make it clear that the absence of human review of or intervention in a particular transaction does not by itself preclude contract formation. Therefore, while a number of reasons may otherwise render a contract invalid under domestic law, the sole fact that automated message systems were used for purposes of contract formation will not deprive the contract of legal effectiveness, validity or enforceability.

2. Attribution of actions performed by automated message systems

211. At present, the attribution of actions of automated message systems to a person or legal entity is based on the paradigm that an automated message system is capable of performing only within the technical structures of its preset programming. However, at least in theory it is conceivable that future generations of automated information systems may be created with the ability to act autonomously and not just automatically. That is, through developments in artificial intelligence, a computer may be able to learn through experience, modify the instructions in its own programs and even devise new instructions.

212. Already during the preparation of the Model Law on Electronic Commerce, UNCITRAL had taken the view that that, while the expression "electronic agent" had been used for purposes of convenience, the analogy between an automated

message system and a sales agent was not appropriate. General principles of agency law (for example, principles involving limitation of liability as a result of the faulty behaviour of the agent) could not be used in connection with the operation of such systems. UNCITRAL also considered that, as a general principle, the person (whether a natural person or a legal entity) on whose behalf a computer was programmed should ultimately be responsible for any message generated by the machine (see A/CN.9/484, paras. 106 and 107).

213. Article 12 of the Electronic Communications Convention is an enabling provision and should not be misinterpreted as allowing for an automated message system or a computer to be made the subject of rights and obligations. Electronic communications that are generated automatically by message systems or computers without direct human intervention should be regarded as "originating" from the legal entity on behalf of which the message system or computer is operated. Questions relevant to agency that might arise in that context are to be settled under rules outside the Convention.

3. Means of indicating assent and extent of human intervention

214. When a contract is formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, there are several ways to indicate the contracting parties' assent. Computers may exchange messages automatically according to an agreed standard, or a person may indicate assent by touching or clicking on a designated icon or place on a computer screen. Article 12 of the Electronic Communications Convention does not attempt to illustrate the ways in which assent may be expressed out of a concern to respect technological neutrality and because any illustrative list would carry the risk of being incomplete or becoming dated, as other means of indicating assent not expressly mentioned might already be in use or might possibly become widely used in the future (see A/CN.9/509, para. 89).

215. The central rule in the article is that the validity of a contract does not require human review of each of the individual actions carried out by the automated message system or the resulting contract. For the purposes of article 12 of the Convention, it is irrelevant whether all message systems involved are fully automated or merely semi-automated (for example, where some actions are only effected following some form of human intervention), as long as at least one of them does not need human "review or intervention", to complete its task (see A/CN.9/527, para. 114).

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 89-92
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 173 and 174
Working Group IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 99-103

Article 13. Availability of contract terms

1. Contract terms in electronic commerce

216. Except for purely oral transactions, most contracts negotiated through traditional means result in some tangible record of the transaction to which the parties can refer in case of doubt or dispute. In electronic contracting, such a record, which may exist as a data message, may be retained only temporarily or may be available only to the party through whose information system the contract was concluded. Thus, some recent legislation on electronic commerce requires that a person offering goods or services through information systems accessible to the public should provide means for storage or printing of the contract terms.

217. The rationale for creating such specific obligations seems to be an interest in enhancing legal certainty, transparency and predictability in international transactions concluded by electronic means. Thus, some domestic regimes require certain information to be provided or technical means to be offered in order to make available contract terms in a way that allows for their storage and reproduction, in the absence of a prior agreement between the parties, such as a trading partner agreement or other type of agreement.

218. Domestic laws contemplate a wide variety of consequences for failure to comply with requirements concerning the availability of contract terms negotiated electronically. Some legal systems provide that failure to make the contract terms available constitutes an administrative offence and subject the infringer to payment of a fine. In other jurisdictions, the law gives the customer the right to seek an order from any court having jurisdiction in relation to the contract requiring that service provider to comply with that requirement. Under yet other systems, the consequence is an extension of the period within which a consumer may avoid the contract, which does not begin to run until the time when the merchant has complied with its obligations. In most cases, these sanctions do not exclude other consequences that may be provided in law, such as sanctions under fair competition laws.

2. Non-interference with domestic requirements

219. UNCITRAL considered carefully the desirability of including provisions that required a party to make available the terms of contracts negotiated electronically. It was noted that no similar obligations existed under the United Nations Sales Convention or most international instruments dealing with commercial contracts. UNCITRAL was therefore faced with the question of whether, as a matter of principle, it should propose specific obligations for parties conducting business electronically that did not exist when they contracted through more traditional means.

220. UNCITRAL recognized that, when parties negotiated through open networks, such as the Internet, there may be a concrete risk that they would be requested to agree to certain terms and conditions displayed by a vendor, but might not have access to those terms and conditions at a later stage. This situation, which does not

only concern consumers, as it may happen in negotiations between business entities or professional traders, may be unfavourable to the party accepting the contractual terms of the other party. It was argued that this problem did not have the same magnitude in the non-electronic environment, since, except for purely oral contracts, the parties would in most cases have access to a tangible record of the terms governing their contract (see A/CN.9/546, para. 134). It was also argued that a duty to make available the terms of contracts negotiated electronically, and possibly also subsequent changes in standard contractual conditions, would encourage good business practice and would be equally beneficial for business-to-business and for business-to-consumer commerce (see A/CN.9/571, para. 178).

221. The final decision, however, was not in favour of introducing a duty to make available contract terms, as it was felt that that approach would result in imposing rules that did not exist in the context of paper-based transactions, thus departing from the policy that the Electronic Communications Convention should not create a duality of regimes governing paper-based contracts on the one hand and electronic transactions on the other (see A/CN.9/509, para. 123). It was also considered that it would not be feasible to formulate an appropriate set of possible consequences for failure to comply with a requirement to make available contract terms and that it would be pointless to establish this type of duty in the Convention if no sanction was created (see A/CN.9/571, para. 179). For example, UNCITRAL discarded the possibility of rendering commercial contracts invalid for failure to comply with a duty to make contract terms available, because of the unprecedented nature of that solution, as other texts, such as the United Nations Sales Convention, had not dealt with the validity of contracts. On the other hand, providing for other types of sanction, such as tort liability or administrative sanctions, was felt to be outside the scope of a uniform instrument on commercial law (see A/CN.9/571, para. 177).

222. Article 13 of the Convention was retained as a reminder for parties that the facilitative rules on the Convention did not relieve them from any obligation they may have to comply with domestic legal requirements that may impose a duty to make contract terms available, for instance, pursuant to regulatory regimes governing the provision of online services, especially under consumer protection regulations (see A/CN.9/509, para. 63).

3. Nature of legal requirements on availability of contract terms

223. 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.[55]

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[55]See *Official Records of the General Assembly, Sixtieth Session*, *Supplement No. 17* (A/60/17), para. 94.

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 93 and 94
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 175-181
Working Group IV, 42nd session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 130-135
Working Group IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 122-125

Article 14. Error in electronic communications

1. Electronic commerce and errors

224. The question of mistakes and errors is closely related to the use of automated message systems in electronic commerce. Such errors may be either the result of human actions (for example, typing errors) or the consequence of malfunctioning of the message system used.

225. Recent legislation on electronic commerce, including some domestic enactments of the UNCITRAL Model Law, contain provisions dealing with errors made by natural persons when dealing with an automated computer system of another person, typically by setting out the conditions under which a natural person is not bound by a contract in the event that the person made an error in an electronic communication. The rationale for these provisions seems to be the relatively higher risk that an error made in transactions involving a natural person, on the one hand, and an automated computer system, on the other, might not be noticed, as compared with transactions that involve only natural persons. Errors made by the natural person in such a situation may become irreversible once acceptance is dispatched. Indeed, in a transaction between individuals there is a greater ability to correct the error before parties have acted on it. However, when an individual makes an error while dealing with the automated message system of the other party, it may not be possible to correct the error before the other party has shipped or taken other action in reliance on the erroneous communication.

226. UNCITRAL considered carefully the desirability of dealing with errors in the Electronic Communications Convention. It was noted that the UNCITRAL Model Law on Electronic Commerce, which was not concerned with substantive issues that arose in contract formation, did not deal with the consequences of mistake and error in electronic contracting. Furthermore, article 4, subparagraph *(a),* of the United Nations Sales Convention expressly provided that matters related to the validity of a sales contract were excluded from its scope, although other international texts, such as the Principles of International Commercial Contracts of the International Institute for the Unification of Private Law (Unidroit), dealt with the consequences of errors for the validity of the contract, albeit restrictively.[56]

[56]Unidroit Principles of International Commercial Contracts, arts. 3.5 and 3.6.

227. UNCITRAL was mindful of the need to avoid undue interference with well-established notions of contract law and to avoid creating specific rules for electronic transactions that might vary from rules that applied to other modes of negotiation. Nevertheless, it felt that there was a need for a specific provision dealing with narrowly defined types of error in the light of the relatively higher risk of human errors being made in online transactions made through automated message systems than in more traditional modes of contract negotiation (see A/CN.9/509, para. 105). The contract law of some legal systems further confirms the need for the article, for example in view of rules that require a party seeking to avoid the consequences of an error to show that the other party knew or ought to have known that a mistake had been made. While there are means of making such proof if there is an individual at each end of the transaction, awareness of the mistake is almost impossible to demonstrate when there is an automated process at the other end (see A/CN.9/548, para. 18).

2. Scope and purpose of the article

228. Article 14 of the Electronic Communications Convention applies to a very specific situation. It is only concerned with errors that occur in transmissions between a natural person and an automated message system when the system does not provide the person with the possibility to correct the error. The conditions for withdrawal or avoidance of electronic communications affected by errors that occur in any other context are left for domestic law.[57]

229. The article deals only with errors made by a natural person, as opposed to a computer or other machine. However, the right to withdraw the portion of the electronic communication is not a right of the natural person but of the party on whose behalf the person was acting (see A/CN.9/548, para. 22).

230. Generally, errors made by any automated system should ultimately be attributable to the persons on whose behalf the system is operated. However, already during the preparation of the UNCITRAL Model Law on Electronic Commerce, it was argued that some circumstances might call for a mitigation of that principle, such as when an automated system generated erroneous messages in a manner that could not have reasonably been anticipated by the person on whose behalf the messages were sent. In practice, the extent to which the party on whose behalf an automated message system is operated is responsible for all its actions may depend on various factors such as the extent to which the party has control over the software or other technical aspects used in programming the system (see A/CN.9/484, para. 108). Given the complexity of those questions, in respect of which domestic law may give varying answers depending on the factual situation, it was felt that it would not be appropriate to attempt to formulate uniform rules at the current stage and that jurisprudence should be allowed to evolve.

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[57]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 96.

3. "Opportunity to correct errors"

231. Article 14 authorizes a party who makes an error to withdraw the portion of the electronic communication where the error was made if the automated message system did not provide the person with an opportunity to correct errors. The article does oblige the party on whose behalf the automated message system operates to make available procedures for detecting and correcting errors in electronic contract negotiation.

232. UNCITRAL considered the desirability of introducing such a general obligation, as an alternative for dealing with the rights of the parties after an error had occurred. Such an obligation exists in some domestic systems, but the consequences for a party's failure to provide procedures for detecting and correcting errors in electronic contract negotiation vary greatly from country to country. In some jurisdictions, such failure constitutes an administrative offence and subjects the infringer to payment of a fine. In other countries, the consequence is either to entitle a customer to rescind the contract or to extend the period within which a consumer may unilaterally cancel an order. The type of consequence provided in each case depends on the type of regulatory approach taken to electronic commerce. During the preparation of the Electronic Communications Convention it was felt that, however desirable such an obligation might be in the interest of promoting good business practices, the Convention would not be an appropriate place for it, since the Convention could not provide a complete system of sanctions appropriate for all circumstances (see A/CN.9/509, para. 108). The agreement eventually reached on this point was that, instead of requiring generally that an opportunity to correct errors should be provided, the Convention should limit itself to providing a remedy for the person making the error (see A/CN.9/548, para. 19).

233. Article 14 of the Electronic Communications Convention deals with the allocation of risks concerning errors in electronic communications in a fair and sensible manner. An electronic communication can only be withdrawn if the automated message system did not provide the originator with an opportunity to correct the error before sending the electronic communication. If no such system is in place, the party on whose behalf the automated message system operates bears the risk of errors that may occur. Thus, the article gives an incentive to parties acting through automated message systems to build in safeguards that enable their contract partners to prevent the sending of an erroneous communication, or correct the error once sent. For example, the automated message system may be programmed to provide a "confirmation screen" to the person setting forth all the information the individual initially approved. This would provide the person with the ability to prevent the erroneous communication from ever being sent. Similarly, the automated message system might receive the communication sent by the person and then send back a confirmation which the person must again accept before the transaction is completed. This would allow for correction of an erroneous communication. In either case, the automated message system would "provide an opportunity to correct the error," and the article would not apply. Rather, other law would govern the effect of any error.

4. Notion and proof of "input error"

234. Article 14 of the Electronic Communications Convention is only concerned with "input" errors, that is, errors relating to inputting wrong data in communications exchanged with an automated message system. These are typically unintentional keystroke errors, which are felt to be potentially more frequent in transactions made through automated information systems than in more traditional modes of contract negotiation. For example, while it would be unlikely for a person to deliver documents unintentionally to a post office, in practice there were precedents where persons had claimed not to have intended to confirm a contract by hitting "Enter" on a computer keyboard or clicking on an "I agree" icon on a computer screen.

235. The article is not intended to be media-neutral, since it deals with a specific issue affecting certain forms of electronic communications. In doing so, article 14 does not overrule existing law on error, but merely offers a meaningful addition to it by focusing on the importance of providing means of having the error corrected (see A/CN.9/548, para. 17). Other types of error are left for the general doctrine of error under domestic law (see A/CN.9/571, para. 190).

236. As is already the case in a paper-based environment, the factual determination as to whether or not an input error has indeed occurred is a matter that needs to be assessed by the courts in the light of the entire evidence and relevant circumstances, including the overall credibility of a party's assertions (see A/CN.9/571, para. 186). The right to withdraw an electronic communication is an exceptional remedy to protect a party in error and not a blank opportunity for parties to repudiate disadvantageous transactions or nullify what would otherwise be valid legal commitments freely accepted. This right is justified by the consideration that a reasonable person in the position of the originator would not have issued the electronic communication, had that person been aware of the error at that time. However, article 14 does not require a determination of the intent of the party who sent the allegedly erroneous message. If the operator of the automated message system fails to offer means for correcting errors despite the clear incentive to do so in article 14, it is reasonable to make such party bear the risk of errors being made in electronic communications exchanged through the automated message system. Limiting the right of the party in error to withdraw the messages would not further the intended goal of the provision to encourage parties to provide for an error-correction method in automated message systems.[58]

5. "Withdraw"

237. Article 14 does not invalidate an electronic communication in which an input error is made. It only gives the person in error the right to "withdraw" the portion of the electronic communication in which the error was made. The term "withdraw" was deliberately used instead of other alternatives, such as "avoiding the

[58]Ibid., para. 97.

consequences" of the electronic communication or similar expressions that might be interpreted as referring to the validity of an act and lead to discussions as to whether the act was null and void or avoidable at the party's request.

238. Furthermore, article 14 does not provide for a right to "correct" the error made. During the preparation of the Convention it was argued that the remedy should be limited to the correction of an input error, so as to reduce the risk that a party would allege an error as an excuse to withdraw from an unfavourable contract. Another proposal was that the person who has made an input error should have a choice to "correct or withdraw" the electronic communication in which the error was made. This possibility, it was argued, would cover both situations where correction was the appropriate remedy for the error (such as typing the wrong quantity in an order) and situations where withdrawal would be a better remedy (such as when a person has unintentionally hit a wrong key or an "I agree" button and sent a message he or she did not intend to send) (see A/CN.9/571, para. 193).

239. After extensive consideration of those options, UNCITRAL agreed that the person who has made an error should only have the right to withdraw the portion of the electronic communication in which the error was made. In most legal systems, the typical consequence of an error is 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. While withdrawal may in most cases equate to nullification of a communication, correction would require the possibility to modify the previous communication. UNCITRAL was not willing to create a general right to "correct" erroneous communications, as this would have introduced additional costs for system providers and would leave given remedies with no parallel in the paper world, a result which UNCITRAL had previously agreed to avoid. A right to correct electronic communications would also cause practical difficulties, as operators of automated message systems may more readily provide an opportunity to nullify a communication already recorded than an opportunity to correct errors after a transaction has been concluded. Furthermore, a right to correct errors would have entailed that an offeror who has received an electronic communication later alleged to contain errors must keep its original offer open since the other party would have effectively replaced the withdrawn communication.[59]

6. The "portion of the electronic communication in which the input error was made"

240. The right to withdraw relates only to the part of the electronic communication where the error was made, if the information system so allows. This has the dual scope of granting to parties the possibility to redress errors in electronic communications, when no means of correcting errors are 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 (see A/CN.9/571, para. 195).

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[59]Ibid., para. 98.

241. Article 14 does not expressly establish the consequences of the withdrawal of the portion of an electronic communication in which an error was made. It is understood that, depending on the circumstances, the withdrawal of a portion of an electronic communication may invalidate the entire communication or render it ineffective for purposes of contract formation.[60] For example, if the portion withdrawn contains the reference to the nature of the goods being ordered, the electronic communication would not be "sufficiently definite" for purposes of contract formation under article 14, paragraph 1, of the United Nations Sales Convention. The same conclusion should apply if the portion withdrawn concerns price or quantity of goods and there are no other elements left in the electronic communication according to which they could be determined. However, withdrawal of a portion of the electronic communication that concerns matters that are not, by themselves or pursuant to the intent of the parties, essential elements of the contract, may not necessarily devoid the entire electronic communication of its effectiveness.

7. Conditions for withdrawing an electronic communication

242. Paragraphs 1 *(a)* and *(b)* of article 14 establish two conditions for a party to exercise the right to withdraw: to notify the other party as soon as possible, and not to have used or received any material benefit or value from the goods or services, if any, received from the other party.

243. UNCITRAL considered extensively whether the right to withdraw the electronic communication should be limited in any way, in particular as the conditions contemplated in article 14 may differ from the consequences of avoidance of contracts under some legal systems (see A/CN.9/548, para. 23). It was, however, felt that the conditions set forth in paragraphs 1 *(a)* and 1 *(b)* 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. UNCITRAL considered that in those cases paragraphs 1 *(a)* and 1 *(b)* 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 (see A/CN.9/571, para. 203).

(a) Notice of error and time limit for withdrawing an electronic communication

244. Paragraph 1 *(a)* of article 14 requires the natural person or the party on whose behalf the person was acting to take prompt action to advise the other party of the error and of the fact that the individual did not intend to approve the electronic communication. Whether the action is prompt must be determined from all the circumstances including the person's ability to contact the other party. The natural person or the party on whose behalf the person was acting should advise the other party both of the error and of the lack of intention to be bound (i.e. avoidance) by

[60]Ibid., para. 100.

the portion of the electronic communication in which the error occurred. However, the party receiving the message should be able to rely on the message, despite the error, up to the point of receiving a notice of error (see A/CN.9/548, para. 24).

245. In some domestic systems that require the operator of automated message systems used for contract formation to provide an opportunity to correct errors, the right to withdraw or avoid a communication must be exercised at the moment of reviewing the communication before dispatch. Under those systems, the party who makes an error cannot withdraw the communication after it has been confirmed. Article 14 does not limit the right to withdrawal in this way, since in practice, a party may only become aware that it has made an error at a later stage, for instance, when it receives goods of a type or in a quantity different from what it had originally intended to order (see A/CN.9/571, para. 191).

246. Furthermore, article 14 does not deal with the time limit for exercising the right of withdrawal in case of input error, as time limits are a matter of public policy in many legal systems. Nevertheless, the parties are not exposed to indefinite withdrawal. The combined impact of paragraphs 1 *(a)* and *(b)* of article 14 limits the time within which an electronic communication could be withdrawn, since withdrawal has to occur "as soon as possible", but in any event not later than the time when the party has used or received any material benefit or value from the goods or services received from the other party.[61]

(b) Loss of right to withdraw an electronic communication

247. It should be noted that goods or services may have been provided on the basis of an allegedly erroneous communication before receipt of the notice required by paragraph 1 *(a)* of article 14. Paragraph 1 *(b)* avoids unjustified windfalls to the natural person or the party on whose behalf that person was acting by erecting stringent requirements before the party in error may exercise the right of withdrawal under the paragraph. Under this provision, a party loses the right to withdrawal when it has received material benefits or value from the vitiated communication.[62]

248. UNCITRAL recognized that such a limitation in the right to invoke an error in order to avoid the consequences of a legally relevant act may not exist in all legal systems under general contract law. The risk of illegitimate windfalls for a person who successfully avoids a contract is usually dealt with by legal theories such as restitution or unjust enrichment. Nevertheless, it was felt that the particular context of electronic commerce justified establishing a particular rule to avoid that risk.

249. Various transactions in electronic commerce may be concluded nearly instantaneously and generate immediate value or benefit for the party purchasing the relevant goods or services. In many cases, it may be impossible to restore the conditions

[61]Ibid., para. 103.

[62]Ibid., para. 102.

as they existed prior to the transaction. For example, if the consideration received is information in electronic form, it may not be possible to avoid the benefit conferred. While the medium containing the information could be returned, mere access to the information, or the ability to redistribute the information, would constitute a benefit that could not be returned. It may also occur that the mistaken party receives consideration that changes in value between the time of receipt and the first opportunity to return. In such a case restitution cannot be made adequately. In all these cases it would not be equitable to allow that, by withdrawing the portion of the electronic communication in which an error was made, a party could avoid the entire transaction while effectively retaining the benefit gained from it. This limitation is further important in view of the large number of electronic transactions involving intermediaries that may be harmed because transactions cannot be unwound.

8. Relationship to general law on mistake

250. The underlying purpose of article 14 is to provide a specific remedy in respect of input errors that occur under particular circumstances and not to interfere with the general doctrine on error under domestic laws.[63] If the conditions set forth in paragraph 1 of article 14 are not met (that is, if the error is not an "input" error made by a natural person, or if the automated message system did in fact provide the person with an opportunity to correct the error), the consequences of the error would be as provided for by other laws, including the law on error, and by any agreement between the parties (see A/CN.9/548, para. 20).

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 95-103
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 182-206
Working Group IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 14-26
Working Group IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 99 and 104-111

CHAPTER IV. FINAL PROVISIONS

Article 15. Depositary

251. Articles 15 to 25 form part of the final provisions of the Electronic Communications Convention. Most of them are customary provisions in multilateral treaties and are not intended to create rights and obligations for private parties. However, as these provisions regulate the extent to which a contracting State is

[63]Ibid., para. 104.

bound by the Convention, including the time the Convention or any declaration submitted thereunder enter into force, they may affect the ability of the parties to rely on the provisions of the Convention.

252. Article 15 designates the Secretary-General of the United Nations as depositary of the Convention. The depositary is entrusted with the custody of the authentic texts of the Convention and of any full powers delivered to the depositary and performs a number of administrative services in connection therewith, such as preparing certified copies of the original text; receiving signatures to the Convention and receiving and keeping custody of any instruments, notifications and communications relating to it; and informing the contracting States and the States entitled to become contracting States of acts, notifications and communications relating to the Convention.

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 106 and 107
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 16. Signature, ratification, acceptance or approval

1. The "all States" formula

253. According to a formula frequently used in multilateral treaties in order to promote the widest possible participation, article 16 declares the Electronic Communications Convention open for signature by "all States".

254. It should be noted, however, that the Secretary-General, as depositary, has stated on a number of occasions that it would fall outside his competence to determine whether a territory or other such entity would fall within the "all States" formula. Pursuant to a general understanding adopted by the General Assembly on 14 December 1973, in discharging his functions as a depositary of a convention with the "all States" clause, the Secretary-General will follow the practice of the General Assembly and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession.[64]

2. Consent to be bound by ratification, acceptance, approval or accession

255. While some treaties provide that States may express their consent to be legally bound by signature alone, the Electronic Communications Convention, like

[64]See *United Nations Juridical Yearbook, 1973* (United Nations publication, Sales No. E.75.V.1), part two, chap. IV, sect. A.3 (p. 79, note 9), and ibid., *1974* (United Nations publication, Sales No. E.76.V.1), part two, chap. VI, sect. A.9 (pp. 157-159).

most modern multilateral treaties, provides that it is subject to ratification, acceptance or approval by the signatory States. Providing for signature subject to ratification, acceptance or approval allows States time to seek approval for the Convention at the domestic level and to enact any legislation necessary to implement the Convention internally, prior to undertaking the legal obligations from the Convention at the international level. Upon ratification, the Convention legally binds the States.

256. Acceptance or approval of a treaty following signature has the same legal effect as ratification, and the same rules apply. Accession has the same legal effect as ratification, acceptance or approval. However, unlike ratification, acceptance or approval, which must be preceded by signature, accession requires only the deposit of an instrument of accession. Accession as a means of becoming party to a treaty is generally used by States wishing to express their consent to be bound by a treaty if, for whatever reason, they are unable to sign it. This may occur if the deadline for signature has passed or if domestic circumstances prevent a State from signing a treaty.

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 108-110
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 17. Participation by regional economic integration organizations

1. Notion of "regional economic integration organization"

257. In addition to "States", the Electronic Communications Convention allows participation by international organizations of a particular type, namely "regional economic integration organizations". In introducing this article, which had not appeared in its previous texts, UNCITRAL acknowledged the growing importance of regional economic integration organizations, which are already allowed to participate in several trade-related treaties, including recent international conventions in the field of international commercial law, such as the Unidroit Convention on International Interests in Mobile Equipment (Cape Town, 2001)[65] (the "Cape Town Convention").

258. The Electronic Communications Convention does not contain a definition of "regional economic integration organizations". Nevertheless, it could be said that the notion of "regional economic integration organizations" used in article 17 encompasses two key elements: the grouping of States in a certain region for the realization of common purposes, and the transfer of competencies relating to those

[65]Available at http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.

common purposes from the members of the regional economic integration organization to the organization.

259. Although the notion of "regional economic integration organization" is a flexible one, participation in the Convention is not open to international organizations at large. It was noted that, at the current stage, most international organizations did not have the power to enact legally binding rules having a direct effect on private contracts, since that function typically required the exercise of certain attributes of State sovereignty that only few organizations, typically regional economic integration organizations, had received from their member States.[66]

2. *Extent of competence of the regional economic integration organization*

260. The Electronic Communications Convention is not concerned with the internal procedures leading to signature, acceptance, approval or accession by a regional economic integration organization. The Convention itself does not require a separate act of authorization by the member States of the organization and does not answer, in one way or the other, the question as to whether a regional economic integration organization has the right to ratify the convention if none of its member States decides to do so. For the Convention, the extent of treaty powers given to a regional economic integration organization is an internal matter concerning the relations between the organization and its own member States. Article 17 does not prescribe the manner in which regional economic integration organizations and their member States divide competences and powers among themselves.[67]

261. Notwithstanding its neutral approach in respect of the internal affairs of a regional economic integration organization, the Convention only allows ratification by an organization that "has competence over certain matters governed by this Convention", as clearly stated in paragraph 1 of article 17. This competence needs further to be demonstrated by a declaration made to the depositary pursuant to paragraph 2 of the article, specifying the matters governed by the Convention in respect of which competence has been transferred to that organization by its member States. Article 17 does not provide a basis for ratification if the regional economic integration organization has no competence on the subject matter covered by the Convention.[68]

262. However, the regional economic integration organization does not need to have competence over all the matters covered by the Convention, which admits that such competence may be partial or concurrent. Regional economic integration organizations typically derive their powers from their member States. By their very nature, as international organizations, regional economic integration organizations have

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[66]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 113.

[67]Ibid., para. 114.

[68]Ibid., para. 116.

competences in the areas that have been expressly or implicitly transferred to their sphere of activities. Several provisions of the Convention, in particular those in chapter IV, imply the exercise of full State sovereignty and the Convention is not in its entirety capable of being applied by a regional economic integration organization. Furthermore, the legislative authority over the substantive matters dealt with by the Convention may be shared to some extent between the organization and its member States.[69]

3. Coordination between regional economic integration organizations and their member States

263. By acceding to the Electronic Communications Convention, a regional economic integration organization becomes a contracting party in its own right and has, therefore, the right to submit declarations excluding or including matters in the scope of application of the Convention pursuant to articles 19 and 20. The Convention itself does not set forth mechanisms to ensure the consistency between declarations made by a regional economic integration organization and those made by its member States.

264. Possible inconsistencies between declarations submitted by a regional economic integration organization and declarations submitted by its member States would create considerable uncertainty in the application of the Convention and deprive private parties of the ability to easily ascertain beforehand to which matters the Convention applied in respect of which States. They would therefore be highly undesirable.[70]

265. In practice, however, it is expected that conflicting declarations by a regional economic integration organization and its member States would be unlikely. Indeed, paragraph 2 of article 17 already imposes a high standard of coordination by requiring the regional economic integration organization to declare the specific matters for which it has competence. Under normal circumstances, careful consultations would take place, as a result of which, if declarations under article 19 or 20 were found to be necessary, there would be a set of common declarations for the matters in respect of which the regional economic integration organization was competent, which would be mandatory for all member States of the organization. Differing declarations from member States would thus be limited to matters in which no exclusive competence had been transferred from member States to the regional economic integration organization, or matters particular to the State making a declaration, as might be the case, for example, of declarations under article 20, paragraphs 2 to 4, since member States of regional economic integration organizations may not necessarily be contracting States to the same international conventions or treaties.[71]

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[69]Ibid., para. 116.

[70]Ibid., para. 115.

[71]Ibid., para. 117.

266. In any event, there is an obvious need for ensuring consistency between declarations made by regional economic integration organizations and declarations made by their member States. Private parties in third countries should be able to ascertain without inordinate effort when the member States and when the organization have the power to make a particular declaration.[72] There was a strong consensus within UNCITRAL that contracting States to the Convention would be entitled to expect that a regional economic integration organization that had ratified the Convention, and its own member States, would take the necessary steps to avoid conflicts in the manner in which they applied the Convention.[73]

4. Relationship between the Convention and rules enacted by regional economic integration organizations

267. Paragraph 4 of article 17 regulates the relationship between the Electronic Communications Convention and rules enacted by a regional economic integration organization. It provides that the provisions of the Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in member States of any such organization, as set out by a declaration made in accordance with article 21.

268. The purpose of this exception is to avoid interference with rules enacted by a regional economic integration organization to harmonize private commercial law within the territory of the organization with a view to facilitating the establishment of an internal market among its member States. In giving priority to conflicting rules of a regional economic integration organization, UNCITRAL recognized that measures to promote legal harmonization among member States of a regional economic integration organization might create a situation that was in many respects analogous to the situation in countries where sub-sovereign jurisdictions, such as states or provinces, had legislative authority over private law matters. It was felt that for matters subject to regional legal harmonization, the entire territory covered by a regional economic integration organization deserved to be treated in a similar way as a single domestic legal system.[74]

269. While paragraph 4 of article 17 sets forth a rule that has not appeared in this form in previous instruments prepared by UNCITRAL, the principle of deference to particular regional regimes embodied in this provision is not entirely new. Article 94 of the United Nations Sales Convention, for example, acknowledges the right of States with similar laws in respect of matters covered by that Convention to declare that their domestic laws take precedence over the provisions of the United Nations Sales Convention in respect of contracts concluded between parties located in their territories.

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[72]Ibid., para. 115.

[73]Ibid., para. 118.

[74]Ibid., para. 119.

270. In view of the fact that legal harmonization promoted by a regional economic integration organization may not necessarily cover the entire range of issues dealt with by the Electronic Communications Convention, the exception in paragraph 4 of article 17 does not operate automatically. The priority status of regional rules needs therefore to be set out in a declaration submitted under article 21. The declaration contemplated in paragraph 4 would be submitted by the regional economic integration organization itself, and is distinct from, and without prejudice to, declarations by States under article 19, paragraph 2. If no such organization adheres to the Convention, their member States who wish to do so would still have the right to include, among the other declarations that they may wish to make, a declaration of the type contemplated in paragraph 4 of article 17 in view of the broad scope of article 19, paragraph 2. It was understood that if a State did not make such a declaration, paragraph 4 would not automatically apply.[75]

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 111-123
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 18. Effect in domestic territorial units

1. The "federal clause"

271. Article 18 permits a contracting State, at the time of signature, ratification, acceptance, approval or accession, to declare that the Electronic Communications Convention is to extend to all its territorial units or only to one or more of them and to amend its declaration by submitting another declaration at any time. This provision, often called "the federal clause", is of interest to relatively few States—federal systems where the central Government lacks treaty power to establish uniform law for the subject matter covered by the Convention. Article 18 addresses this problem by providing that a State may declare that the Convention will apply "only to one or more" of its territorial units—an option that permits a State to adopt the Convention with its applicability limited to those units (e.g. provinces) which have enacted legislation to implement the Convention.

272. The effect of the provision is therefore on the one hand to permit federal States to apply the Convention progressively to their territorial units and on the other to permit those States that wish to do so to extend its application to all their territorial units from the very outset. Paragraph 2 of article 18 provides for the declarations to be notified to the depositary and to state expressly the territorial units to which the Convention extends. If no declaration is submitted, the Convention will extend to all territorial units of that State in accordance with paragraph 4.

[75]Ibid., para. 122.

273. It should be noted however that a State that has two or more territorial units is only entitled to make the declaration under article 18 if different systems of law apply in those units in relation to the matters dealt with in the Convention. Unlike earlier texts in which this clause had appeared, article 18, paragraph 1, does not make reference to the contracting State's constitution as the basis of the existence of different systems of law in the State concerned. This slight modification, which follows recent practice in other international uniform law instruments,[76] should not alter the way the "federal clause" operates.

2. *Operation in practice*

274. Paragraph 3 of article 18 makes it clear that, for the purposes of the Electronic Communications Convention, a place of business is not considered to be located in a contracting State when that place of business is located in a territorial unit of a contracting State to which unit that State has not extended the Convention. The consequences of paragraph 3 will depend on whether or not the contracting State whose laws apply to an exchange of electronic communications has made a declaration pursuant to article 19, paragraph 1 *(a)*. If such a declaration exists, the Convention would not apply. However, if the applicable law is the law of a contracting State that has not made this declaration, the Convention would nevertheless apply, as article 1, paragraph 1, does not require that both parties be located in contracting States (see above, paras. 60-64).

275. The wording in the negative, completed by the proviso "unless [the place of business] is in a territorial unit to which the Convention extends" was chosen so as to avoid creating the misleading impression that the Convention might apply to a contract concluded between parties with places of business in different territorial units of the same contracting State to which the Convention had been extended by that State.

276. Article 18 should be read in conjunction with article 6, paragraph 2. Thus, for example, if a large company has places of business in more than one territorial unit of a federal State, not all of which are located in territorial units to which the Convention extends, the decisive factor, in the absence of an indication of a place of business, is the place of business that has the closest relationship to the contract to which the electronic communications relate.

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 124 and 125
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

[76]Ibid., para. 125.

Article 19. Declarations on the scope of application

1. Nature of declarations

277. The possibility for contracting States to make declarations aimed at adjusting the scope of application of a particular convention is not uncommon in private international law and commercial law conventions. In this area of treaty practice, they are not regarded as reservations—which the Convention does not permit—and do not have the same consequences as reservations under public international law (see also paras. 311-317 below).

2. Declarations on the geographic scope of application of the Convention

278. As noted above, pursuant to article 1, paragraph 1, the Electronic Communications Convention applies whenever the parties exchanging electronic communications have their places of business in different States, even if those States are not contracting States to the Convention, as long as the law of a contracting State is the applicable law. Article 19, paragraph 1 *(a),* allows contracting States to declare, however, that notwithstanding article 1, paragraph 1, they will apply the Convention only when both States where the parties have their places of business are contracting States to the Convention. This type of declaration will have the following practical consequences:

(a) Forum State is a contracting State that has made a declaration under article 19, paragraph 1 (a). The Convention will have "autonomous" application and will therefore apply to the exchange of electronic communications between parties located in different contracting States regardless of whether the rules of private international law of the forum State lead to the application of the laws of that State or of another State;

(b) Forum State is a contracting State that has not made a declaration under article 19, paragraph 1 (a). The applicability of the Convention will depend on three factors: *(a)* whether the rules of private international law point to the law of the forum State, of another contracting State or of a non-contracting State; *(b)* whether the State the law of which is made applicable under the rules of private international law of the forum State has made a declaration pursuant to article 19, paragraph 1 *(a);* and, if so, *(c)* whether or not both parties have their places of business in different contracting States. Accordingly, if the applicable law is the law of a contracting State that has made a declaration under paragraph 1 *(a),* the Convention applies only if both parties have their places of business in different contracting States. If the applicable law is the law of the forum State or of another contracting State that has not made this declaration, the Convention applies even if the parties do not have their places of business in different contracting States. If the applicable law is the law of a non-contracting State, the Convention does not apply;

(c) Forum State is a non-contracting State. The Convention will apply, mutatis mutandis, under the same conditions as described in paragraph 278 *(b)* above.

279. The possibility for contracting States to make this declaration has been introduced so as to facilitate accession to the Convention by States that prefer the enhanced legal certainty offered by an autonomous scope of application, which allows the parties to know beforehand, and independently from rules of private international law, when the Convention applies.

3. Limitation based on the choice of the parties

280. Paragraph 1 *(b)* of article 19 contemplates a possible limitation in the scope of application of the Convention. Under this provision, a State may declare that it will apply the Convention only when the parties to a contract have agreed that the Convention applies to the electronic communications exchanged by them. When introducing this possibility, UNCITRAL was aware that a declaration of this type would, in practice, considerably reduce the applicability of the Convention and deprive a State making the declaration of default uniform rules for the use of electronic communications between parties to an international contract that had not agreed on detailed contract rules for the matters covered by the Convention.

281. Another argument against permitting this type of declaration was that it might give rise to some uncertainty on the application of the Convention in non-party States whose rules of private international law directed the courts to the application of the laws of a contracting State that had made such a declaration.[77] Some legal systems would accept agreements to subject a contract to the laws of a contracting State, but would not recognize the right of the parties to incorporate the terms of the Convention as such into their contract on the grounds that an international convention on private law matters would only have legal effect for private parties to the extent that the convention in question has been given effect domestically. Thus, choice-of-law clauses referring to an international convention would usually be enforced in those countries as incorporation of foreign law, but not as enforcement of the international convention as such (see A/CN.9/548, para. 95).

282. The countervailing view was that many legal systems would not create obstacles to the enforcement of a clause choosing an international convention as applicable law. Furthermore, disputes involving international contracts are not solved exclusively by State courts, and arbitration is a widespread practice in international trade. Arbitral tribunals are often not specifically linked to any particular geographic location and often rule on the disputes submitted to them on the basis of the law chosen by the parties. In practice, choice-of-law clauses do not always refer to the laws of particular States, as parties often choose to subject their contracts to international conventions independently from the laws of any given jurisdiction (see A/CN.9/548, para. 96).

283. UNCITRAL agreed to retain the possibility for States to submit a declaration pursuant to paragraph 1 *(b)* of article 19, as a means of promoting wider adoption of the Convention. It was felt that paragraph 1 *(b)* offered those States which might have difficulties in accepting the general application of the Convention under

[77] Ibid., para. 128.

its article 1, paragraph 1, the possibility to allow their nationals to choose the Convention as applicable law.[78]

4. Exclusion of specific matters under paragraph 2

284. In preparing the Electronic Communications Convention, UNCITRAL aimed at achieving as wide as possible application. General exclusions under article 2, which apply to all contracting States, have accordingly been kept to a minimum. It was recognized, at the same time, that the degree of acceptance of electronic communications still varied greatly among legal systems and that several jurisdictions still excluded certain matters or types of transaction from the scope of legislation intended to facilitate the use of electronic communications. It was also acknowledged that some legal systems, while accepting electronic communications in connection with certain types of transaction, sometimes subjected them to specific requirements, for instance as regarded the type of electronic signature that the parties may use. Other countries, however, may take a more liberal approach, so that matters excluded or subject to particular requirements in some countries may not be excluded or subject to any special requirement in other countries.

285. In view of that diversity of approaches, UNCITRAL agreed that contracting States should be given the possibility of excluding certain matters from the scope of application of the Convention by means of declarations submitted under article 21. In adopting this approach, UNCITRAL was mindful of the fact that unilateral exclusions by way of declarations under article 21 were not in theory conducive to enhancing legal certainty. Nevertheless, it was felt that such a system would allow States to limit the application of the 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 excluded transactions from using electronic communications (see A/CN.9/571, para. 63).

286. The types of matter that may be excluded may include matters that some States currently exclude from the scope of domestic legislation enacted to promote electronic commerce (for examples, see para. 82 above). Another type of exclusion might be a declaration limiting the application of the Convention only to the use of electronic communications in connection with contracts covered by international conventions listed in article 20, paragraph 1, although UNCITRAL was of the view that such a declaration, while possible under the broad terms of article 19, paragraph 2, would not further the desired goal of ensuring the broadest possible application of the Convention and should not be encouraged.[79]

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 126-130
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 28-46
Working Group IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 27-37

[78]Ibid.

[79]Ibid., para. 129.

Article 20. Communications exchanged under other international conventions

1. Origin and purpose of the article

287. When it first considered the possibility of further work on electronic commerce after the adoption of the UNCITRAL Model Law on Electronic Signatures, UNCITRAL contemplated, among other issues, a topic broadly referred to as "electronic contracting" and measures that might be needed to remove possible legal obstacles to electronic commerce under existing international conventions. After UNCITRAL Working Group IV (Electronic Commerce) had reviewed the initial draft of what later became the Electronic Communications Convention, at its thirty-ninth session (see A/CN.9/509, paras. 18-125), and following the Secretariat's survey of possible legal obstacles to electronic commerce under existing international conventions (see A/CN.9/WG.IV/WP.94) at its fortieth session (see A/CN.9/527, paras. 24-71), the Working Group agreed that UNCITRAL should attempt to identify the common elements between removing legal barriers to electronic commerce in existing instruments and a possible international convention on electronic contracting, and that both projects should as much as possible be carried out simultaneously[80] (see also A/CN.9/527, para. 30 and A/CN.9/546, para. 34). It was eventually agreed that the Convention should incorporate provisions aimed at removing possible legal obstacles to electronic commerce that might arise under existing international trade-related instruments.[81]

288. One of the objectives of the work of UNCITRAL towards the removal of possible legal obstacles to electronic commerce in existing international instruments was to formulate solutions that obviated the need for amending individual international conventions. Article 20 of the Electronic Communications Convention intends to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments that had been identified by the Secretariat in its above-mentioned survey (see A/CN.9/527, paras. 33-48).

289. The intended effect of the Convention in respect of electronic communications relating to contracts covered by other international conventions is not merely to interpret terms used elsewhere, but to offer substantive rules that allow those other conventions to operate effectively in an electronic environment (see A/CN.9/548, para. 51). However, article 20 is not meant to formally amend any international convention, treaty or agreement, whether or not listed in paragraph 1, or to provide an authentic interpretation of any other international convention, treaty or agreement.

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[80]Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 213.

[81]Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 71.

2. *Relationship between the Convention and other conventions, treaties or agreements*

290. The combined effect of paragraphs 1 and 2 of article 20 of the Electronic Communications Convention is that, by ratifying the Convention, and except as otherwise declared, a State would automatically undertake to apply the provisions of the Convention to electronic communications exchanged in connection with any of the conventions listed in paragraph 1 or any other convention, treaty or agreement to which a State is or may become a contracting State. These provisions aim at providing a domestic solution for a problem originating in international instruments. They are based on the recognition that domestic courts already interpret international commercial law instruments. Paragraphs 1 and 2 of article 20 of the Electronic Communications Convention ensure that a contracting State would incorporate into its legal system a provision that directs its judicial bodies to use the provisions of the Convention to address legal issues relating to the use of data messages in the context of other international conventions (see A/CN.9/548, para. 49).

291. Article 20 does not list which provisions of the Electronic Communications Convention can or should be applied to electronic communications exchanged in connection with contracts governed by other conventions, treaties and agreements. Such a list, however valuable in theory, would have been extremely difficult to draw up, in view of the diversity of the contractual matters covered by existing conventions. The Electronic Communications Convention therefore leaves it for a body applying the Convention to establish which of its provisions might be relevant in respect of the exchange of electronic communications to which other conventions also apply. It is expected that if any provision in the Electronic Communications Convention is not appropriate for certain transactions, that circumstance should be clear to a reasonable person applying that Convention (see A/CN.9/548, para. 55).

3. *The list of conventions in paragraph 1*

292. The list in paragraph 1 of article 20 has been included merely for purposes of clarity. Parties to contracts falling under the scope of application of the Electronic Communications Convention to which any of these conventions also apply will therefore know beforehand that the electronic communications exchanged by them will benefit from the favourable regime provided by the Convention.

293. Five of the conventions listed in paragraph 1 resulted from the work of UNCITRAL: the Convention on the Limitation Period in the International Sale of Goods ("Limitation Convention");[82] the United Nations Convention on Contracts for the International Sale of Goods ("United Nations Sales Convention");[83] the United Nations Convention on the Liability of Operators of Transport Terminals in

[82]United Nations, *Treaty Series*, vol. 1511, No. 26119.

[83]Ibid., vol. 1489, No. 25567.

International Trade ("Terminal Operators Convention");[84] the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit ("Guarantees Convention");[85] and the United Nations Convention on the Assignment of Receivables in International Trade ("Receivables Convention").[86] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")[87] was not prepared by UNCITRAL, but is directly related to its mandate.

294. The fact that two of these conventions have not yet entered into force, namely the Terminal Operators Convention and the Receivables Convention, was not regarded as an obstacle to their inclusion in the list. Indeed, there were several precedents for references in a convention to international instruments that had not yet entered into force at the time the new convention was drafted. One example that had resulted from the work of UNCITRAL was the preparation, at the time of the finalization of the United Nations Sales Convention, in 1980, of a protocol to adapt the Limitation Convention, of 1974, at that time not yet in force, to the regime of the United Nations Sales Convention (see A/CN.9/548, para. 57).

295. Two of the conventions prepared by UNCITRAL were not included in the list: the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 9 December 1988);[88] and the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978).[89] UNCITRAL considered that the possible problems related to the use of electronic communications under those conventions, as well as under other international conventions dealing with negotiable instruments or transport documents, might require specific treatment and that it might not be appropriate to attempt to address those problems in the context of the Electronic Communications Convention (see A/CN.9/527, para. 29; see also A/CN.9/527, paras. 24-71).

4. General effect in respect of electronic communications related to contracts governed by other international conventions, treaties or agreements

296. The application of the provisions of the Electronic Communications Convention to electronic communications exchanged in connection with contracts covered by other international conventions, treaties or agreements was initially limited to electronic communications in the context of a contract covered by one of the conventions listed in paragraph 1 of article 20. However, it was considered that in many legal systems, the Convention could be applied to the use of electronic communications in the context of contracts covered by any other international

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[84]United Nations publication, Sales No. E.95.V.15.

[85]General Assembly resolution 50/48, annex.

[86]General Assembly resolution 56/81, annex.

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

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

[89]United Nations, *Treaty Series*, vol. 1695, No. 29215.

convention simply by virtue of article 1, without the need for a specific reference to a convention governing such a contract in article 20.

297. Paragraph 2 of article 20 was therefore adopted with a view to expanding the scope of application of the Electronic Communications Convention and allowing the parties to a contract to which another legal instrument applied to benefit automatically from the enhanced legal certainty for the exchange of electronic communications that the Convention provided. Given the enabling nature of the provisions of the Convention, it was felt that States would be more likely to be inclined to extending its provisions to trade-related instruments than to excluding their application to other instruments. Under paragraph 2, such an expansion operates automatically, without the need for contracting States to submit numerous opt-in declarations to achieve the same result (see A/CN.9/571, para. 25).

298. Accordingly, in addition to those instruments which, for the avoidance of doubt, are listed in paragraph 1 of article 20, the provisions of the Convention also apply, pursuant to paragraph 2 of article 20, to electronic communications exchanged in connection with contracts covered by other international conventions, treaties or agreements, unless such application has been excluded by a contracting State.

299. Paragraph 2 of article 20 does not specify the nature of the other conventions, treaties or agreements in support of which the provisions of the Electronic Communications Convention may be extended, but the reach of the provision is narrowed down by the reference to electronic communications exchanged "in connection with the formation or performance of a contract". While it was generally understood that those other conventions, treaties or agreements primarily comprised other international agreements or conventions on private commercial law matters, it was felt that such a qualification should not be added, as it would unnecessarily restrict the application of paragraph 2. UNCITRAL considered that the Electronic Communications Convention could have value for many States in connection with contractual matters other than those relating strictly to private commercial law (see A/CN.9/548, para. 60).

300. The last sentence of paragraph 2 of article 20 allows a contracting State to exclude the expanded application of the Convention. The possibility has been added to take into account possible concerns of States that may wish to ascertain first whether the provisions contained in the Convention are compatible with their existing international obligations (see A/CN.9/548, para. 61).

5. Specific exclusions or inclusions by contracting States

301. Paragraph 3 of article 20 adds further flexibility by allowing States to add specific conventions to the list of international instruments to which they would apply the provisions of the Electronic Communications Convention—even if the State has submitted a general declaration under paragraph 2.

302. Paragraph 4 of article 20, in turn, has the opposite effect and allows States to exclude certain specific conventions identified in their declarations. Declarations

under paragraph 4 would exclude the application of the Electronic Communications Convention to the use of electronic communications in respect of all contracts to which the specified international convention or conventions apply. This provision does not contemplate the possibility for a contracting State to exclude only certain types or categories of contract covered by another international convention (see A/CN.9/571, para. 56).

303. A declaration under paragraph 3 of article 20 would extend the application of the entire Electronic Communications Convention, as appropriate (see para. 291 above), to electronic communications exchanged in connection with contracts governed by the conventions, treaties or agreements specified in that State's declaration. A contracting State making such a declaration is not allowed to choose which of the provisions of the Convention would be extended, as it was considered that such an approach would create uncertainty as to which provisions of the Convention applied in any given jurisdiction (see A/CN.9/548, para. 64).

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 131 and 132
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 23-27 and 47-58
Working Group IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 38-70

Article 21. Procedure and effects of declarations

1. Time and form of declarations

304. Article 21 of the Electronic Communications Convention defines the manner of making a declaration under the Convention and of its withdrawal, as well as the time at which a declaration or its withdrawal becomes effective.

305. Declarations under article 17, paragraph 4, article 19, paragraphs 1 and 2, and article 20, paragraphs 2, 3 and 4, may be made at any time. Other declarations, such as under article 17, paragraph 2, and article 18, paragraph 1 (but not a later amendment thereof), must be made at the time of signature, ratification, acceptance or approval. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval. In the absence of confirmation such declarations will be without effect.

306. Several international treaties, including uniform law treaties such as the United Nations Sales Convention,[90] generally authorize contracting States to submit declarations only at the time of the deposit of their instrument of ratification,

[90]Except for declarations under article 94, paragraph 1, and article 96 of the United Nations Sales Convention, which can be made at any time.

acceptance, approval or accession. This limitation is generally justified by the interest in simplifying the operation of the treaty, promoting legal certainty and uniform application of the treaty, which may be hampered by excessive flexibility in making, amending and withdrawing declarations. In the particular case of the Electronic Communications Convention, however, it was generally felt that in an area evolving as rapidly as the area of electronic commerce, in which technological developments rapidly change existing patterns of business and trade practices, it was essential to afford States a greater degree of flexibility in the application of the 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 Convention in various areas that would have otherwise benefited from the favourable framework it provides for electronic communications.

307. According to paragraph 2 of article 21, declarations and confirmations of declarations must be in writing and formally notified to the depositary. This provision also relates to declarations made at the time of accession, to which no reference was made in paragraph 1 of the article since accession presupposes the absence of signature.

2. When declarations take effect

308. Paragraph 3 of article 21 lays down two rules of general application. The first sentence of paragraph 3, which provides that a declaration takes effect simultaneously with the entry into force of the Electronic Communications Convention in respect of the State concerned, contemplates the normal case of a declaration made at the time of signature, ratification, acceptance or accession which will precede the entry into force of the Convention in respect of that State.

309. In accordance with the second sentence of paragraph 3 of article 21, a declaration that is notified to the depositary after the entry into force of the Convention in respect of the State concerned takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary, a rule which has the advantage of giving other contracting States some time to become aware of the change in the law of the State making the declaration. UNCITRAL did not accept a proposal to reduce to three months the time when declarations lodged after the entry into force of the convention should take effect, as it was felt that three months could not be adequate time to allow for adjustment in certain business practices.[91]

310. Paragraph 4 of article 21 constitutes a pendant to paragraph 2 and the second sentence of paragraph 3 in that it permits the withdrawal by a State at any time of a declaration by formal notification in writing addressed to the depositary,

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[91] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 140.

such withdrawal taking effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 137-141
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 22. Reservations

1. Reservations not authorized

311. Article 22 of the Electronic Communications Convention excludes the right of contracting States to make reservations to the Convention. The intention of the provision is to prevent States from limiting the application of the Convention by making reservations beyond the declarations specifically provided for in articles 17 to 20.

312. Although it could be argued that an express statement of the rule was not necessary, as it might be considered to be implicit in the Convention, its presence certainly excludes any ambiguity which might otherwise exist in the light of article 19 of the Vienna Convention on the Law of Treaties,[92] which permits the formulation of reservations unless *(a)* the reservation is prohibited by the treaty; *(b)* the treaty provides that only specific reservations, which do not include the reservation in question, may be made; or *(c)* in cases not falling under subparagraphs *(a)* and *(b),* the reservation is incompatible with the object and purpose of the treaty.

313. The effect of article 22 of the Electronic Communications Convention, therefore, is to bring the Convention squarely within the ambit of article 19, subparagraph *(a),* of the Vienna Convention on the Law of Treaties. Article 22 of the Electronic Communications Convention excludes any implied right that States might otherwise have under article 19 of the Vienna Convention on the Law of Treaties to make reservations allegedly not "incompatible with the object and purpose of the treaty". Any such purported reservation by a contracting State to the Electronic Communications Convention must therefore be deemed ineffective.

2. Distinction between reservations and declarations

314. As indicated above, article 22 of the Electronic Communications Convention clearly excludes any reservation to the Convention. However, it does not affect the right of States to make any of the declarations authorized by the Convention, which do not have the effect of reservations. While this distinction is not always made in general treaty practice, it has become customary for conventions on private international law and commercial law matters to differentiate between declarations and reservations.

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[92]United Nations, *Treaty Series*, vol. 1155, No. 18232.

315. Unlike most multilateral treaties negotiated by the United Nations, which are typically concerned with relations between States and other matters of public international law, conventions on private international law and commercial law matters deal with law that applies to private business transactions and not to State actions, and are typically intended to be incorporated into the domestic legal system. In order to facilitate coordination between existing domestic law and the provisions of an international convention on commercial law or related matters, States are often given the right to make declarations, for example for the purpose of excluding certain matters from the scope of the convention.

316. Recent provisions in UNCITRAL instruments confirm this practice, such as articles 25 and 26 of the Guarantees Convention and articles 35 to 43 (except for article 38) of the Receivables Convention, 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)[93] 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.[94]

317. This distinction is important because reservations to international treaties typically trigger a formal system of acceptances and objections, for instance as provided in articles 20 and 21 of the Vienna Convention on the Law of Treaties. This result would lead to considerable difficulties in the area of private international law, as it might reduce the ability of States to agree on common rules allowing them to adjust the provisions of an international convention to the particular requirements of their domestic legal system. Therefore, the Electronic Communications Convention follows this growing practice and distinguishes between declarations pertaining to the scope of application, which the Convention admits and does 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 Convention excludes[95] (see also A/CN.9/571, para. 30).

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 142 and 143
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 23. Entry into force

1. Time of entry into force of the Convention

318. The basic provisions governing the entry into force of the Electronic Communications Convention are laid down in article 23, paragraph 1. The paragraph

[93]Available at http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.

[94]Available at http://hcch.e-version.nl/index_en.php/act=conventions.text&cid=72.

[95]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 143.

provides that the Convention will enter into force on "the first day of the month following the expiration of six months after the deposit of the third instrument of ratification, acceptance, approval or accession".

319. Existing UNCITRAL conventions require as few as three and as many as 10 ratifications for entry into force. In choosing a number of three ratifications, UNCITRAL followed the modern trend in commercial law conventions, which promotes their application as early as possible to those States that seek to apply such rules to their commerce.[96] A six-month period from the date of deposit of the third instrument of ratification, acceptance, approval or accession is provided so as to give States that become parties to the Convention sufficient time to notify all the national organizations and individuals concerned that a convention that would affect them would soon enter into force.

2. Entry into force for States that adhere to the Convention after it has entered into force

320. Paragraph 2 of article 23 deals with the entry into force of the Electronic Communications Convention as regards those States that become parties thereto after the time for its entry into force under paragraph 1 has already started. In respect of such States, the Convention will enter into force on the first day of the month following the expiration of six months after the date of the deposit of their instrument of ratification, acceptance, approval or accession. For example, if a State deposits an instrument of ratification five months before the entry into force of the Convention under paragraph 1 of article 23, the Convention will enter into force for that State on the first day of the month following the expiration of one month after the Convention has entered into force.

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 148-150
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 24. Time of application

321. While article 23 is concerned with the entry into force of the Electronic Communications Convention as regards the international obligations of the contracting States arising under the Convention, article 24 determines the point in time when the Convention commences to apply in respect of the electronic communications governed by it. As expressly indicated in article 24, the Convention only applies prospectively, that is to electronic communications that are made after the date when the Convention entered into force.

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[96]Ibid., para. 149.

322. The words "in respect of each Contracting State" are intended to make it clear that the article refers to the time when the Convention enters into force in respect of the contracting State in question, and not when the Convention enters into force generally. This clarification is to avoid the erroneous interpretation that the Convention would have retrospective application in respect of States that adhere to the Convention after it has already entered into force pursuant to article 23, paragraph 1.[97] The words "each Contracting State" are further to be understood as referring to the contracting State whose laws apply to the electronic communication in question.

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 151-155
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 25. Denunciations

323. Paragraph 1 of article 25 of the Electronic Communications Convention provides that a State may denounce the Convention by a formal notification in writing addressed to the depositary. Denunciation of the Convention will take effect on the first day of the month following the expiration of 12 months after the notification is received by the depositary, unless such notification specifies a longer period for the denunciation to take effect. The period of 12 months mentioned in paragraph 2 of article 25, which is twice the period for entry into force of the Convention under article 23, is intended to give sufficient time to all concerned, both in the denouncing State and in other contracting States, to become aware of the change in the legal regime applicable to electronic communications in that State.

324. Although article 23 requires three contracting States for the Convention to enter into force, nothing is said as to the fate of the Convention should the number of contracting parties subsequently fall below three, for example as a result of denunciations with a view to the acceptance of a new instrument intended to supersede the Convention. It would however seem that the Convention would remain in force since article 55 of the Vienna Convention on the Law of Treaties provides that "unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of parties falls below the number necessary for its entry into force."

References to preparatory work

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 156 and 157
Working Group IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

[97]Ibid. para. 153.

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

United Nations Convention on Contracts for the International Sale of Goods

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1. United Nations Convention on Contracts for the International Sale of Goods

PREAMBLE

The States Parties to this Convention,

Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

Have agreed as follows:

Part I. Sphere of application and general provisions

CHAPTER I. SPHERE OF APPLICATION

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(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, 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

This Convention does not apply to sales:

(a) 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;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.

Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

CHAPTER II. GENERAL PROVISIONS

Article 7

(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 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 10

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the 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;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business

in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Article 13

For the purposes of this Convention "writing" includes telegram and telex.

Part II. Formation of the contract

Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 20

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 21

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

Article 24

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee

when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

Part III. Sale of goods

CHAPTER I. GENERAL PROVISIONS

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

CHAPTER II. OBLIGATIONS OF THE SELLER

Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Section I. Delivery of the goods and handing over of documents

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) in other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 32

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

Article 33

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Section II. Conformity of the goods and third-party claims

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs *(a)* to *(d)* of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

Section III. Remedies for breach of contract by the seller

Article 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses

advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 52

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

CHAPTER III. OBLIGATIONS OF THE BUYER

Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I. Payment of the price

Article 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

Article 58

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the

contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

Section II. Taking delivery

Article 60

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

Section III. Remedies for breach of contract by the buyer

Article 61

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Article 63

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 64

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

Article 65

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

CHAPTER IV. PASSING OF RISK

Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

Section I. Anticipatory breach and instalment contracts

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. Damages

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Section III. Interest

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

Section IV. Exemptions

Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

Section V. Effects of avoidance

Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section VI. Preservation of the goods

Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take

possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

PART IV. FINAL PROVISIONS

Article 89

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions

concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

Article 91

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 92

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 93

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 94

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 95

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

Article 96

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Article 97

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Article 98

No reservations are permitted except those expressly authorized in this Convention.

Article 99

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part

of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary coordination in this respect.

Article 100

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)*(a)* or the Contracting State referred to in subparagraph (1)*(b)* of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)*(a)* or the Contracting State referred to in subparagraph (1)*(b)* of article 1.

Article 101

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

II. Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods

This note has been prepared by the Secretariat of the United Nations Commission on International Trade Law for informational purposes; it is not an official commentary on the Convention.

Introduction

1. The United Nations Convention on Contracts for the International Sale of Goods provides a uniform text of law for international sales of goods. The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and adopted by a diplomatic conference on 11 April 1980.

2. Preparation of a uniform law for the international sale of goods began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT) in Rome. After a long interruption in the work as a result of the Second World War, the draft was submitted to a diplomatic conference in The Hague in 1964, which adopted two conventions, one on the international sale of goods and the other on the formation of contracts for the international sale of goods.

3. Almost immediately upon the adoption of the two conventions there was widespread criticism of their provisions as reflecting primarily the legal traditions and economic realities of continental Western Europe, which was the region that had most actively contributed to their preparation. As a result, one of the first tasks undertaken by UNCITRAL on its organization in 1968 was to enquire of States whether or not they intended to adhere to those conventions and the reasons for their positions. In the light of the responses received, UNCITRAL decided to study the two conventions to ascertain which modifications might render them capable of wider acceptance by countries of different legal, social and economic systems. The result of this study was the adoption by diplomatic conference on 11 April 1980 of the

United Nations Convention on Contracts for the International Sale of Goods, which combines the subject matter of the two prior conventions.

4. UNCITRAL's success in preparing a Convention with wider acceptability is evidenced by the fact that the original eleven States for which the Convention came into force on 1 January 1988 included States from every geographical region, every stage of economic development and every major legal, social and economic system. The original eleven States were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia.

5. As of 1 September 2010, 76 States are parties to the Convention. The current updated status of the Convention is available on the UNCITRAL website.[1] Authoritative information on the status of the Convention, as well as on related declarations, including with respect to territorial application and succession of States, may be found on the United Nations Treaty Collection on the Internet.[2]

6. The Convention is divided into four parts. Part One deals with the scope of application of the Convention and the general provisions. Part Two contains the rules governing the formation of contracts for the international sale of goods. Part Three deals with the substantive rights and obligations of buyer and seller arising from the contract. Part Four contains the final clauses of the Convention concerning such matters as how and when it comes into force, the reservations and declarations that are permitted and the application of the Convention to international sales where both States concerned have the same or similar law on the subject.

Part One. Scope of application and general provisions

A. Scope of application

7. The articles on scope of application indicate both what is covered by the Convention and what is not covered. The Convention applies to contracts of sale of goods between parties whose places of business are in different States and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State. A few States have availed themselves of the authorization in article 95 to declare that they would apply the Convention only in the former and not in the latter of these two situations. As the Convention becomes more widely adopted, the

[1] www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.
[2] http://treaties.un.org/.

practical significance of such a declaration will diminish. Finally, the Convention may also apply as the law applicable to the contract if so chosen by the parties. In that case, the operation of the Convention will be subject to any limits on contractual stipulations set by the otherwise applicable law.

8. The final clauses make two additional restrictions on the territorial scope of application that will be relevant to a few States. One applies only if a State is a party to another international agreement that contains provisions concerning matters governed by this Convention; the other permits States that have the same or similar domestic law of sales to declare that the Convention does not apply between them.

9. Contracts of sale are distinguished from contracts for services in two respects by article 3. A contract for the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. When the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services, the Convention does not apply.

10. The Convention contains a list of types of sales that are excluded from the Convention, either because of the purpose of the sale (goods bought for personal, family or household use), the nature of the sale (sale by auction, on execution or otherwise by law) or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity). In many States some or all of such sales are governed by special rules reflecting their special nature.

11. Several articles make clear that the subject matter of the Convention is restricted to formation of the contract and the rights and duties of the buyer and seller arising from such a contract. In particular, the Convention is not concerned with the validity of the contract, the effect which the contract may have on the property in the goods sold or the liability of the seller for death or personal injury caused by the goods to any person.

B. Party autonomy

12. The basic principle of contractual freedom in the international sale of goods is recognized by the provision that permits the parties to exclude the application of this Convention or derogate from or vary the effect of any of its provisions. This exclusion will occur, for example, if parties choose the law of a non-contracting State or the substantive domestic law of a contracting State as the law applicable to the contract. Derogation from the Convention

will occur whenever a provision in the contract provides a different rule from that found in the Convention.

C. Interpretation of the Convention

13. This Convention for the unification of the law governing the international sale of goods will better fulfil its purpose if it is interpreted in a consistent manner in all legal systems. Great care was taken in its preparation to make it as clear and easy to understand as possible. Nevertheless, disputes will arise as to its meaning and application. When this occurs, all parties, including domestic courts and arbitral tribunals, are admonished to observe its international character and to promote uniformity in its application and the observance of good faith in international trade. In particular, when a question concerning a matter governed by this Convention is not expressly settled in it, the question is to be settled in conformity with the general principles on which the Convention is based. Only in the absence of such principles should the matter be settled in conformity with the law applicable by virtue of the rules of private international law.

D. Interpretation of the contract; usages

14. The Convention contains provisions on the manner in which statements and conduct of a party are to be interpreted in the context of the formation of the contract or its implementation. Usages agreed to by the parties, practices they have established between themselves and usages of which the parties knew or ought to have known and which are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned may all be binding on the parties to the contract of sale.

E. Form of the contract

15. The Convention does not subject the contract of sale to any requirement as to form. In particular, article 11 provides that no written agreement is necessary for the conclusion of the contract. However, if the contract is in writing and it contains a provision requiring any modification or termination by agreement to be in writing, article 29 provides that the contract may not be otherwise modified or terminated by agreement. The only exception is that a party may be precluded by his conduct from asserting such a provision to the extent that the other person has relied on that conduct.

16. In order to accommodate those States whose legislation requires contracts of sale to be concluded in or evidenced by writing, article 96 entitles those

States to declare that neither article 11 not the exception to article 29 applies where any party to the contract has his place of business in that State.

Part Two. Formation of the contract

17. Part Two of the Convention deals with a number of questions that arise in the formation of the contract by the exchange of an offer and an acceptance. When the formation of the contract takes place in this manner, the contract is concluded when the acceptance of the offer becomes effective.

18. In order for a proposal for concluding a contract to constitute an offer, it must be addressed to one or more specific persons and it must be sufficiently definite. For the proposal to be sufficiently definite, it must indicate the goods and expressly or implicitly fix or make provisions for determining the quantity and the price.

19. The Convention takes a middle position between the doctrine of the revocability of the offer until acceptance and its general irrevocability for some period of time. The general rule is that an offer may be revoked. However, the revocation must reach the offeree before he has dispatched an acceptance. Moreover, an offer cannot be revoked if it indicates that it is irrevocable, which it may do by stating a fixed time for acceptance or otherwise. Furthermore, an offer may not be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

20. Acceptance of an offer may be made by means of a statement or other conduct of the offeree indicating assent to the offer that is communicated to the offeror. However, in some cases the acceptance may consist of performing an act, such as dispatch of the goods or payment of the price. Such an act would normally be effective as an acceptance the moment the act was performed.

21. A frequent problem in contract formation, perhaps especially in regard to contracts of sale of goods, arises out of a reply to an offer that purports to be an acceptance but contains additional or different terms. Under the Convention, if the additional or different terms do not materially alter the terms of the offer, the reply constitutes an acceptance, unless the offeror without undue delay objects to those terms. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

22. If the additional or different terms do materially alter the terms of the contract, the reply constitutes a counter-offer that must in turn be accepted

for a contract to be concluded. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or settlement of disputes are considered to alter the terms of the offer materially.

Part Three. Sale of goods

A. Obligations of the seller

23. The general obligations of the seller are to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to when, where and how the seller must perform these obligations.

24. The Convention provides a number of rules that implement the seller's obligations in respect of the quality of the goods. In general, the seller must deliver goods that are of the quantity, quality and description required by the contract and that are contained or packaged in the manner required by the contract. One set of rules of particular importance in international sales of goods involves the seller's obligation to deliver goods that are free from any right or claim of a third party, including rights based on industrial property or other intellectual property.

25. In connection with the seller's obligations in regard to the quality of the goods, the Convention contains provisions on the buyer's obligation to inspect the goods. He must give notice of any lack of conformity with the contract within a reasonable time after he has discovered it or ought to have discovered it, and at the latest two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

B. Obligations of the buyer

26. The general obligations of the buyer are to pay the price for the goods and take delivery of them as required by the contract and the Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to how the price is to be determined and where and when the buyer should perform his obligations to pay the price.

C. Remedies for breach of contract

27. The remedies of the buyer for breach of contract by the seller are set forth in connection with the obligations of the seller and the remedies of the seller are set forth in connection with the obligations of the buyer. This makes it easier to use and understand the Convention.

28. The general pattern of remedies is the same in both cases. If all the required conditions are fulfilled, the aggrieved party may require performance of the other party's obligations, claim damages or avoid the contract. The buyer also has the right to reduce the price where the goods delivered do not conform with the contract.

29. Among the more important limitations on the right of an aggrieved party to claim a remedy is the concept of fundamental breach. For a breach of contract to be fundamental, it must result in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the result was neither foreseen by the party in breach nor foreseeable by a reasonable person of the same kind in the same circumstances. A buyer can require the delivery of substitute goods only if the goods delivered were not in conformity with the contract and the lack of conformity constituted a fundamental breach of contract. The existence of a fundamental breach is one of the two circumstances that justifies a declaration of avoidance of a contract by the aggrieved party; the other circumstance being that, in the case of non-delivery of the goods by the seller or non-payment of the price or failure to take delivery by the buyer, the party in breach fails to perform within a reasonable period of time fixed by the aggrieved party.

30. Other remedies may be restricted by special circumstances. For example, if the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A party cannot recover damages that he could have mitigated by taking the proper measures. A party may be exempted from paying damages by virtue of an impediment beyond his control.

D. Passing of risk

31. Determining the exact moment when the risk of loss or damage to the goods passes from the seller to the buyer is of great importance in contracts for the international sale of goods. Parties may regulate the issue in their contract either by an express provision or by the use of a trade term such as, for example, an INCOTERM. The effect of the choice of such a term

would be to amend the corresponding provisions of the CISG accordingly. However, for the frequent case where the contract does not contain such a provision, the Convention sets forth a complete set of rules.

32. The two special situations contemplated by the Convention are when the contract of sale involves carriage of the goods and when the goods are sold while in transit. In all other cases the risk passes to the buyer when he takes over the goods or from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery, whichever comes first. In the frequent case when the contract relates to goods that are not then identified, they must be identified to the contract before they can be considered to be placed at the disposal of the buyer and the risk of their loss can be considered to have passed to him.

E. Suspension of performance and anticipatory breach

33. The Convention contains special rules for the situation in which, prior to the date on which performance is due, it becomes apparent that one of the parties will not perform a substantial part of his obligations or will commit a fundamental breach of contract. A distinction is drawn between those cases in which the other party may suspend his own performance of the contract but the contract remains in existence awaiting future events and those cases in which he may declare the contract avoided.

F. Exemption from liability to pay damages

34. When a party fails to perform any of his obligations due to an impediment beyond his control that he could not reasonably have been expected to take into account at the time of the conclusion of the contract and that he could not have avoided or overcome, he is exempted from the consequences of his failure to perform, including the payment of damages. This exemption may also apply if the failure is due to the failure of a third person whom he has engaged to perform the whole or a part of the contract. However, he is subject to any other remedy, including reduction of the price, if the goods were defective in some way.

G. Preservation of the goods

35. The Convention imposes on both parties the duty to preserve any goods in their possession belonging to the other party. Such a duty is of even greater importance in an international sale of goods where the other party is from a

foreign country and may not have agents in the country where the goods are located. Under certain circumstances the party in possession of the goods may sell them, or may even be required to sell them. A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them and must account to the other party for the balance.

Part Four. Final clauses

36. The final clauses contain the usual provisions relating to the Secretary-General as depositary and providing that the Convention is subject to ratification, acceptance or approval by those States that signed it by 30 September 1981, that it is open to accession by all States that are not signatory States and that the text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.

37. The Convention permits a certain number of declarations. Those relative to scope of application and the requirement as to a written contract have been mentioned above. There is a special declaration for States that have different systems of law governing contracts of sale in different parts of their territory. Finally, a State may declare that it will not be bound by Part II on formation of contracts or Part III on the rights and obligations of the buyer and seller. This latter declaration was included as part of the decision to combine into one convention the subject matter of the two 1964 Hague Conventions.

Complementary texts

38. The United Nations Convention on Contracts for the International Sale of Goods is complemented by the United Nations Convention on the Limitation Period in the International Sale of Goods, 1974, as amended by a Protocol in 1980 (the Limitation Convention). The Limitation Convention establishes uniform rules governing the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against another party to assert a claim arising from the contract or relating to its breach, termination or validity. The amending Protocol of 1980 ensures that the scope of application of the Limitation Convention is identical to the one of the United Nations Convention on Contracts for the International Sale of Goods.

39. The United Nations Convention on Contracts for the International Sale of Goods is also complemented, with respect to the use of electronic communications,

by the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (the Electronic Communications Convention). The Electronic Communications Convention aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents. The Electronic Communications Convention may help to avoid misinterpretation of the CISG that might occur, for example, when a State has lodged a declaration mandating the use of the traditional written form for contracts for the international sale of goods. It may also promote the understanding that the "communication" and/or "writing" under the CISG should be construed so as to include electronic communications. The Electronic Communications Convention is an enabling treaty whose effect is to remove those formal obstacles by establishing the requirements for functional equivalence between electronic and traditional written form.

Further information can be obtained from:

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Force Majeure in Tumultuous Times: Impracticability as the New Impossibility

It's Not as Easy to Prove as You Might Believe

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Abstract
Force majeure clauses excuse a party from performance if some unforeseen event beyond its control prevents performance of its contractual obligations. Although the prior standard of "impossibility" to invoke force majeure has effectively been replaced by "impracticability," arbitration tribunals rarely enforce force majeure clauses unless the specific impediment is defined in the clause. As a result, the standard of "impracticability" is not as easy to prove as it might appear to be. Foreseeability, failure to explore alternate performance, and lack of timely notice are common reasons that force majeure defenses fail. Due to tribunals' typically narrow and restricted application of force majeure clauses, they should be detailed, comprehensive, and focus on the particular circumstances of the transaction at issue.

Keywords
arbitration; force majeure; foreseeability; impossibility; impracticability; International Chamber of Commerce; Court of Arbitration

I. Introduction

Most international business agreements have force majeure clauses. Force majeure means "superior force."[1] These clauses excuse a party from performance if some unforeseen event beyond its control prevents performance of its contractual obligations. Their purpose is to allocate risk and to provide notice of events that may delay or excuse performance.

Parties to a contract expressly allocate their risk when they define what constitutes a force majeure event. Impediments to contract performance frequently occur. Arbitration tribunals, however, rarely enforce force majeure

[1] *Black's Law Dictionary* 718 (9th ed. 2009).

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clauses unless the specific impediment is defined in the clause, even though the prior standard of "impossibility" to invoke force majeure has effectively been replaced by "impracticability." The current standard of "impracticability" appears to be relatively easy to prove, but it is not. International business people are presumed to be aware of the risks they face. They are held accountable if they fail to protect themselves specifically in their contract.

There is no universally accepted definition of the requirements to successfully invoke force majeure. Different laws and jurisdictions take different approaches.[2] Moreover, the focal point of analysis is on the wording of the specific clause at issue. A definitive summary of the law of force majeure is beyond the scope of this paper. Instead, we focus on what we believe are the legal and contract drafting points of greatest practical significance in light of the challenges faced when relying on a force majeure clause.

The law of force majeure has evolved to reflect "... the needs and common practices of the international business community...."[3] There is an emerging consensus about force majeure legal requirements that your authors believe is represented in the International Chamber of Commerce's ("ICC") Force Majeure Clause 2003 ("ICC Clause").[4] The ICC Clause incorporates an "impracticability" standard. It provides that an event must be (1) beyond the party's control, (2) not foreseeable at the time the contract is signed, and (3) an event that could not reasonably have been avoided or overcome. These principles and their corollaries are discussed below.

Recent dramatic events have caused widespread commercial loss and business interruption. These include the events of September 11, 2001; Hurricane Katrina in 2005 in the area of New Orleans, Louisiana; and the 2010 volcano in Iceland that disrupted flights and impacted businesses at airports and those reliant upon air freight. Most recently, the devastating earthquake and tsunami in Japan destroyed factories and interrupted the supply chain for Japanese and international businesses.

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2) There are many thoughtful articles that address in detail these different approaches. *See e.g.*, Chengwei Liu, *Force Majeure: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law* (2d ed. Apr. 2005), *available at* http://www.cisg.law.pace.edu/cisg/bibio/liu6.html; Catherine Kessedjian, *Competing Approaches to Force Majeure and Hardship*, 25 Int'l Rev. of Law & Econ. 415 (Sept. 2005); Dr. Theo Rauh, *Legal Consequences of Force Majeure Under German, Swiss, English and United States Law*, 25 Denv. J. Int'l L & Pol'y 151 (Fall 1996).

3) W. Laurence Craig et al., International Chamber of Commerce Arbitration 651 (3d ed. 2001).

4) The ICC has also developed the "ICC Hardship Clause 2003." That clause is triggered when the contractual duties have become "excessively onerous" for a party due to an event beyond its control that it could not reasonably have been expected to have taken into account at the time of the contract, and that the party could not reasonably have avoided or overcome the event or its consequences. When such an event occurs, the parties are required to negotiate alternative contract terms that reasonably allow for the consequences of the event. If those negotiations are unsuccessful, the party invoking the clause is permitted to terminate the contract. Int'l Chamber of Commerce, ICC Force Majeure Clause 2003 - Hardship Clause 2003, ICC Publication 650 (2003).

One author notes that, although past manmade catastrophes (Bhopal, the Exxon Valdez, and even Chernobyl) had devastating local consequences, their national and international impact was relatively limited.[5] He goes on to point out, on the other hand, that a global failure of the Internet from cyber terrorism or a prolonged power grid failure in the U.S. would have national and international commerce ramifications.[6] These extraordinary and difficult-to-predict events bring home the need for an effective force majeure clause.

Published arbitral awards suggest that a large majority of all force majeure defenses are rejected. The difficulties are demonstrated in an ICC case[7] where a dispute arose when the seller did not deliver the goods promised in the contract, arguing that non-delivery by a supplier excused liability under Article 79 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG")[8] or the force majeure clause in the contract. The tribunal, applying the CISG to the contract pursuant to applicable German law, said that the risk of non-delivery by a supplier fell clearly on the seller. The tribunal noted that its decision was in line with the consistent practice of ICC arbitrators who uphold the force majeure defense only in "extreme cases such as war, strikes, riots, embargoes or other incidences *listed*" (emphasis added) in the force majeure clause of the contract. The tribunal further noted that, in cases of impediments to performance related to typical commercial risks, arbitrators uphold the principle of *pacta sunt servanda* (preserve the sanctity of contract).

Similarly, under common law, the burden is upon the contractor to negotiate limitations on his strict liability such as by inclusion of a force majeure clause. Under U.S. law, for example, "[c]ontract liability is strict liability. It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if he is without fault and even if circumstances have made the contract more burdensome or less desirable than he anticipated."[9]

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5) Robert J. Rhee, *Catastrophic Risk And Governance After Hurricane Katrina: A Postscript To Terrorism Rick In A Post - 9/11 Economy*, 38 Ariz. St. L. J. 581, 583–84 (Summer 2006). Another author has quantified the impact and toll from acts of terrorism, pandemics and more routine everyday risks. *See* Patrick J. O'Connor, *Allocating Risks of Terrorism and Pandemic Pestilence: Force Majeure for an Unfriendly World*, 23 Constr. Law 5, 5–6 (2003).

6) Rhee, *supra* note 5 at 585 n.23.

7) ICC Case No. 9978/1999 (Extract), 11 ICC Bull. 2000, 117.

8) The CISG applies to contracts of sale of moveable goods between parties that have their places of business in different countries when those countries have adopted the CISG or when the rules of private international law lead to the application of the law of a country that has adopted the CISG. CISG Art. 1(1). The CISG is essentially an overlay on the national sales code or sales law of each country that has adopted it.

9) U.S. Restatement (Second) of Contracts, Ch. 11, introductory note (1981).

To rely on a force majeure clause in most jurisdictions, a party must establish that the event was not foreseeable. This is likely to become more and more difficult as the world sees the far-reaching effects of recent devastating events. Virtually any type of "imaginable" event is arguably foreseeable.

Given the narrow and restricted interpretation of force majeure, it is essential to draft a detailed and comprehensive force majeure clause that addresses the particular circumstances of the transaction at issue. Due consideration must be given to the market, the relevant jurisdiction, the location of the project or services, and all external events that may interfere with performance of the contract. This is because unless the type of event is specifically listed in the force majeure clause, virtually no external event will be deemed *unforeseeable* and constitute force majeure excusing contract performance.

We first address the "principles" of force majeure; the ICC's Force Majeure Clause 2003, which your authors believe best summarizes the emerging law of force majeure; and then challenges to successfully invoking the doctrine. We next review contemporary force majeure events and how they may be interpreted in the context of a force majeure defense. We conclude with specific drafting suggestions to deal with these sorts of events.

II. Principles of Force Majeure

A. Background

The concept of force majeure originated in the Napoleonic Code.[10] In common law, the concept has evolved from one of "physical impossibility" to "frustration of purpose" (U.K.) to "commercial impracticability" (U.S.). Initially, the test for impossibility in common law was objective: Was performance rendered absolutely or physically impossible?

Today, most tribunals and courts utilize a standard of commercial impracticability.[11] Performance is excused when it is not practical and could be done

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[10] The Code Napoleon, or, the French Civil Code, Articles 1147 and 1148, 313–14 (Inner Temple translation) (William Benning London 1827). Article 1147 provided that the "debtor is condemned, if there be ground, to the payment of damages and interest, either by reason of the non-performance of the obligation or by reason of delay in its execution, as often as he cannot prove that such non-performance proceeds from a foreign cause which cannot be imputed to him, although there be no bad faith on his part." Article 1148 provided that "[t]here is no ground for damages and interest, when by consequence of a superior force or of a fortuitous occurrence, the debtor has been prevented from giving or doing that to which he has bound himself, or has done that from which he was interdicted."

[11] A helpful brief overview of the evolution of the doctrine of impossibility under common law is found in the discussion of "Force Majeure and Common Law" in Carlos A. Ecinas, *Can A Borrower Use an Economic Downturn or Economic Downturn Event to Invoke The Force Majeure*

only at excessive and unreasonable cost.[12] The U.S. Restatement (Second) of Contracts provides that when, "after a contract is made, a party's performance is made impracticable without [the party's] fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, [the party's] duty to render that performance is discharged as a result, unless the language or the circumstances indicate the contrary."[13] Essentially the same standard is found in U.S. Uniform Commercial Code Section 2–615 involving the sale of goods. Section 2–615(a) sets forth a three part test: (1) a "contingency" (event or impediment) occurred, (2) which makes contract performance impracticable, and (3) the non-occurrence of the contingency was a basic assumption on which the contract was made.[14]

Force majeure is similar to the doctrine of "necessity," which states may attempt to rely on in the investment context when force majeure-type circumstances arise. The International Law Commission Articles on State Responsibility provide in Article 25 that a state may invoke the doctrine of necessity as a basis for excusing a wrongful act only when (1) the act is the only means for the state to safeguard an essential interest against a grave or imminent peril, and (2) the act does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.[15] Argentina has widely invoked the necessity defense in the arbitrations it has faced and is facing in the International Centre for the Settlement of Investment Disputes ("ICSID").[16] As a result of a financial crisis, Argentina repealed the law on which most of its bilateral investment treaties had been negotiated, leading to dozens of arbitrations brought against it.[17] Although different tribunals have reached different outcomes, by and large Argentina has not been able to rely successfully on necessity.

There are a number of similarities between force majeure and necessity in addition to the fundamental similarity that they are both invoked when catastrophe strikes. With both force majeure and necessity, the specific contract or

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Clause In Its Commercial Real Estate Documents?, 45 Real Prop. Tr. & Est. L.J. 731 (2011). This is a thought-provoking article that argues that unprecedented economic downturns such as the 2008 credit crisis in the U.S. are a basis for invoking a force majeure clause in a borrower's commercial real estate loan documents. *Cf. Flathead-Michigan I, LLC v. The Peninsula Development LLC,* 2011 U.S. Dist. LEXIS 27045 (E.D. Mich. Mar. 16, 2011). *See also* Jay D. Kelly, *So What's Your Excuse? An Analysis of Force Majeure Claims*, 2 Tex. J. Oil Gas & Energy L. 91, 93–97 (2006).

12) *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir 1966).

13) Restatement (Second) of Contracts § 261 (1981).

14) U.C.C. §2–615(a) (1977).

15) International Law Commission Articles on State Responsibility Article 25(1), UN Doc. A/56/10, 2001.

16) Amin George Forji, *Drawing the Right Lessons from ICSID Jurisprudence on the Doctrine of Necessity*, 76 Arbitration 44, 47 (2010).

17) *Id.*

treaty provision, respectively, will effectively "trump" any relevant governing law, whether international or otherwise. Further, the application of a force majeure or necessity defense is often restricted to a limited period of time, instead of allowing a blanket defense.[18] Necessity and force majeure, however, require fundamentally different analyses. Unlike force majeure, the necessity defense does not include any type of "foreseeability" requirement. In addition, necessity requires examining the effect of the state's "wrongful" act on other parties – a requirement wholly missing from the inquiry under force majeure.

It is now generally accepted in common and civil law systems that contractual performance that becomes "impossible" or "commercially impracticable" under certain circumstances may be excused. The issue we address is under what circumstances – recognizing that there is not unanimity of approach in all legal systems.

B. The ICC Has Developed a Comprehensive Model Force Majeure Clause

The ICC Clause is a model clause that reflects the emerging consensus about what is required to establish a force majeure defense. The "Introductory Note" and Note (a) to the ICC Clause states it "amalgamates" elements of the previous ICC Force Majeure Clause 1985, the CISG, the Principles of European Contract Law ("PECL") and the Unidroit Principles for International Contracts ("UNIDROIT").

The ICC Clause first provides a general force majeure formula: a party relying on the ICC Clause must prove that (1) its failure to perform was caused by an impediment beyond its reasonable control, (2) it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract, and (3) it could not reasonably have avoided or overcome the effects of the impediment.[19]

The ICC Clause states in Section 3 that, in the absence of proof to the contrary and unless otherwise agreed by the parties, if the impediment is listed in Section 3(a) to (g), a party "shall be presumed" to have established that (a) its failure to perform was caused by an impediment beyond its reasonable control, and (b) it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of

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[18] ICC Force Majeure Clause 2003 para. 6; Forji, *supra* note 16 at 49 (tribunal finding state of necessity for one-and-a-half years).

[19] ICC Force Majeure Clause 2003 para. 1(a)-(c). In drafting the ICC Clause, the ICC Task Force on Force Majeure and Hardship took into account the previous ICC Force Majeure Clause 1985, CISG Article 79, the Principles of European Contract Law ("PECL") Section 8:108, and the Unidroit Principles for International Commercial Contracts ("Unidroit Principles"), Article 7.1.7. For a discussion on how the CISG, Unidroit Principles, and PECL treat force majeure, see Liu, *supra* note 2.

the contract, *provided* the impediment is specifically listed therein. The ICC Clause in Section 3 lists dozens of force majeure events, including, but not limited to, war, armed conflict, hostilities, terrorism, act of God, plague, natural disaster (including violent storm, volcanic activity, and tsunami), explosion, fire, and general labor disturbances such as strike or boycott. The ICC Clause states that successfully invoking force majeure means a party is relieved from liability in damages or other contractual remedy for breach of contract.[20] When the effect of the impediment is temporary, however, a party is only relieved from its duty to perform under the contract as long as the impediment impedes performance.[21]

The Notes to the ICC Clause specify that the mere occurrence of an enumerated event does not automatically afford relief to the non-performing party.[22] That party must prove, in addition, that he could not have avoided or overcome the effects of the event.[23] Even then, the non-defaulting party may prevail by proving the event was within control of the non-performing party or could have been foreseen by it.[24] This is the "balance of evidence to be resolved between the parties"[25] that a tribunal must review and decide. Although this evidentiary burden appears to be easy to meet, in practice, tribunals rarely agree with a party claiming that a force majeure event occurred.

The ICC Clause, reflecting developments in the law, adopts a lower threshold test for invocation of force majeure than "impossibility" of performance. Note a) to the ICC Clause points to use of the phrase "beyond its reasonable control" in Section 1(a) and "could not reasonably have avoided" in Section 1(c). In short, a balancing approach is adopted – not a hard and fast rule.

Section 2 of the ICC Clause addresses the problems that can arise when a third party fails to perform its contractual duties. In this case, the contracting party may only invoke the protections of the force majeure clause when it establishes first the general force majeure requirements that (1) its failure to perform was caused by an impediment beyond its reasonable control, (2) it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract, and (3) it could not reasonably have avoided or overcome the effects of the impediment. The contracting party must also prove that those same requirements apply to the third party, *i.e.*, that the third party was also subject to a force

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20) ICC Clause at para. 5.
21) *Id.* at para. 6.
22) ICC Clause Note (d).
23) *Id.*
24) *Id.*
25) *Id. See also* ICC Clause Introductory Note ("It should be emphasized that even where a party invoking the clause does so by pointing towards a listed event, that party still needs to prove that it could not reasonably have avoided or overcome the effects of the listed event.").

majeure event. Note b) to the ICC Clause explains that, without these requirements for both the contracting party and the third party, the contracting party would "find it too easy" in most situations to invoke force majeure simply by demonstrating that the third party did not fulfill its contractual obligations.

C. *The Three Major "Impediments" to Invoking Force Majeure Successfully*

The three primary reasons tribunals find that a force majeure defense fails are that the party invoking the event (1) should have foreseen it, (2) should have determined an alternate way to perform the contract, or (3) did not comply with the notice requirements in the force majeure clause. Further, even when an arbitral tribunal allows a force majeure defense, it usually limits the defense to a certain period of time, so a force majeure clause does not necessarily excuse performance indefinitely.[26]

1. *Tribunals strictly interpret foreseeability*

In civil and common law legal systems, the event must have been unforeseeable at the time of contracting for a force majeure defense to be successful. Tribunals and courts reason that failure to protect oneself against a foreseeable event is an assumption of the risk of that event.[27] Foreseeability is a question of fact for the decision maker.

Because the interpretation of a force majeure clause turns on the language in the contract at issue, an arbitration tribunal or court determining whether reliance on a force majeure clause was permissible must make a fact-specific inquiry in light of the governing law of the contract. In many of the decisions where tribunals reject a force majeure defense, the party asserting the defense could and should have identified the problem that led to non-performance and specifically allocated its risk before entering into the contract. For instance, in ICC No. 12112/2009,[28] the State partner of a joint venture for cultivating agricultural products did not perform its contractual obligations because it failed

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[26] For instance, in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, ICC Case No. 1703/1971, Pieter Sanders (ed.), I Yearbook Commercial Arbitration 130–32 (1976), the tribunal found that the respondent was excused from performance only for one month of time in which the defendant claimed a force majeure event prevented performance. *See also* 508 F.2d 969 (2d Cir. 1974) (award enforced in the U.S.).

[27] The U.S. Supreme Court explained, "as Justice Traynor said, [i]f [the risk] was foreseeable, there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed." *United States v. Winstar Corp.*, 518 U.S. 839, 905–907 (1996).

[28] ICC Case No. 12112 in Albert Jan van den Berg (ed.), XXXIV Yearbook Commercial Arbitration 77–110 (2009).

to make available the land, equipment, and facilities that it was to contribute to the venture. This was because it made all of the land available to an international organization to accommodate refugees from a neighboring country. The tribunal concluded that force majeure did not excuse the State partner's failure to perform because the State partner, as a regional public entity, must have known about the social climate and forces in its region that made ensuring performance difficult. The tribunal noted that "[b]efore entering an obligation, everyone must, before, be certain that he has the ability to perform it. If he has or must have the slightest doubt about his ability to perform at the given time, he must make all necessary verifications before promising performance."

In *ICC Nos. 3099 and 3100/1979*,[29] two companies entered into a contract for sale of petroleum-based products. The respondent sought to avoid payment because its central government agency imposed currency exchange controls that, through no fault of the respondent, prevented it from obtaining the necessary foreign currency to make payment. The contract included a clause that listed as force majeure events impediments arising from legislation or regulation by Algeria – but not from the respondent's government. The tribunal found that the restrictions imposed by the respondent's government did not amount to force majeure, because the imposition of exchange controls was "certainly not unforeseeable" in that those very regulations were already in force when the contract was formed.

In *ICC Case No. 2216/1974*,[30] the market price for petrol fell dramatically after the parties entered into the contract. The respondent refused to take delivery, arguing that the fall in price was so large it excused respondent's performance, and also that intervention of government financial authorities to prevent currency losses constituted force majeure. The tribunal found that the change in market price risk was foreseeable and its risk could have been allocated. The tribunal also found that the respondent was generally aware of the legislation allowing the financial authorities to intervene, and indeed had received a letter from the relevant authority, so the change in circumstances was foreseeable. The tribunal noted that the respondent could have negotiated clauses in the contract that took into account the effects of the legislation allowing financial authorities to take such action, and that no doctrine or case law precedent held that such legislation could constitute force majeure.

In *ICC Case No. 11253/2002*,[31] a Romanian company entered into a contract for the sale of scrap metal to a German company. The contract provided that the seller would obtain an export license, which it failed to do. The contract

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29) I ICC Awards 67.
30) ICC No. 2216/1974, Award Abstract and Commentary, Digest of ICC Awards.
31) 21 ICC Bull. 66 (2010).

further provided that force majeure was to be understood as described in Incoterms 1990 – pre-determined contract terms published by the ICC. The tribunal noted that Incoterms defined force majeure as non-performance arising out of causes beyond either party's control and without any fault or negligence by the non-performing party. The seller claimed that its failure to obtain the export license was for reasons beyond its control and constituted force majeure. The tribunal disagreed, concluding that the regulation upon which the seller relied to justify its failure to obtain the export license had been in effect for four years. Accordingly, it could not be compared to an event such as a sudden change in the economic or political situation in Romania. The seller was expected to know national export regulations and procedures in Romania. Lastly, the tribunal noted that obtaining the export license was part of the seller's contractual obligations, and thus the seller had full responsibility for not obtaining the license. *See also ICC No. 9466/1999*[32] (concluding that a "loss" of ships by their owner when impounded by a creditor did not qualify as a force majeure event under the contract because there was no unforeseeability).

Under different circumstances, in *ICC No. 8790/2000*,[33] the tribunal concluded that the seller's temporary suspension of deliveries was justified based on force majeure. The seller had procured a certificate from the local Chamber of Commerce stating that a drought led to a decrease in raw material yield, and that those circumstances were "beyond human control" and prevented the seller from fulfilling its contractual obligations. The force majeure provision at issue there did not specify drought as a force majeure event, but the tribunal concluded that the provision's inclusion of "natural catastrophes" and "other circumstances outside control" entitled the seller to invoke force majeure.

It is because most impediments are *foreseeable* that force majeure clauses should allocate these risks specifically according to the economics of the transaction and to the party best able to manage the risk.

2. *Exploring alternate performance – and demonstrating its impossibility – is critical*

It is a generally accepted principle of law that a party seeking to excuse non-performance must demonstrate it could not have avoided or overcome the impediment or its consequences.[34] The CISG Secretariat Commentary to Article 79 (i) states:

> Even if the non-performing party can prove that he could not reasonably have been expected to take the impediment into account at the time of the conclusion of the

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32) IV ICC Awards 97.
33) IV ICC Arbitral Awards 155.
34) CISG Article 79 (i), UNIDROIT Principle Article 7.1.7 (i), PECL Article 8:108 (i).

> contract, he must also prove that he could neither have avoided the impediment nor overcome it nor avoided or overcome the consequences of the impediment. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance.

This approach is also found in the ICC Clause at Section 1(c).

In other words, when asserting force majeure as a defense, a party must show that there were no reasonable alternate arrangements that would have allowed it to perform under the contract. Tribunals often require a party claiming force majeure to prove it attempted alternate performance before accepting its force majeure defense.

For instance, in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*,[35] the respondent was performing a turn-key contract for the supply of a factory when hostilities broke out in the region. These hostilities led to conflict between the governments of the two parties (the claimant was a state-controlled enterprise), and the respondent's personnel were required to leave the country. At the end of the hostilities, the claimant asked the respondent to continue carrying out the contract. Respondent refused on grounds of impossibility, claiming that it was not able to ensure the safe return of its employees to the country, and that its own government cancelled the financial backing it had previously given. The tribunal found that, due to the conditions arising from the hostilities, the respondent was excused from performance under the contract and the relevant law, but only for the one month of hostilities. After that month, because it did not appear that the respondent made any effort to obtain the required visas for its personnel or explored other staffing alternatives, force majeure was not a valid defense. In addition, the tribunal noted that the respondent could have obtained alternate financing from claimant as provided in the contract.

The tribunal in *Macromex Srl. v. Globex Int'l Inc.*[36] reached a similar result. The contract there was for the purchase of chicken leg quarters to be delivered into Romania. After the contract was signed, an avian flu outbreak prompted the Romanian government to bar all chicken imports not certified by a particular date. The seller raised a defense under CISG Article 79. Because the contract contained no force majeure clause, the arbitrator applied the CISG to fill the "gap." The tribunal concluded that the seller satisfied the first two and possibly the fourth elements of force majeure under the CISG – there was an impediment beyond a party's control, that was unforeseeable by that party,

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35) ICC No. 1703/1971, Pieter Sanders (ed.), I Yearbook Commercial Arbitration 130–32 (1976). *See also Parsons & Whittemore Overseas Co.*, 508 F.2d 969 (award enforced in the U.S.).

36) AAA Case No. 50181T 0036406 (Interim Award dated Oct. 23, 2007). *See also* 2008 U.S. Dist. LEXIS 31442 (S.D.N.Y. 2008) (award enforced in the U.S.).

and that the party's nonperformance was due to that impediment. However, the tribunal found the seller did not meet the third element – that the impediment could not be reasonably avoided or overcome. The tribunal relied on the substituted performance provision in the U.S. Uniform Commercial Code to analyze the third element and concluded that the seller could have shipped to another port in a neighboring country, as the buyer had proposed.

In *National Oil Corp. v. Libyan Sun Oil Co.*,[37] the parties entered into an oil exploration and production sharing agreement in Libya. When the U.S. government then banned oil imports from Libya and severely restricted oil exports to Libya, the defendant invoked force majeure and suspended performance under the contract. Defendant claimed that its personnel, all U.S. citizens, could not enter Libya because the U.S. government declared that U.S. passports were no longer valid for travel to Libya. The tribunal rejected the force majeure defense, concluding that the defendant could have hired non-U.S. personnel to perform the contract, so the ban did not constitute force majeure.

In *ICC No. 1782/1973*,[38] the respondent contracted to deliver a fleet of trucks to three sites in an Arab country. After defaulting on its obligations, the respondent cited force majeure as a basis for the default, claiming that its Israeli employees would have been unable to obtain visas. The tribunal determined that there was insufficient proof of force majeure, specifically noting that the delay in obtaining visas could not account for default over 26 months, and that the respondent could have hired employees without the alleged restrictions.

As these decisions illustrate, tribunals demand evidence both that the impediment could not have been avoided and that alternate performance options were explored but were not feasible. There is a reasonableness limitation to the dual requirement to "avoid" the impediment and to "overcome" its effects. The test is what a "reasonable person" would have done in like circumstances. As Comment C (iii) to PECL Article 8:108 states:

> One cannot expect the debtor to take precautions out of proportion to the risk (e.g., the building of a virtual fortress) nor to adopt illegal means (e.g., the smuggling of funds to avoid a ban on their transfer) in order to avoid the risk.

"Reasonableness" is a question of fact which can only be determined on a case by case basis. A shipper carrying items such as a Michelangelo painting will be expected to take far more extensive and costly steps to prevent damage to the item than would be the case if the object was not unique and irreplaceable.

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37) ICC Case No. 4462/1985 and 1987, Albert Jan van den Berg (ed.), XVI Yearbook Commercial Arbitration 54–78 (1991). *See also* 733 F. Supp. 800 (D. Del. 1990) (award enforced in the U.S.).
38) Award Abstract and Commentary, Digest of ICC Awards.

3. *An otherwise successful force majeure defense can be lost by failing to give timely notice*

A duty to notify the other party of the impediment and its consequences "without delay" is found in Section 4 of the ICC Clause. The same requirement is found in CISG Article 79(4); UNIDROIT Article 7.1.7(g); PECL Article 8:108(3); and in both common and civil law. The underlying policy and logic are straightforward – to give the non-defaulting party the opportunity to take all reasonable steps available to it to overcome or mitigate the consequences of the event.

Tribunals will not excuse failure to provide timely notice of asserting a force majeure event. For example, in *ICC No. 2478/1974*,[39] a French company claimed damages against a Romanian company that had not delivered an agreed quantity of fuel because of a change in the price of oil and because the Romanian authorities cancelled the export license concerning the fuel. The Romanian company asserted that the cancellation of the export license constituted force majeure, exempting it from all contractual liability for having stopped deliveries. The tribunal agreed, saying the event "undeniably constitutes a case of force majeure," based both on the "general principle of law" and on the relevant contract. However, the contract and general legal principles required the party invoking force majeure to inform the other party without delay. The Romanian company did not provide timely notice – waiting over six months – and as a result, it lost the opportunity to claim force majeure for a certain time period.

In short, it is essential to provide timely notice of events of force majeure as early as possible to preserve the ability to assert your rights under the doctrine.

III. Learning from Contemporary Force Majeure Events

ICC Force Majeure Clause 2003 provides a detailed and thoughtful model clause. Nevertheless, a party will be best served by customizing the clause to the circumstances of its contract and business transaction. In addition, of course, there are many other reasons to carefully draft force majeure clauses.

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[39] I ICC Awards 25. *See also* Kyriaki Karadelis, *Thai company wins oil claim against Glencore*, Global Arbitration Review, Oct. 28, 2011, *available at* http://www.globalarbitrationreview.com/news/article/29919/Thai-company-wins-oil-claim-against-glencore (rejecting force majeure arguments in arbitration of breach of oil sales contract when seller claimed it could not deliver cargo because Venezuela's state-owned oil company had been instructed by the Venezuelan government to stop production and export of the crude oil to be delivered). The tribunal reportedly found the notice of force majeure "invalid and ineffective."

For example, these clauses are carefully reviewed by investors and lenders to confirm they are clear, comprehensive and consistent with market practice. Lenders will often not make loans unless the force majeure clause clearly indicates who will bear the risk if the project becomes not feasible so the lender will know to whom to look for repayment of its loan.

As noted above "ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused."[40] Where then to draw the line in terms of identifying and listing specific events of force majeure?

Science fiction writers can envision a time when machines controlled by artificial intelligence might go awry and interfere with commerce. Such an event, although it can be imagined, is not reasonably foreseeable at this time. Most businessmen and their counsel would agree this risk is so remote as to be currently unworthy of consideration.

There are foreseeable events to consider that, while unlikely, are worth analysis. For example, a "Carrington Event" is a large solar flare – a burst of X-rays spinning out from a sunspot.[41] The largest such event occurred in 1859. A more recent solar event in 1989 caused hundreds of millions of dollars of damage in Quebec, Canada and destroyed huge electric transformers in South Africa. Scientists currently are aware that we are in a two or three year period of increasingly frequent outbursts. A Carrington scale event could result in a geomagnetic storm that might take down part of the North American power grid. Indeed, a 2008 *U.S. National Academy of Sciences* report stated that such an event could knock out power in parts of the country for months or possibly years. The report estimated that approximately 135 million Americans could be forced to revert to a pre-electric lifestyle or move to new location: "Water systems would fail. Food would spoil. Thousands would die."[42] The impact on national and international commerce, assuming the study is correct, would be catastrophic.

Many companies would have to claim force majeure. The party opposing the defense would argue that the non-performing party should both have foreseen the possibility of a Carrington event and taken precautions to protect against its effects. Electric utilities know, for example, how to protect their transformers which are most vulnerable to these solar storms. To date, they have not been willing to invest the $350,000 to $1 million per transformer to protect their equipment and customers against these storms.

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40) *Kell Kim Corp v. Cert. Mkts., Inc.*, 519 N.E 2d 295, 296 (N.Y. 1987).

41) Brian Vastag, *As the sun awakens, the power grid stands vulnerable*, Wash. Post, June 20, 2011, *available at* http://www.washingtonpost.com/national/science/as-the-sun-awakens-the-power-grid-stands-vulnerable/2011/06/09/AGwc8DdH_story.html.

42) *Id.*

Legislation passed by the U.S. House of Representatives in 2011 said that 350 such transformers in the U.S. are critical and should be protected.[43]

Severe solar storms are a classic "Act of God" and arguably a "violent storm" listed in Section 3(e) of the ICC clause. Nevertheless, will a utility's force majeure defense fail because (a) the event is foreseeable, and (b) its effects can be avoided for a reasonable cost?

An asteroid strike is an "Act of God" and presumably a "natural disaster" listed in Section 3(e) of the ICC clause. Asteroid strikes are known and foreseeable.[44] The threat of an impending strike is discoverable by scientists, but often only with a few days notice. This would provide enough time to evacuate personnel and equipment that are movable, but not, for example, in place, finished construction. Depending on its size, the strike would likely render the site uninhabitable. Unlike a solar storm's impact on the electric grid, there is no way to "avoid" an asteroid strike or fully overcome its effects. Neither party is in a better position to manage the risk. We assume that is why this rare – albeit foreseeable and real – risk is not listed in any force majeure clause of which we are aware.

Similar questions can be raised for other types of force majeure events. If a company is located in an area where earthquakes, tornadoes, or hurricanes are frequent and not unexpected, will it be held to a higher standard to avoid or overcome the impact than a company located where those types of events are a rarity? Likewise, should a company located in London or New York be better and differently prepared for a terrorist event than a company located in Alaska? With heightened unrest in the Middle East, should energy companies be expected to give more consideration to alternative energy sources and to energy independence? What sort of back-up plan should be in place and ready to be implemented in order to minimize business disruptions when faced with these or other force majeure events?

IV. Practical Drafting Suggestions

The ICC model clause, in our view, is an excellent effort at defining a clear, analytic framework and specific events that should be listed. Nevertheless, we suggest a few modest changes and questions to address. The most important points are to identify and list specifically all risks and to revisit foreseeability in the context of every new contract.

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43) *Id.*

44) *See, e.g.*, Steve Tracton, *Asteroid to barely miss contact with Earth*, Wash. Post, June 27, 2011, *available at* http://www.washingtonpost.com/blogs/capital-weather-gang/post/asteroid-barely-misses-contact-with-earth/2011/06/27/AGseRTnH_blog.html.

In ICC Clause Section 3(c), we and others suggest adding to "act of terrorism" the words "or threat thereof." The facts in the U.S. case *Sub-Zero Freezer Company v. Cunard Lines Limited*[45] are instructive, even though there was no force majeure clause in the contract. The plaintiff reserved well in advance a cruise ship to sail the Mediterranean the first week in October 2001, which turned out to be three weeks after the events of 9/11. Many of the plaintiff's employees and guests refused to go because of safety concerns. The defendant refused to reschedule or to return the deposit amount. The court found that the parties could have allocated the risks, but did not, and therefore ruled against the plaintiff's claim of force majeure. We can only speculate whether, if there was a force majeure clause and it did list "act of terrorism" as an event of force majeure, the court would have interpreted it to include "threats" of terrorism under the circumstances. There were threats and real fear of additional acts of terrorism in the period after 9/11. However, there were no "acts." Is the "threat" of an "act of terrorism" an event of force majeure in the absence of the suggested new language?

To deal with Carrington type events, we suggest adding the words "atmospheric disturbance" to ICC Clause Section 3(e). This will avoid an argument that it is not a "violent storm" listed in 3(e) and the further argument that it was a foreseeable event whose risk was not specifically allocated and therefore is not force majeure.

Another change to consider is whether to add the words "or quarantine" after "plague, epidemic," in ICC Clause Section 3(e). Many believe the threat of biological warfare has increased and the threat of some new more virulent threat of influenza – terrorist or otherwise – cannot be ruled out. We think it preferable to make clear that quarantine in the course of a plague or epidemic, an "effect," but not the event listed itself, is covered.

Climate change has become a big issue for energy vendors and manufacturers (and others). New greenhouse gas laws and regulations are being proposed with regularity. It is important for counsel to help clients anticipate and plan for major changes in applicable environmental laws and regulations.[46] Companies entering into long term supply contracts have to consider potentially significant new financial (*e.g.,* capital and operating cost) uncertainties resulting from regulatory change. In addition, there are an increasing number of climate change tort litigations being filed. These foreseeable changes are hard to predict and quantify. Nevertheless, they are risks which should be analyzed and allocated, whether in a force majeure, price adjustment and/or termination clause. Many existing contracts allocate risks from increased

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45) 2002 WL 32357103 (W.D. Wis. Mar. 12, 2002).

46) Dane A. Holbrook and Aileen M. Hooks, *Climate Change Finds Its Way Into Business Contracts, National L.J.*, Oct. 25, 2010.

regulatory costs which might cover some greenhouse gas laws. An issue is whether existing force majeure clauses cover both local and national greenhouse gas regulations as well as international treaty climate change legislation?

There are many situations that are less clear to analyze and resolve. For example, should contract negotiators try to address a situation such as the U.S.'s recent debt ceiling crisis, where Congress failed to act until the last minute to raise the ceiling? This inaction created turmoil and uncertainty in the global economy, including stalled deals and delayed financings. Although government inaction generally is foreseeable, some might argue that the length of Congress's recent inaction over the debt ceiling was not foreseeable. One possible solution would be to add as a specified impediment "any failure by a government to act as expected in the normal course of time." Such language, however, may not adequately define the impediment.

V. Conclusion

It is increasingly important to maximize force majeure protection by carefully drafting – and then preserving – rights under a contract that will excuse performance if faced with unexpected events beyond one's control. The unexpected should be expected.