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## International eCommerce regulation

# First UN Convention on eCommerce finalised

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### ABSTRACT

The United Nations Commission on International Trade Law (UNCITRAL) has finalised its Convention on electronic contracting following over three years of deliberations. The Convention has been formally titled the *Convention on the use of electronic communications in international contracts*. It will be presented at the UN General Assembly meeting in late 2005, where if adopted it will become the first UN Convention addressing legal issues created by the digital environment. This paper analyses the content of the Convention and questions whether the flexibility offered to member states to alter the application through declarations made when signing the Convention may act as a barrier to harmonisation, creating the potential for a regime of varying and multitudinous exemptions.

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## 1. Introduction

The UNCITRAL Convention seeks to enhance the legal certainty and commercial predictability of international electronic transactions by setting out a number of interpretive rules for the use of electronic communications in negotiating and forming contracts. This paper discusses the main provisions of the Convention and the impact of the Convention on the legal rules surrounding electronic contracting.

The new Convention is likely to establish a default standard for electronic transactions. Even if a country does not ratify the Convention (once it is brought into force) it will still influence the terms of a transaction; particularly where the other contracting party is from a country that is a signatory to the Convention.

The Convention on electronic contracting also seeks to harmonise national law regarding how electronic contracts can be made. Harmonised domestic legislation will overcome the legal uncertainty in international business transactions where contracting parties are from different countries. A more certain legal environment will increase confidence in

conducting electronic transactions, and in turn participation in eCommerce.

However, the complex provisions in the Convention on scope and exclusions may undo some of the good intentions of the Convention, and this paper raises concerns about the management of these exclusions in practice.

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## 2. Why a Convention?

The Convention follows on from earlier work of the UNCITRAL Working Group on Electronic Commerce which released the *Model Law on Electronic Commerce* in 1996 and the *Model Law on Electronic Signatures* in 2001. These set out basic legal rules for establishing the legal validity for concepts such as writing, signature and originals when in electronic form, and other provisions facilitating the legal recognition of electronic communications and signatures. The Model Laws are recommendations by UNCITRAL for electronic enabling provisions that national legislators may incorporate into the laws of their country to allow contracts to be formed electronically. There is

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neither formal process of adoption of the Model Laws nor is there any requirement that notification be given to UNCITRAL.

The non-binding character of these instruments gives states great flexibility in picking and choosing provisions to implement into domestic law and flexibility in the method of implementation. The sacrifice that comes with the flexible approach used in the Model Laws is reduced uniformity in implementation and less certainty and harmonisation of national eCommerce legislation. The *Model Law on Electronic Commerce* when first created was a visionary instrument and provided a broad framework for harmonisation at a time when eCommerce was in its infancy and there was little international law on the matter.

However, it is now nearly a decade since the 1996 *Model Law on Electronic Commerce* was released and the current move towards a Convention reflects the increased use, familiarity, and acceptance of the legal provisions needed to enable international electronic transactions. The creation of a Convention also reflects an increased desire in the international community for harmonisation and greater predictability in eCommerce. While the Convention shares many notional similarities with the Model Law, it has updated it to take into account changes in legal understanding and advances in technology.

### 3. Core principles

Like the Model Laws, the Convention contains provisions enabling the two principles at the core of any electronic transaction's legislation:

- *Functional equivalence* – paper documents and electronic transactions are treated equally by the law; and
- *Technology neutrality* – the law does not discriminate between different forms of technology.

Of these two principles it is the former that is of the greatest importance, allowing the legal requirements of paper-based documents such as writing and signature to be readily translated into electronic equivalents. The interpretative nature of functional equivalence provisions allows the general application of these rules without necessitating amendment of all laws containing provisions on writing, signature or other form requirements.

The Convention refrains from including too many substantive provisions as it was felt by UNCITRAL that these were best left to national legislators to address. In any case most substantive issues would also apply to paper-based trade.

The principle of party autonomy that is at the heart of private international law and the UN *Convention on Contracts for the International Sale of Goods* (1980), and to a lesser extent the 1996 and 2001 Model Laws is also embodied in the electronic contracting Convention. Party autonomy, or the principle of contractual freedom, is important to ensure parties are at liberty to choose who they contract with and on what terms. There are also distinct practical advantages to this approach as it allows parties to resolve amongst themselves any legal difficulties arising from the use of electronic communications.

## 4. Key provisions

*This section examines the key provisions of the UNCITRAL Convention, their effect, and how it fits in with or derogates from existing principles of international law.*

### 4.1. Scope of application

Broadly, the Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose place of business is in different states.<sup>2</sup> The application of the Convention is not autonomous but applies when the principles of private international law apply to the law of a contracting state whose law governs a contract.

By applying the Convention to electronic communications rather than to the contract, the scope of the Convention is broadened significantly and can apply in a number of situations, including:

- where a contract is formed partially by electronic communications and partially through other, more traditional means such as orally or through written communications; and
- to communications made during the negotiation stage of a contract as well as any communication made in connection with contract formation. The scope of the Convention must necessarily be this broad as communications made during the negotiation and performance stages play a significant role in shaping parties' understanding of the contract terms. It is not reasonable to judge a contract without looking at the circumstances surrounding its creation. This reflects long-standing principles of contract law.

Articles 2, 3, 19 and 20, however, place a number of significant qualifications on this prima facie broad scope of application. These articles are discussed below.

### 4.2. Declarations

Articles 19 and 20 are designed to be read with Article 1 and place some major qualifications and clarifications on the scope of the Convention. Article 19 contains provisions on declarations a state may make when signing the Convention.

Article 19 of the UNCITRAL Convention gives contracting states, through a declaration made when signing the Convention, broad powers to limit the scope of application. The application of the UNCITRAL Convention can be limited by placing restrictions on criteria for when the Convention will apply or by excluding specified matters from the scope of application.

Criteria that a contracting state can apply to the scope of the UNCITRAL Convention include:

- only applying the Convention when states from which contracting parties have their place of business are a signatory to the Convention (Article 19(1)(a));
- only applying the Convention when the parties have agreed that it applies (Article 19(1)(b)); or

<sup>2</sup> Article 1.

- specifying matters to exclude from the scope of application of the Convention in a declaration made when signing the Convention or at any subsequent time (Article 19(2)).

The flexibility given to states to limit the application of the Convention could pose a significant barrier to the international harmonisation of the legal rules surrounding eCommerce. The Convention sets out a number of provisions aimed at enhancing legal certainty when using electronic communications in contract negotiations and performance, however, this certainty can be stripped if a state makes a declaration by only applying the Convention to certain matters. As it stands, Article 19 has the potential to re-introduce the very legal ambiguities that the Convention is designed to avoid. It could also be a significant barrier to the harmonisation of the rules surrounding electronic contracting.

The UNCITRAL Convention has been created for the benefit of private parties, not for public bodies wishing to engage in international electronic contracts. It appears to be an undue obstacle to international eCommerce if a party could not benefit from the provisions of the Convention because the state where the other contracting party had their place of business had exempted the matter covered by the contract.<sup>3</sup> It should also be remembered that parties are given complete discretion to vary or derogate from the UNCITRAL Convention – it seems almost superfluous to give states a comparable power to vary the scope of application of the Convention.

As yet there has been no discussion in UNCITRAL or the UNCITRAL Working Group on Electronic Commerce of a mechanism to track limitations a contracting state has placed on the application of the Convention. The most obvious example of such a mechanism is a website, managed by the UNCITRAL Secretariat, for example, listing exemptions a contracting state has made in declarations. Without such a mechanism it will be difficult for private parties to ascertain whether or not a matter covered in a contract has been exempted either by the state where they have their place of business or the state where the other party has their place of business. The burden of discovering such information is a barrier to efficient international electronic trade – the very thing the Convention is aimed at promoting.

In addition to the broad power given to states to exempt ‘matters’, the famed legal word to cover everything, states can also declare that the Convention only applies when parties agree to apply the Convention, for example, in the contract itself or through some other ongoing arrangement. The effect of such a declaration is to make the Convention apply only on an opt-in basis.

#### 4.3. Communications exchanged under other international instruments

Article 20 contains provisions extending the scope of application of the Convention to other Conventions so that the rules surrounding the use of electronic communications in contract formation apply without needing to alter these Conventions. It creates a somewhat complex but flexible regime for opting in and out of international instruments:

- Article 20(1) lists a number of in force UNCITRAL Conventions to which the electronic contracting Convention applies. It includes the 1980 *Convention on Contracts for the International Sale of Goods* and the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*;
- Article 20(2) provides that the Convention applies to communications made under any other international instrument unless the state elects not to apply the Convention. If states do not elect to do this the Convention applies. The opt-out approach used in Article 20(2) is both necessary and desirable. If an opt-in regime was adopted states may never elect for the Convention to apply to other international Conventions;
- Article 20(3) allows a state to apply the Convention to specified international instruments if a state has made a broad excluding declaration under Article 20(2); and
- Article 20(4) allows states to opt-out of specific international instruments if a declaration is not made under Article 20(2), which applies the Convention to all international instruments.

This four-pronged approach creates a highly flexible system of choosing international instruments to which the Convention applies. Again with this flexibility comes the reduced certainty of harmonisation, and there is a need for a mechanism to track any declarations states have made under Article 20.

#### 4.4. Participation by regional organisations

Article 17 allows a regional economic integration organisation constituted by sovereign states to sign, ratify or accede to the Convention on behalf of its members. The organisation is required to make a declaration at the time of signature, ratification or accession (as the case may be) that it has competence to act on behalf of its members over the matters governed by the Convention, and will be given the rights and obligations of a contracting state.

Article 17 allows organisations such as the European Commission, the chief law-making body of the European Union, to sign the Convention on behalf of its member countries. The article is a convenient mechanism to aid regional harmonisation and promote a common regional economic vision regarding electronic contracting.

#### 4.5. Exclusions

In addition to the power given to states to alter the scope of application of the UNCITRAL Convention, and the power given to contracting parties to vary or derogate from the provisions of the UNCITRAL Convention, certain matters are specifically exempted from the Convention. These are contained in Article 2, and are as follows:

- contracts concluded for personal, family or household purposes (Article 2(1)(a));
- transactions on a regulated exchange (Article 2(1)(b)(i));
- foreign exchange transactions (Article 2(1)(b)(ii));
- inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to

<sup>3</sup> This can be done in accordance with Article 18, paragraph 2.

securities or other financial assets or instruments (Article 2(1)(b)(iii));

- the transfer of security rights in sale, loan or the holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary (Article 2(1)(b)(iv)); and
- transferable trade documents, including bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts, or any other 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 2(2)).

Consumer contracts have been excluded from the Convention as the rules covering these contracts differ from country to country. Regulation of electronic communications in consumer contracts requires protection provisions that go beyond the provisions of the present Convention. This is the main exemption to the UNCITRAL Convention. A similar exclusion to Article 2(1)(a) has been incorporated into the 1980 Sale of Goods Convention.

The exemptions incorporated into Article 2(1)(b) have been included because it was felt by UNCITRAL that the financial service sector was already subject to well-defined regulations and industry standards that addressed the legal issues relating to international eCommerce. The inherently cross-border nature of these kinds of financial transactions would not make it appropriate for these transactions to be excluded through declarations made by states under Article 19.

Practical issues in creating electronic equivalents have resulted in the exclusion of transferable trade documents. For example, the requirement for a singular original cannot be easily resolved in the electronic environment. Article 2(2) also does not apply to letters of credit and bank guarantees.

#### 4.6. Party autonomy

Consistent with the principle of party autonomy at the core of private international law, Article 3 of the Convention gives parties the power to agree to exclude, vary or derogate from all or part of the provisions of the Convention.

#### 4.7. Location of the parties

Article 6 of the UNCITRAL Convention sets out a number of rebuttable presumptions to determine the location or place of business of the parties. The location of the parties plays an important role in determining the place of dispatch of an electronic communication and the place of contract formation. These help in determining which court in which country has jurisdiction to hear disputes arising from an electronic contract. Location is also important in determining the applicable law. The default rules in Article 6 are also useful in determining the place of business of an organisation that has more than one business location.

Factors that may be considered in determining the location of the parties are as follows:

- the place of business is presumed to be the location indicated by the party (Article 6(1));

- if a place of business has not been indicated and there is more than one then the place of business is the location which has the closest relationship to the contract. This is to be determined by considering the circumstances contemplated by the parties at any time before the conclusion of the contract (Article 6(2));
- where a person does not have a place of business, their place of habitual residence is to be used (Article 6(3));
- a location is not a place of business simply because it is the location where the technology used in connection with the formation of a contract is located or where this information system is accessed by other parties (Article 6(4)); and
- the use of a domain name or email address connected to a specific country does not create a presumption that a party's place of business is located in that country (Article 6(5)).

The rules set out above can all be rebutted with evidence to the contrary – they simply provide a convenient and practical starting point to determine a party's place of business. Articles 6(2) and 6(3) provide a default position if no indication of a party's place of business is made.

Article 6 does not impose an obligation on parties to disclose their place of business. UNCITRAL has recognised that requiring parties to do this could be harmful to some business practices. It would also begin to address substantive issues of the contract, something that the Convention tries to avoid.

Of all the default rules in Article 6, the rule contained in paragraph (1) has the most significance. It reaffirms the autonomy of parties to determine their location where they have multiple places of business. The 1996 Model Law did not contain such a provision. The UNCITRAL Convention expands on the rules set out in the Model Law, which only contained provisions analogous to Articles 6(2) and 6(3).

Where a party has more than one place of business, the circumstances known or contemplated by the parties at any time before the conclusion of the contract is to be considered in determining their place of business for the purposes of the Convention.<sup>4</sup> This of course will be unique to every contract but, for example, could include off the record communications made by a party, or if a party has been consistently negotiating with other parties from a particular place of business there may be an expectation that this is where their place of business is.

While Articles 6(4) and 6(5) seek to clarify that certain presumptions should not be made based on the location of any supporting technology or virtual address, this does not preclude a court or arbitrator from taking these matters into consideration in determining the location of a party, where the court or other dispute resolution body decides it is appropriate.<sup>5</sup>

#### 4.8. Formation of contracts

Unsurprisingly the Convention contains a number of provisions facilitating the non-discriminatory treatment and

<sup>4</sup> This requirement is contained in Article 6(2) itself.

<sup>5</sup> United Nations Commission on International Trade Law, *Report of the Working Group on Electronic Commerce on the work of its forty-fourth session*, 8 November 2004 (A/CN.9/571), <http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0458992>, para 98.



improvement of the legal certainty of contracts formed using electronic communications. These include:

- a communication shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication (Article 8(1));
- while a party is not obliged to use or accept electronic communications, their agreement to do so may be inferred from their conduct (Article 8(2));
- electronic communications that are not addressed to a specific party but are accessible by a number of parties using an information system are to be considered an invitation to make an offer (or an invitation to treat), unless a contrary intention is clearly expressed (Article 11); and
- a contract formed where one or both parties are an automated information system shall not be denied validity on the sole ground that there was no intervention by a natural person (Article 12).

Article 8 gives equal status to paper-based and electronic contracts and communications. While the corresponding article in the 1996 Model Law explicitly contemplated situations where parties may not agree to accept or use electronic communications in contract formation, the UNCITRAL Convention contemplates a different standard. The Convention does not contain a corresponding provision, although it is implied from the freedom of contract principle in Article 3. Instead it slightly increases the standard set in the Model Law by specifying that agreements to use electronic communications can be inferred from a party's conduct. It is a subtle difference, but the difference in wording can be attributed to the increased use and acceptance of electronic communications in contract formation.

Article 11 (described above) reflects a similar provision in the *Convention on the International Sale of Goods* and applies it to electronic media. It has been created to ensure that vendors with limited stock who use such general communication methods are not bound to fulfil those orders which could be potentially received from an unlimited number of buyers.<sup>6</sup>

Article 12 allows a contract to be validly formed without human interaction by one or both parties. However, the article does not override the substantive requirement in some countries that there is an intention for a contract to be formed.<sup>7</sup>

#### 4.9. Form requirements

Article 9, the central article of the UNCITRAL Convention, contains a number of default minimum standards for enabling electronic equivalents to traditional paper-based form requirements. These are as follows:

<sup>6</sup> United Nations Commission on International Trade Law, *Draft Convention on the use of electronic communications in international contracts: note by the Secretariat – Addendum: Background Information*, 17 November 2004 (A/CN.9/577/Add.1), <http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0583272>, p. 12.

<sup>7</sup> Chong Ka Wei, *Convention on the use of electronic communications in international contract*. Presentation at ASEAN Australia Development Cooperation Program Legal Infrastructure for eCommerce in ASEAN Malaysia Workshop (W4), 29 July 2005 (unpublished).

- where the law requires that a communication or contract is in writing, that requirement is met if an electronic communication is used that is accessible and usable for subsequent reference (Article 9(2));
- where there is a legal requirement for a communication or contract to be signed, that requirement is met if:
  - a method is used to identify the party and to indicate that party's intention in respect of the information in the communication (Article 9(3)(a)); and
  - the method used is reliable as appropriate for the purpose which the electronic communication was generated (Article 9(3)(b)(i)); or is proven to identify the party and indicate their intention in respect of the information within the communication (Article 9(3)(b)(ii));
- where the law requires that a contract or communication should be retained in their original form that requirement is met if there is a reliable assurance as to the integrity of the communication<sup>8</sup> and the information is capable of being displayed to the person whom it is to be made available (Article 9(4)).

An electronic communication is understandably defined quite broadly in Article 5 as a communication made by means of a data message. A data message is defined as 'information generated, sent, received, or stored by electronic, magnetic, optical or similar means', such as an email or through electronic data interchange (EDI).

The enabling provisions in the Convention are dealt with in a completely different manner to its Model Law predecessor. While the Model Law contained a number of separate articles for creating electronic equivalents for the requirements of writing, signature, original and retention of electronic messages, all enabling provisions in the Convention are in the same article. The Convention does not contain enabling provisions on record retention as it was felt by UNCITRAL that this was more an evidentiary matter rather than a matter related to the rules surrounding contract formation. This same argument could be levelled at the enabling provisions for an electronic original included in the Convention. Article 9(4) was initially included in order to cover arbitration awards governed by the 1958 UN *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, and was retained as it was felt that the usefulness of the provision extended beyond its relevance to the 1958 Convention.<sup>9</sup>

<sup>8</sup> Article 9(5) contains further provisions on assessing the integrity of a communication, namely that:

- the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display (Article 9(5)(a)); and
- 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 9(5)(b)).

<sup>9</sup> United Nations Commission on International Trade Law, *Report of the Working Group on Electronic Commerce on the work of its forty-fourth session (Vienna, 11–22 October 2004)*, 8 November 2004 (A/CN.9/571), <http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0458992>, p. 31.

The Convention will create a new international standard for the definition of an electronic signature. The new definition in Article 9(3) (described above) updates the definitions contained in both the Model Laws on Electronic Commerce and Electronic Signatures in favour of what is intended to be a more flexible and technology neutral alternative. For example, Article 9(3)(a) refers to a party's intention regarding an electronic communication rather than a party's approval of it, which is the standard used in the Model Laws. In practice, the distinction will only have relevance in a limited number of circumstances. Nevertheless a more flexible and slightly broader definition should be supported as it extends the applicability of the Convention regarding electronic signatures.

Article 9(3)(b) allows the reliability of the signature to be determined in two different ways:

- reliability in principle – subparagraph (b)(i) involves a more theoretical determination of reliability. The circumstances surrounding the use of the electronic signature, including any relevant agreement, is also to be considered in determining reliability; or
- reliability in fact – subparagraph (b)(ii) allows evidence to be adduced to prove the signature used fulfilled the function described in subparagraph (a) (described above).<sup>10</sup>

#### 4.10. Time of dispatch and receipt of electronic communications

The UNCITRAL Convention greatly departs from the provisions in its Model Law predecessor on the default rules governing the time of dispatch and receipt of electronic communications, and is creating new legal rules in electronic contracting. These changes update the law to align it more closely with the practicalities of eCommerce in the Internet Age, rather than when the Model Law was written and EDI was more prevalent. Article 10 is also said by UNCITRAL to more closely reflect the elements of dispatch and receipt commonly used in domestic legislation.<sup>11</sup>

##### 4.10.1. Time of dispatch

Article 10(1) provides that the time of dispatch of an electronic communication is when it leaves an information system under the control of the originator. Where the communication does not leave an information system in the control of the originator the time of dispatch is when the communication is received.

By having the time of dispatch as the time when a communication leaves an information system rather than when it enters an information system outside the control of the originator, as was the case in Article 15 of the Model Law, a standard is adopted that more closely reflects traditional

notions. For evidentiary purposes it is also easier to gather information on when a message has left an information system under a party's control rather than when it enters an information system outside it. Practically speaking, however, there is little temporal difference between the Convention and the Model Law standard. The Convention option is, however, more logical and practically convenient.

The second part of Article 10(1) covering situations where a communication does not leave the originator's information system is intended to cover the posting of messages on websites.

##### 4.10.2. Time of receipt

Article 10(2) provides that the time of receipt of an electronic communication is when it becomes capable of being retrieved at an electronic address designated by the addressee. If an electronic address has not been designated, the time of receipt is when the addressee becomes aware of the electronic communication being sent to that address *and* it is capable of being retrieved.

The terminology used in Article 10(2) differs from that used in the Model Law and focuses on retrieval at an electronic address. An electronic address could be an email address, IP address or some other location where a computer can access information or receive email. Again this aligns more closely with traditional notions of a physical address and is more technology neutral.

An objective test of when the communication is capable of being received is also introduced. UNCITRAL has noted that the test for the capability of retrieval is not intended to be subjective.<sup>12</sup> An email for example is capable of being retrieved when it has reached an electronic inbox. Article 10(2) also creates a rebuttable presumption that an electronic message is capable of being retrieved when it reaches the addressee's electronic address.

An additional requirement of the addressee 'becoming aware' of the communication is imposed when a communication is sent to an address other than the designated address. The time of receipt of electronic messages not sent to a designated address is when it is capable of being retrieved *and* the addressee becomes aware that an electronic communication has been sent to that address.

An information system supporting an electronic address may be in a different location to where an electronic message is deemed to be received under Article 10(3) (discussed below). Despite these differing locations Article 10(4) provides that the rules for determining the time of receipt in Article 10(2) still apply.

#### 4.11. Place of dispatch and receipt of electronic communications

The place of dispatch as set out in Article 10(3) is the place of business of the originator. The place of receipt is where the

<sup>10</sup> Chong Ka Wei, *Convention on the use of electronic communications in international contract*. Presentation, 29 July 2005.

<sup>11</sup> United Nations Commission on International Trade Law, *Draft Convention on the use of electronic communications in international contracts: note by the Secretariat – Addendum: Background Information*, 17 November 2004 (A/CN.9/577/Add.1), <http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0459325>, p. 13.

<sup>12</sup> United Nations Commission on International Trade Law, *Draft Convention on the use of electronic communications in international contracts: note by the Secretariat – Addendum: Background Information*, 17 November 2004 (A/CN.9/577/Add.1), <http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0459325>, p. 14.

addressee has their place of business. The rules for determining the place of business are set out in Article 6.<sup>13</sup>

#### 4.12. Error in electronic communications

One of the few substantive issues dealt with in the UNCITRAL Convention is where there has been an error made by a natural person in communicating with an automated system. The likelihood of a mistake being made is increased where transactions are completed instantaneously, rather than through more traditional means such as through person-to-person dealings or in written contracts. Article 14 provides some assistance for a party which has made an input error in such transactions by giving them the opportunity, in certain circumstances, to withdraw that communication.

Specifically, Article 14 provides that where a person makes an input error in an electronic communication exchanged with an automated system, and that system does not provide that party with the opportunity to correct that error, the electronic communication can be withdrawn if:

- that party notifies the other party of the error as soon as possible after having discovered the error; and
- that party has not used or received any material benefit from the goods or services.

The opportunity offered to individuals to correct mistakes made in an electronic communication is limited in the Convention only to input errors made when communicating with an automated message system. The Convention does not deal with other types of errors, which are intended to be dealt with in domestic law.

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## 5. Other developments

### 5.1. International Chamber of Commerce

The International Chamber of Commerce (ICC) has created the ICC eTerms 2004,<sup>14</sup> which are two clauses that can be incorporated into contracts to make it clear that parties intend to enter into an electronic agreement. It is intended to apply only to business-to-business electronic transactions.

Article 1 of the ICC eTerms 2004 makes clear the parties' intention to send and receive electronic messages and that these can be used to create enforceable rights between them. Article 1 also provides that the parties agree that electronic messages may be admissible as evidence and that they will not challenge the validity of an electronic communication on the sole ground that it was in electronic form.

Article 2 contains clauses setting out the rules to determine the time and place of dispatch and receipt of an electronic message. It converts Article 10 of the UNCITRAL Convention into a form that can be readily incorporated into contracts. However,

<sup>13</sup> See Section D(7) for more information.

<sup>14</sup> International Chamber of Commerce Task Force on Electronic Contracting, *ICC eTerms 2004*, International Chamber of Commerce, 12 August 2004, <http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0456873>.

the ICC eTerms 2004 were published in August 2004 and the wording in the ICC clause reflects the wording in a previous draft of the Convention, not the standard currently adopted.

The ICC eTerms 2004 is accompanied by a Guide to Electronic Contracting<sup>15</sup> – together these documents are intended to facilitate legally certain and binding electronic contracts among private parties as well as address many of the legal issues involved with electronic contracting. The UNCITRAL Working Group on Electronic Commerce has recognised the work of the ICC in this area as complementary to its work on the Convention. While the UNCITRAL work is legislative in character, the ICC seeks to offer assistance to private parties.<sup>16</sup>

### 5.2. Domestic implementations issues

The UNCITRAL Convention applies to international contracts, where the parties are located in different countries.<sup>17</sup> An issue for national governments to consider in implementing the Convention is whether to adopt the rules contained in the Convention to domestic contracts in order to avoid having different regimes for domestic and international electronic contracts. Many countries that have based their electronic transactions legislation on the 1996 Model Law have applied the legislation to both domestic and international contracts.

The UNCITRAL Convention is not intended to cover all legal issues that arise from electronic contracts. It simply contains a few key facilitative provisions. The Convention also tries to avoid addressing substantive or regulatory issues, and where appropriate defers these issues to domestic governments. For example, Article 13 on the availability of contract terms imposes no obligation on parties to make available to the other party electronic communications containing the contract terms. Treatment of this issue is left to the domestic law of the relevant country.

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## 6. Conclusion

Greater familiarity and acceptance of the rules surrounding electronic contracts and the desire for greater legal certainty and international harmonisation have prompted UNCITRAL to develop the *Convention on the Use of Electronic Communications in International Contracts*. The Convention builds upon the basic principles contained in the *Model Law on Electronic Commerce*. It improves and updates many of the core provisions contained in the Model Law, which was created before the Internet was widely used in electronic transactions. The enabling provision for electronic signatures contained in Article 9 and the provisions on the time and place of dispatch and receipt of electronic communications in Article 10 are key examples of this.

<sup>15</sup> International Chamber of Commerce Task Force on Electronic Contracting, *ICC Guide to Electronic Contracting*, International Chamber of Commerce, 12 August 2004, <http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0456873>.

<sup>16</sup> United Nations Commission on International Trade Law, *Report of the Working Group on Electronic Commerce on the work of its forty-fourth session*, 8 November 2004 (A/CN.9/571), <http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0458992>, para 11.

<sup>17</sup> Article 1. See Section D(1) for more information.

New principles have also been incorporated, including invitations to make offers, use of automated information systems, and errors in electronic communications, reflecting new legal concerns that have arisen since the release of the first Model Law in 1996.

The Convention has been developed with the intention of creating an internationally harmonised legal regime for electronic contracting. However, the flexibility offered to member states to alter the application through declarations made when signing the Convention may act as a barrier to harmonisation as it creates the potential for a regime of varying and multitudinous exemptions. This could strip the Convention

of the very legal certainty in international electronic contracts it is trying to create.

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