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L'effet du projet de convention de la CNUDCI sur les communications électroniques dans des contrats internationaux sur les Conventions de La Haye

préparé par Andrea Schulz, Premier secrétaire, et
Nicola Timmins, chercheur juridique intérimaire

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The Effect of the UNCITRAL Draft Convention on Electronic Communications in International Contracts on the Hague Conventions

prepared by Andrea Schulz, First Secretary, and
Nicola Timmins, temporary legal researcher

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Permanent Bureau | *Bureau Permanent*
6, Scheveningseweg 2517 KT The Hague | *La Haye* The Netherlands | *Pays-Bas*
telephone | *téléphone* +31 (0)70 363 3303 fax | *télécopieur* +31 (0)70 360 4867
e-mail | courriel secretariat@hcch.net website | site internet http://www.hcch.net

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Part I. Executive Summary

1. UNCITRAL's work on a Convention on Electronic Communications in International Contracts

The United Nations Commission on International Trade Law (UNCITRAL) is working on a draft Convention on Electronic Communications in International Contracts. The UNCITRAL Working Group on Electronic Commerce, at its forty-fourth session in October 2004, produced a draft convention on the use of electronic communications in international contracts (the E-Contracting Convention).[1]

The UNCITRAL draft E-Contracting Convention has been communicated to the Secretary General of the Hague Conference by letter of the UNCITRAL Secretary of 26 January 2005, received on 9 February 2005, for possible comments to be sent to the UNCITRAL secretariat by 15 April 2005. At UNCITRAL's next session which takes place in Vienna from 4-15 July 2005, the draft Convention will be submitted to the Commission for completion (including, in particular, a more in-depth discussion of the final clauses) and adoption before its transmission to the United Nations General Assembly.

The UNCITRAL draft, in essence, provides that where the law requires a contract to be in writing, this requirement will be satisfied by an electronic communication.[2] In States parties to the E-Contracting Convention, its provisions will also apply to contracts to which other international conventions, to which that State is or may become a party, apply unless the State declares otherwise.[3] If a State makes such an "opt out declaration", it can nevertheless opt back in to the UNCITRAL regime for specific conventions to which it is already or may become a party.[4] The E-Contracting Convention, therefore, has a potential impact on Hague Conventions. The following paragraphs will describe this impact for the Hague Conventions concerned by grouping them in different categories, and delegates interested in this overview only may limit themselves to reading Part I, *i.e.* this Executive Summary. For those interested to know in detail what the situation for each Hague Convention concerned is, the full research is attached as Part II.

2. The impact of UNCITRAL's draft Convention on Electronic Communications in International Contracts on Hague Conventions

a) The requirement of "writing" in existing Hague Conventions

aa) The following Hague Conventions which are in force contain a requirement of written form which is not supplemented by a provision on electronic form being equivalent:

i. *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (Article 10(5))

ii. *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes* (Articles 11, 12, 13)

iii. *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (Article 3).

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[1] See the draft text adopted by the working group in the Annex.
[2] Article 9, E-Contracting Convention.
[3] *Idem.*, Article 19(2).
[4] *Idem.*, Article 19(3).

bb) Other existing Hague Conventions which have not yet entered into force and contain a requirement of written form but no rule on electronic form are –

i. *Convention du 15 avril 1958 sur la compétence du for contractuel en cas de vente à caractère international d'objets mobiliers corporels* (Article 2(2) requires at least a one-sided confirmation in writing which remains uncontested)

ii. *Convention of 25 November 1965 on the Choice of Court* (Article 4 requires acceptance in whichever form of a written proposal)

iii. *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* (Articles 5(2), 8).

cc) The following Hague instruments are not yet in force and contain both a requirement of writing and a "functional equivalent-rule" for electronic form:

i. draft Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (adopted on 13 December 2002, Article 1(1) *n*))

ii. preliminary draft Convention on Exclusive Choice of Court Agreements (Article 3(c) *ii*)).

b) The impact of the draft E-Contracting Conventions on Hague Conventions

aa) Out of the first group, the Convention listed under i. would clearly fall within the scope of the draft E-Contracting Convention. However, it would be compatible with its spirit to equate electronic form to writing.

For the Convention on the law applicable to matrimonial property regimes (listed under ii.) it is doubtful from the wording of the draft E-Contracting Convention whether its subject-matter falls within its scope. Bearing in mind the mandate of UNCITRAL, namely "to further the progressive harmonization and unification of the law of international trade", one may assume that it does not, but from the text of the draft Convention this is not clear on its face. However, it would be incompatible with the spirit and purpose of the matrimonial property Convention to equate electronic form to writing. It is therefore desirable to clarify in Article 2 of the E-Contracting Convention or at least in the Explanatory Report that these matters excluded from its scope. The mere possibility for States to opt out of the application of the E-Contracting Convention under its Article 19(2) may lead to diverging practices and is therefore neither satisfactory nor sufficient.

As to the Trust Convention (listed under iii.), an interpretation of the scope of the E-Contracting Convention in light of UNICTRAL's mandate would be likely to lead to an exclusion of some trusts (created upon death) and to the inclusion of others (created *inter vivos*, but excluding those relating to family law matters). The Hague Trust Convention itself does not deal with the form of the trust to be valid, and the requirement of the trust being evidenced in writing in order for it to fall within the scope of the Convention could just as well be satisfied by electronic form, thus bringing more trusts within the scope of the Hague Convention.

bb) As concerns the second group of Hague Conventions, the same doubts as to its coverage by the scope of the E-Contracting Convention exist for the *Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons* (listed under iii.).

In substance, however, it seems that it would be compatible with the spirit of all three Conventions in this group to equate electronic form to writing. The requirement of written form only serves evidentiary purposes that are also satisfied by the functional equivalent provided by the E-Contracting Convention. The two early Conventions on Choice of Court moreover aim at reflecting and respecting current commercial practice, and it should therefore correspond to this spirit that they evolve as practice evolves.

cc) The two Hague instruments mentioned in the third group – one already adopted but not yet in force, the other nearing completion – both contain a "functional equivalent-rule" on electronic form themselves. While the draft Securities Convention is excluded from the scope of the draft E-Contracting Convention by Article 2(1) *b*) iv) of the latter, the preliminary draft Convention on Exclusive Choice of Court Agreements would be covered by the scope. Both instruments are fully compatible, and there is therefore no need for clarification or changes, nor for any State to opt out of the E-Contracting Convention with regard to the future Hague Convention on Exclusive Choice of Court Agreements.

c) General concerns relating to Hague family law Conventions

A number of Hague Conventions in the non-business sphere refer to (private and administrative) "agreements" without, at this point, establishing any form requirements (see, *e.g.*, Article 3 of the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*; Articles 3 and 17 *c)* of the 1993 *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*; Article 16(2) of the 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*). As these Conventions evolve, the need to require a writing formality, *e.g.,* in a Recommendation adopted by a Special Commission on the operation of a particular Convention, may arise. This should not be precluded by the draft E-Contracting Convention.

3. Conclusion

In order to avoid conflicts with Hague Conventions, it might be suggested to UNCITRAL to add another item to the exclusions from the scope of the E-Contracting Convention, namely "contracts relating to family law and succession".

The Report[5] on the last meeting of the UNCITRAL Working Group describes four different additional exclusions from the scope of the E-Contracting Convention, which were propsed. One of them was "Contracts governed by family law or by the law of succession". The Report states that some were in favour of adding all four explicit exclusions, and mentions the reasons given. It goes on saying that others were in favour of not adding all four explicit exclusions, and reports the reasons why these subject-matters should indeed be covered by the E-Contracting Convention. The Report then mentions, again without distinguishing between the four suggested explicit exclusions, that one reason given for retaining them was that "some of those matters were clearly foreign to the trade-law mandate of UNCITRAL and should not be perceived as being

[5] See the Report of the Working Group on Electronic Commerce on the work of its forty-fourth session (Vienna, 11-22 October 2004) (United Nations document A/CN.9/571, available at < www.uncitral.org > under "Working Groups" – "Working Group IV – Electronic Commerce", paras. 62-66) on the discussions concerning what is now Article 2(1) *b).*

covered by the draft convention". It can only be assumed that the latter applied to the suggested exclusion of "Contracts governed by family law or by the law of successions".

If an explicit reference in Article 2 is considered unnecessary in light of UNCITRAL's mandate "to further the progressive harmonization and unification of the law of international trade", which does not extend to these matters, it should at least be explicitly and unambiguously stated in the Explanatory Report that contracts relating to family law and succession are excluded from the scope of the Convention.

It might also be desirable to state in the Explanatory Report on the E-Contracting Convention that the Hague Securities Convention is excluded from its scope.

Part II. Examination in detail

I. Introduction

The UNCITRAL Working Group on Electronic Commerce, at its forty-fourth session in October 2004, produced a draft convention on the use of electronic communications in international contracts (the E-Contracting Convention).[6] The UNCITRAL draft, in essence, provides that where the law requires a contract to be in writing, this requirement will be satisfied by an electronic communication.[7] In States parties to the E-Contracting Convention, its provisions will also apply to contracts to which other international conventions, to which that State is or may become a party, apply unless the State declares otherwise.[8] If a State makes such an "opt out declaration", it can nevertheless opt back in to the UNCITRAL regime for specific conventions to which it is already or may become a party.[9] The E-Contracting Convention, therefore, has a potential impact on Hague Conventions.[10]

The UNCITRAL draft E-Contracting Convention has been communicated to the Secretary General of the Hague Conference by letter of the UNCITRAL Secretary of 26 January 2005, received on 9 February 2005, for possible comments to be sent to the UNCITRAL secretariat by 15 April 2005. At UNCITRAL's next session which takes place in Vienna from 4-15 July 2005, the draft Convention will be submitted to the Commission for completion (including, in particular, a more in-depth discussion of the final clauses) and adoption before its transmission to the United Nations General Assembly.

This note examines the effect of the E-Contracting Convention on the Hague Conventions, identifying which conventions will potentially be affected and the impact on them. This is to assist Member States of the Hague Conference on Private International Law and other States parties to Hague Conventions in the preparation of their comments they may wish to make to the UNCITRAL secretariat, and to give an indication of the direction which the comments that the Permanent Bureau intends to transmit to the UNCITRAL secretariat will take.

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[6] See the draft text adopted by the working group in the Annex.
[7] Article 9, E-Contracting Convention.
[8] *Idem.*, Article 19(2).
[9] *Idem.*, Article 19(3).
[10] An additional question is raised by the cross-cutting effect of the draft E-Contracting Convention on form requirements with regard to choice of law rules:
Assuming a State is party to the E-Contracting Convention as well as to a certain Hague Convention on applicable law. If the courts of this State are seised, but the rules on applicable law designate the law of another State which is not party to the E-Contracting Convention, the substantive law designated by the Hague Convention might not include the latter with its equation of electronic form to "writing". Is this intended under the E-Contracting Convention? Or would the law governing the form requirement be determined separately? In this case, many jurisdictions would let the form required by the substantive law of the State where the contract was concluded suffice. Would the State of the court seised breach its obligations under the E-Contracting Convention if, in these cases, its court did not consider electronic form to be sufficient because neither the State the law of which governs the contract itself nor the State where the contract was concluded is a party to the E-Contracting Convention?

II. The Hague Conventions concerned

1. *Convention du 15 juin 1955 sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels*[11]

Article 2 *Cette désignation doit faire l'objet d'une clause expresse, ou résulter indubitablement des dispositions du contrat.*

Article 5 *La présente Convention ne s'applique pas (…) à la forme du contrat.*

The Convention requires that the choice of law be in an express clause or be clear from the terms of the contract. It does not require the choice to be in writing. Article 5 even clarifies that the Convention does not apply to the form of the contract. Thus the E-Contracting Convention does not have an effect on this Hague Convention.

2. *Convention du 15 avril 1958 sur la compétence du for contractuel en cas de vente à caractère international d'objets mobiliers corporels*[12]

Article 2(2) Lorsque la vente, conclue oralement, comporte la désignation du for, cette désignation n'est valable que si elle a été exprimée ou confirmée par une déclaration écrite émanant de l'une des parties ou d'un courtier, sans avoir été contestée.

Avant-projet de Convention du 2 mars 1954 relatif à la compétence judiciaire, soumis à la Commission spéciale par G. Morelli:[13]

Article premier *Chacun des Etats contractants reconnaît la validité de la clause écrite par laquelle les parties à un contrat de vente désignent un juge ou les juges d'un autre Etat contractant comme exclusivement compétents pour connaître des différends qui sont surgis ou peuvent surgir dudit contrat.*

This early version of the Convention required that the choice of court be in writing. However, the final version merely requires that the choice be express, and if it is not written that it be confirmed in writing.

The Special Commission Report of H. Batiffol discusses this article:

> "*Une longue discussion a eu lieu sur le point de savoir si la désignation ne devrait pas être écrite, et la Commission s'était tout d'abord prononcée dans ce sens. Mais plusieurs délégués ont fait observer que l'accord des parties pouvait être exprès et incontesté sans toutefois se présenter sous la forme écrite, juridiquement parlant. On a cité notamment le cas courant en matière commerciale, d'un accord verbal, notamment téléphonique, suivi immédiatement d'une confirmation écrite par l'une des parties spécifiant les clauses convenues* (…). ***Il serait choquant de ne pas lui donner effet, et de***

[11] Entry into force: 1 September 1964.
States parties as at 1 January 2005: Denmark, Finland, France, Italy, Norway, Sweden, Switzerland and Niger.
[12] Not yet entered into force.
[13] *Documents relatifs à la Huitième session* (1956), Tome II, p. 43.

soustraire ainsi à la convention, déjà étroite, une situation commercialement courante."[14] [bold added]

It seems that the Special Commission was thinking about current commercial practices and wanted to give effect to these. At the time of drafting it was the practice for the parties to come to agreement orally and then confirm in writing later. The Convention was thus drafted in such a way as to recognise this and so did not require the agreement to be in writing, so long as it was express. It therefore seems that it would not be contrary to the spirit of the Convention for the requirement that a contract be expressed or confirmed in writing to now allow that expression or confirmation to be by electronic communication.

This view is confirmed by the Explanatory Report of L. Frédéricq:

> "*Pour assurer la sécurité désirée par les milieux du commerce, sans toutefois tomber dans un formalisme qui répugne à la pratique commerciale, la Commission a admis une solution intermédiaire qui lui parait répondre aussi aux exigences de la bonne foi*."[15]

3. Convention of 25 November 1965 on the Choice of Court[16]

Article 4 For the purpose of this Convention the agreement on the choice of court shall have been validly made if it is the result of the acceptance by one party of a written proposal by the other party expressly designating the chosen court.

Explanatory Report of L. T. Welamson:

> "*Lors de l'élaboration de l'avant-projet exécution* [Note by the Permanent Bureau: for a discussion of the former see, No 4 below] *d'importantes divergences d'opinion s'étaient manifestées au sein de la Commission spéciale sur le point de savoir quelles devraient être les conditions sous lesquelles un accord d'élection de for a été formé pour que soit reconnue la compétence conférée à un tribunal par cet accord. Selon une opinion on aurait dû prendre comme modèle la disposition suivante du second alinéa de l'article 2 de la Convention for-vente :* (…) [Note by the Permanent Bureau: see No 2 above]
>
> *Selon une autre opinion, cette disposition était hasardeuse au point de vue de la sécurité juridique, surtout s'agissant d'une convention qui s'étend à d'autres personnes que des commerçants, et tout particulièrement eu égard au fait que la passivité d'une des parties peut jouer un rôle décisif sur l'obligation que lui impose ou non une clause d'élection de for. Selon cette conception, il aurait été préférable de se référer à la Convention de New York de 1958 pour la reconnaissance et l'exécution des sentences arbitrales étrangères, qui pose en condition fondamentale à la validité d'un accord d'arbitrage* une convention écrite, impliquant que cet accord doit avoir été au moins contenu dans un échange de lettres ou de télégrammes.
>
> *La rédaction du premier alinéa de l'article 4 que l'on a adoptée après avoir discuté la matière en détail au sein de la Quatrième commission, a dans une certaine mesure le caractère d'un compromis entre les deux points de vue que nous venons d'indiquer. Elle pose comme condition que le tribunal ou les tribunaux élus aient été expressément désignés dans une proposition écrite de l'une des parties*

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[14] *Documents relatifs à la Huitième session* (1956), Tome II, p. 48.
[15] *Actes de la Huitième session* (1956), Tome I, p. 303.
[16] Not yet entered into force.

et que cette proposition ait été acceptée par l'autre partie, mais elle ne précise pas la façon dont cette acceptation est censée se manifester. Quant à savoir sous quelles conditions on peut admettre qu'un accord d'élection de for ait été valablement formé et notamment accepté du fait de la passivité d'une des parties à l'égard de la proposition écrite visée par l'article, le texte de la convention laisse à dessein une marge d'appréciation considérable."[17]

It seems from the above that the application of the E-Contracting Convention to this Convention would not be contrary to the purpose behind Article 4 of the Hague Convention. The requirement for writing is only in relation to the offer. It appears to be a requirement so that there is certainty as to the content of the agreement. An electronic communication could satisfy this need. The article has deliberately been drafted with a degree of flexibility and so it would not seem to be a problem if the offer was in electronic form.

4. Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters[18]

Article 10(5) The court of the State of origin shall be considered to have jurisdiction for the purposes of this Convention if, by a written agreement or by an oral agreement confirmed in writing within a reasonable time, the parties agreed to submit to the jurisdiction of the court of origin disputes which have arisen or which may arise in respect of a specific legal relationship, unless the law of the State addressed would not permit such an agreement because of the subject-matter of the dispute.

The Special Commission Report of Ch. N. Fragistas explains:

"*Selon notre avis une* volonté expresse *des parties existe si les parties ont écrit ou parlé, et que leurs déclarations, écrites ou orales, se réfèrent directement au sujet du for contractuel (…).*

La Commission spéciale s'est arrêtée longtemps à la question de la preuve de la convention sur le for contractuel. (…) Selon cette formule une déclaration écrite est nécessaire, mais cette déclaration peut émaner de l'une quelconque des parties, pas nécessairement du défendeur."[19]

The Explanatory Report of Ch. N. Fragistas states:

"*La Convention se contenant d'une confirmation écrite est censée libérer les parties* pour la preuve de l'accord oral de l'obligation à produire toute autre preuve écrite."[20]

Again, it seems that the requirement for writing is as a source of evidence of the agreement. From reading the Convention and Reports there is no reason why the agreement could not be evidenced in electronic form.

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[17] *Actes et documents de la Dixième session* (1964), Tome IV, pp. 211 *et seq*.

[18] Entry into force: 20 August 1979.
States parties as at 1 January 2005: Cyprus, the Netherlands, Portugal and Kuwait. However, for the Convention to apply between any two of them Article 21 requires that in addition a Supplementary Agreement between the two States is also concluded. So far no Supplementary Agreements have been made known to the Depository or to the Permanent Bureau of the Hague Conference on Private International Law.

[19] *Actes et documents de la Session extraordinaire* (1966), p. 33.

[20] *Actes et documents de la Session extraordinaire* (1966), p. 376.

5. Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes[21]

Article 11 The designation of the applicable law shall be by express stipulation, or arise by necessary implication from the provisions of a marriage contract.

Article 12 The marriage contract is valid as to form if it complies either with the internal law applicable to the matrimonial property regime, or with the internal law of the place where it was made. In any event, the marriage contract shall be in writing, dated and signed by both spouses.

Article 13 The designation of the applicable law by express stipulation shall comply with the form prescribed for marriage contracts, either by the internal law designated by the spouses, or by the internal law of the place where it is made. In any event, the designation shall be in writing, dated and signed by both spouses.

a) The form of a marriage contract

According to Article 12 of this Hague Convention, the marriage contract has to be in writing, dated and signed by both spouses.

i) Does a marriage contract fall within the scope of application of the E-Contracting Convention?

Article 1 defines the scope of application of the E-Contracting Convention. Article 1(1) states that "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." This is spelled out in further detail in paragraphs 2 and 3. According to paragraph 3, "[n]either 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."

Parties to a marriage contract do not necessarily have a "place of business", and even if they happen to have one, it is not relevant in the context of their marriage contract. In addition, UNCITRAL stands for the United Nations Commission on International Trade Law. Surely UNCITRAL would not intentionally intend to govern matters relating to marriage. It would, therefore, appear that the provisions of the E-Contracting Convention are not intended to apply here. The Report[22] on the last meeting of the UNCITRAL Working Group describes four different additional exclusions from the scope of the E-Contracting Convention. One of them was "Contracts governed by family law or by the law of succession". The Report states that some were in favour of adding all four explicit exclusions, and mentions the reasons given. It goes on saying that others were in favour of not adding all four explicit exclusions, and reports the reasons why these subject-matters should indeed be covered by the E-Contracting Convention that were proposed. The Report then mentions, again without distinguishing between the four suggested

[21] Entry into force: 1 September 1992.
States parties as at 1 January 2005: France, Luxembourg and the Netherlands.

[22] See the Report of the Working Group on Electronic Commerce on the work of its forty-fourth session (Vienna, 11-22 October 2004) (United Nations document A/CN.9/571, available at < www.uncitral.org > under "Working Groups" – "Working Group IV – Electronic Commerce", paras. 62-66) on the discussions concerning what is now Article 2(1)(b).

explicit exclusions, that one reason given for retaining them was that "some of those matters were clearly foreign to the trade-law mandate of UNCITRAL and should not be perceived as being covered by the draft convention". It can only be assumed that the latter applied to "Contracts governed by family law or by the law of successions".

On its face, however, in a situation where the two parties to a marriage contract are also active in business and therefore do have a "place of business", Article 1(1) could cover marriage contracts. It is therefore necessary to examine whether they are excluded from the scope of the E-Contracting Convention by Article 2.

ii) Does a marriage contract fall within the exclusion from scope contained in Article 2(1)(a) of the E-Contracting Convention?

If the marriage contract does fall within the scope of the E-Contracting Convention as defined by Article 1(1), it may still also fall within the exclusion contained in Article 2(1)(a) as being a contract concluded for personal, family or household purposes. However, from the Report on the last meeting of the UNCITRAL Working Group on Electronic Commerce it does not become clear whether this exclusion would also apply to matrimonial property regimes or is only intended to cover consumer contracts. [23]

The clause appears to originate from the wording used in the *United Nations Convention on Contracts for the International Sale of Goods* (1980) (CISG).[24] There, it was understood to mean consumer contracts.[25] A marriage contract cannot be described as a consumer contract. So if Article 2(1)(a) of the E-Contracting Convention is understood in the same way as the exclusion in the United Nations Convention then marriage contracts would fall within the E-Contracting Convention.

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[23] See the Report of the Working Group on Electronic Commerce on the work of its forty-fourth session (Vienna, 11-22 October 2004) (United Nations document A/CN.9/571, paras. 61-66) on the discussions concerning the exclusions.

[24] *United Nations Convention on Contracts for the International Sale of Goods (1980)*
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.

[25] See Commentary on the Draft Convention on the International Sale of Goods (A/CN.9/annex II) in the UNCITRAL Yearbook, Volume VII: 1976, A/CN.9/SER.A/1976, also available at < www.uncitral.org/en-index.htm >:

Commentary on Article 2 CISG:

"Exclusion of consumer sales, subparagraph (a)

2. Subparagraph (a) of this article excludes consumer sales from the scope of this convention. A particular sale is outside the scope of this convention if the goods are bought for "personal, family or household use". However, if the goods were purchased by an individual for a commercial purpose, the sale would be governed by this convention. (…)

3. The rationale for excluding consumer sales from the convention is that in a number of countries such transactions are subject to various types of national laws that are designed to protect consumers. In order to avoid any risk of impairing the effectiveness of such national laws, it was considered advisable that consumer sales should be excluded from this convention. In addition, most consumer sales are domestic transactions and it was felt that the convention should not apply to the relatively few cases where consumer sales were international transactions, e.g.,. *because the buyer was a tourist with his habitual residence in another country or that the goods were ordered by mail."*

Although the clause in Article 2(1)(a) of the E-Contracting Convention has traditionally been understood as meaning consumer contracts (following the UN *Convention on the International Sale of Goods*) it could be argued that a different interpretation should be given here:

The interpretation given to Article 2 CISG as excluding consumer sales contracts has to be seen in the light of the positive scope. Marriage contracts are unlikely to fall within the scope[26] of the *UN Convention on the International Sale of Goods*. It was therefore not necessary to consider whether they also fell within the exclusion. The scope of the E-Contracting Convention, on the other hand, is wider and so it is reasonable to give a wider interpretation also to its exclusion clause. The Vienna Convention on the Law of Treaties provides that a treaty provision should first be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[27] On a strict reading of the words used in the clause it would seem that a marriage contract is almost certainly a contract concluded for personal or family purposes. The text, its context and the object and purpose of the E-Contracting Convention would tend to suggest that marriage contracts are outside its scope. Consumer contracts were excluded from the 1980 Vienna Sales Convention because of national laws designed to protect consumers and it was not intended to affect these laws. The same could be said for form requirements in relation to marriage contracts. National laws and treaties provide for a minimum set of requirements in order to protect the parties and the E-Contracting Convention should not affect these rules.

However, in case law and practice the clause "personal, family or household purposes" has always been understood as meaning consumer contracts. This is true for the UN Convention on the International Sale of Goods as well as for other instruments (see, *e.g.*, Article 2(1)(a) of the preliminary draft Hague Convention on Exclusive Choice of Court Agreements, discussed below under No 9). Therefore it is certainly arguable that that same meaning would be given to Article 2(1)(a) of the draft E-Contracting Convention. Since that instrument is still under negotiation it is therefore desirable to clarify the exclusion from its scope as also covering marriage contracts, either in the text itself or in the Explanatory Report.

b) The designation of the law applicable to the marriage contract

The designation of the law applicable to the marriage contract can be by express stipulation, or arise by necessary implication from the provision of a marriage contract. In either case it has to be in writing, dated and signed by both spouses.

If the designation arises by necessary implication from the provision of a marriage contract, what was said above for the latter also applies here.

If the designation of the applicable law is by express stipulation, it does not necessarily form part of a "marriage contract". The scope of the E-Contracting Convention as defined by Article 1(1) could cover it although, again, this is doubtful because of its reference to the parties' place of business in the definition of its scope of application. For the reasons explained above it is equally unclear whether the exclusion of "contracts concluded for personal, family or household purposes" would apply.

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[26] Article 1(1) *UN Convention on Contracts for the International Sale of Goods.*
[27] Article 31(1) Vienna Convention on the Law of Treaties.

c) Conclusion

In conclusion, it is not clear whether the E-Contracting Convention in its present version applies to marriage contracts and separate agreements designating the law applicable to matrimonial property regimes.

The *Hague Convention on the Law Applicable to Matrimonial Property Regimes* provides for specific form requirements which it would not be appropriate for the E-Contracting Convention to amend. The Explanatory Report of A. E. von Overbeck[28] makes it clear that the writing requirement is a "minimum of formalities" and the signatures of the spouses must be in their own handwriting.

The Special Commission likewise emphasised the importance of the form requirements:

> "The necessity of a certain strictness of form in matters of marriage contracts was emphasised in the Special Commission. It was considered especially important to remove doubts concerning the date of the document."[29]

It appears that the Convention was deliberately drafted in this way, requiring a document that both parties have agreed to at the same time. Electronic communications may be deemed to be incompatible with this.

It should therefore be made clear that the scope of the E-Contracting Convention does not include marriage contracts and designations of the law applicable to matrimonial property, or at least that an exclusion in Article 2(1) of the E-Contracting Convention applies to them. This could either be an amended "consumer exclusion" in Article 2(1) *a)* or an additional exclusion for contracts relating to family law and succession.

6. Convention of 14 March 1978 on the Law Applicable to Agency[30]

Article 5 The internal law chosen by the principal and the agent shall govern the agency relationship between them. This choice must be express or must be such that it may be inferred with reasonable certainty from the terms of the agreement between the parties and the circumstances of the case.

Explanatory Report of I. G. F. Karsten:

> "Consistently with the decision to give priority to the will of the parties, the manner of making the choice permitted to them by Article 5 is not subject to serious limitations: it may be either express or implied."[31]

The article does not require the choice to be in writing and the report makes it clear that writing is not necessary as the court may even infer a choice.

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[28] *Actes et documents de la Treizième session* (1976), Tome II, p. 371, paras. 190, 193.
[29] *Actes et documents de la Treizième session (*1976), Tome II, p. 168, para. 129.
[30] Entry into force: 1 May 1992.
States parties as at 1 January 2005: Argentina, France, the Netherlands and Portugal.
[31] *Actes et documents de la Treizième session* (1976), Tome IV, p. 390, para. 46.

7. Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods[32]

Article 7(1) A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract.

Article 11(1) A contract of sale concluded between persons who are in the same State is formally valid if it satisfies the requirements either of the law which governs it under the Convention or of the law of the State where it is concluded.

Explanatory Report of A. T. von Mehren:

> "The view that an express choice was necessary received considerable support but failed of adoption. Discussion then turned to the degree of clarity or certainty that Article 7(1) should require with respect to the existence of a party choice. It was urged that a clear demonstration of the existence of party choice should be required. By a very substantial margin, the Conference expressed its preference for the standard that the choice be 'clearly demonstrated'."[33]
>
> "In connection with the system of alternative reference by Article 11 the issue was raised whether Article 7 of the Convention provides rules as to the formal validity of choice-of-law clauses. It was agreed that Article 7 definitively regulates the formal validity of stipulations for the governing law and does not require a particular form. Accordingly, Article 11's alternative reference system had no role to play in determining the formal validity of an Article 7 choice of the applicable law."[34]

It is clear that writing is not required by the Convention as such (while the law designated by it may well contain such a requirement[35]) and the E-Contracting Convention will not affect the application of this Hague Convention.

8. Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition

Article 3 The Convention applies only to trusts created voluntarily and evidenced in writing.

Explanatory Report of A. von Overbeck:

> "Article 3 states (...), drawing its inspiration from article 5, No 6 of the Brussels Convention, "that the trust must be evidenced in writing". In fact, a trust may be established orally or by simple delivery of the goods to the trustee, although the execution of an instrument in writing is more customary. From this it seems

[32] Not yet entered into force.
[33] *Proceedings of the Extraordinary Session* (1985), p. 725, para. 47.
[34] *Idem.*, p. 737, para. 111.
[35] On this question see *supra* footnote 10.

> reasonable to require at least evidence in writing. This may even consist of a writing in which the trustee recites the intentions expressed orally by the settlor. (...)"[36]
>
> "It will be recalled that the Convention applies only to trusts evidenced in writing (article 3). Must a trust also meet the formal requirements of the law which is applicable to it under articles 6 and 7? The Special Commission discussed this question in considerable depth; it decided in the end that formal validity should not be governed by the Convention and it deleted a supplementary paragraph to article 8 which included this issue."[37]

It is therefore clear that the formal validity of the trust is not governed by this Hague Convention. For a trust to fall within its scope, however, the trust must be evidenced in writing.

Bearing in mind UNCITRAL's mandate "to further the progressive harmonization and unification of the law of international trade", it has to be recalled that not all trusts may fall within the scope of the E-Contracting Convention if one assumes that contracts and agreements relating to family law and succession would be outside the scope of the E-Contracting Convention. The Hague Trust Convention covers trusts created both *inter vivos* or on death (Article 2).

Where a trust – *inter vivos* and not relating to family law matters - could be considered to fall within the scope of the E-Contracting Convention, Article 9(2) of the latter provides that, "[w]here the law requires that a communication or a contract should be made 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". As far as the E-Contracting Convention were to apply to trusts – including trusts covered by this Hague Convention -, the former would bring more trusts within the scope of the Hague Convention, namely also trusts evidenced in electronic form. Since the Hague Convention deliberately does not deal with formal validity, in can be inferred that the requirement of evidence in writing serves only evidentiary purposes, and if these can be met by an equivalent electronic form, this should be in line with the spirit and purpose of the Hague Trust Convention.

9. Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons

Article 5

(1) A person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there.

(2) This designation shall be expressed in a statement made in accordance with the formal requirements for dispositions of property upon death. The existence and material validity of the act of designation are governed by the law designated. If under that law the designation is invalid, the law governing the succession is determined under Article 3.

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[36] *Proceedings of the Fifteenth Session* (1984), Tome II – *Trusts – applicable law and recognition*, p. 381, para. 52.
[37] Idem., p. 388, para. 82.

Article 8 For the purposes of this Chapter an agreement as to succession is an agreement created in writing or resulting from mutual wills which, with or without consideration, creates, varies or terminates rights in the future estate or estates of one or more persons parties to such agreement.

Explanatory Report of D. V. M. Waters:

Article 5, paragraph 2:

> "This paragraph deals with issues concerning the form of the designation and the existence of the designation maker's real consent to the making of a designation. The first sentence requires the designation to be "expressed" in a "statement", and it is provided via this neutral language that the designation may be made in a will or other testamentary act, in a *pacte successoral*, or in a declaration whose sole content is the designation of an applicable law to govern the succession. That is, the declaration disposes of nothing, as a will would be expected to do, nor does it constitute or record any agreement as to succession. The Special Commission and Commission II were both involved in discussion over what degree of clarity should be required for the expression of a designation. The implied designation is rejected by the convention, but he Sixteenth Session finally concluded that whether the designation had to be "clearly expressed" or be "expressed" made little difference, since all that is being said is that the judge, the notary or the solicitor or attorney must have no difficulty in seeing that a designation was made. "Expressed in a statement" is intended to have that meaning; the "statement", it would appear, may be oral if the law governing the formal validity will permit that. If the forum conflict rules incorporate the *Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*, the formal validity of wills and codicils will be assessed in light of the Convention, but, as to *pactes successoraux* and States where the last mentioned Hague Convention has not been adopted, the conflict rules of the forum will decide what law governs form. The meaning of "formal validity" is, as previously noted, for the forum." [38]

Article 8:

> "(...) The Convention's Article 8 remedies the absence of a defining article in the preliminary draft. It usefully encapsulates the subject-matter with which the chapter is concerned, and it also restricts the Convention's concern to agreements in writing. The Commission was aware that oral agreements are recognized by a few jurisdictions, but was of the opinion that the agreement "created in writing" because of evidentiary considerations is as far as the Convention should go. However, this is merely a restriction on the scope of Chapter III. The applicable law may indeed choose to accept the validity of an oral *pacte*; the oral *pacte* (or agreement) is simply not included in the Convention."[39]
>
> "As has been seen, an agreement as to succession must be "created in writing" if it is to be subject to the Convention. This should be contrasted with "evidenced in writing", an alternative requirement which Commission II considered but rejected. If an agreement had only to be proved by a writing, it could be orally created and the writing originated at some other time. All the writing would have to do is establish that an agreement was in fact entered into, and at the time alleged. To

[38] *Proceedings of the Sixteenth Session* (1988), Tome II, Succession to estates – applicable law, p. 557, para. 65.
[39] Idem, p. 571, para. 84.

the contrary, an agreement which has to be "created in writing" means precisely that the bringing into existence of the agreement must be by way of a document of some kind. Article 8 is not to be understood as encompassing any orally created agreement, even if proof in writing of its creation is available.

Which law determines the form which the "writing" must or may take is for the forum to decide. The Convention determines only the applicable law. So while some systems require a *pacte successoral* to be in the form of a will, and others require a notarial writing, yet others have requirements of still another kind. The Convention has remained silent on the subject of the form of the written agreement. The Convention speaks as to form in connection solely with the *professio juris*. If the *pacte successoral* contains a *professio juris*, the written agreement must be in the form specified by paragraph 2 of Article 5."[40]

As for the Convention on Matrimonial Property Regimes (*supra* under No 5) it is doubtful whether this Hague Convention would fall within the substantive scope of the E-Contracting Convention. In light of UNCITRAL's mandate, one may assume that it would not. In the unlikely event, however, that this Hague Convention were included within the scope of the E-Contracting Convention, there would not be any conflict in substance:

It seems that the requirement of written form under Article 8 for an agreement to be covered by the scope of this Hague Convention serves mere evidentiary purposes. If these can be met by electronic form, there does not seem to be an obstacle for the latter to be sufficient. The form requirement for a choice of law which is contained in Article 5(2) of the Convention, on the other hand, is an indirect one, referring only to possible form requirements contained in the law applicable which is designated by the Convention.[41]

10. Draft Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (adopted on 13 December 2002)[42]

Article 1(1) n) "Writing" and "written" mean a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion.

Article 4(1) The law applicable to all the issues specified in Article 2(1) is the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law. (…)

Article 5(1) If the applicable law is not determined under Article 4, but it is expressly and unambiguously stated in a written account agreement that the relevant intermediary entered into the account agreement through a particular office, the law applicable to all the issues specified in Article 2(1) is the law in force in the State, or the territorial unit of a Multi-unit State, in which that office was then located, provided that such office then satisfied the condition specified in the second sentence of Article 4(1). (…)

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[40] *Proceedings of the Sixteenth Session* (1988), Tome II, Succession to estates – applicable law, pp. 573 *et seq*., paras. 90 *et seq*.
[41] On this question see *supra*, footnote 10.
[42] Not yet entered into force.

Explanatory Report of R. Goode, H. Kanda and K. Kreuzer, with the assistance of Christophe Bernasconi (Permanent Bureau):

Article 1(1) n) "The broad definition is intended to keep pace with technological developments. It makes clear that electronic transmissions are considered writings if they can be reproduced in tangible form."[43]

Article 4(1) "There is no requirement in Article 4(1) that the account agreement be in writing; indeed writing is not required anywhere by the Convention, except under Article 5. So an oral express choice of law is effective."[44]

The E-Contracting Convention does not apply to the Hague Securities Convention. The latter deals with securities held with an intermediary, which is what Article 2(1)(b) iv) of the draft E-Contracting Convention excludes from its scope.[45]

The Hague Securities Convention, by way of its Article 1(1) *n*), is "e-compatible" in its own right. This solution is satisfactory, and it might be desirable to state in the Explanatory Report on the E-Contracting Convention that the Hague Securities Convention is excluded from its scope.

11. Preliminary draft Convention on Exclusive Choice of Court Agreements[46]

Article 3 c) An exclusive choice of court agreement must be entered into or evidenced:

i) in writing; or

ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference.

The E-Contracting Convention would apply in cases which are subject to this future Hague Convention. However, the current preliminary draft Hague Convention itself satisfies the requirements of the E-Contracting Convention. In fact, the wording of this provision was inspired by Article 6(1) of the UNCITRAL Model Law on Electronic Commerce 1996.[47] There, thus appears to be no conflict here, hence no need to exclude this future Hague Convention from the scope of the E-Contracting Convention.

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[43] Para. 1-29.

[44] Para. 4-18.

[45] See the Report of the Working Group on Electronic Commerce on the work of its forty-fourth session (Vienna, 11-22 October 2004) (United Nations document A/CN.9/571, para. 61) on the discussions concerning what is now Article 2(1)(b) of the E-Contracting Convention:

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

[46] Hague Conference on Private International Law, Work. Doc. No 110 – Revised, May 2004.

[47] Draft Explanatory Report of M. Dogauchi and T. Hartley, Prel. Doc. No 26, December 2004, footnote 75.

III. Summary – The Effect of the E-Contracting Convention on the Hague Conventions

Hague Convention (HC)	Effect of E-Contracting Convention on HC?	Effect compatible with HC?	HC in force?
1. Convention du 15 juin 1955 sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels	No	N/A	Yes
2. Convention du 15 avril 1958 sur la compétence du for contractuel en cas de vente à caractère international d'objets mobiliers corporels	Yes	Yes	No
3. Convention of 25 November 1965 on the Choice of Court	Yes	Yes	No
4. Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters	Yes	Yes	Yes
5. Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes	Possibly	No	Yes
6. Convention of 14 March 1978 on the Law Applicable to Agency	No	N/A	Yes
7. Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods	No	N/A	No
8. Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition	Possibly	Yes	Yes
9. Convention of 1 August 1989 on the Law Applicable to Successions to the Estates of Deceased Persons	Possibly	Yes	No
10. Draft Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (adopted on 13 December 2002)	No	N/A	No
11. Preliminary Draft Convention on Exclusive Choice of Court Agreements	Yes	Yes	Not yet adopted

IV. Conclusion

The E-Contracting Convention does not appear to adversely affect the operation of any of the Hague Conventions, except in regard to the *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*.

It might therefore be desirable to add a further item to the exclusions from the scope of the E-Contracting Convention in Article 2, thereby excluding "contracts relating to family law and succession". If this is were to be considered unnecessary or undesirable by the delegates participating in UNCITRAL's meeting in July 2005, it should at least be clearly stated in the Report that these matters do not fall within the scope of the Convention. The same should be stated in the Report for the Hague Securities Convention.

A N N E X E / A N N E X

Annex - Draft Convention on the use of electronic communications in international contracts

Chapter I. Sphere of application

Article 1. Scope of application

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

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

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

Article 2. Exclusions

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

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

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

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

Article 3. Party autonomy

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

Chapter II. General provisions

Article 4. Definitions

For the purposes of this Convention:

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

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

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

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

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

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

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

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

Article 5. Interpretation

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

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 6. Location of the parties

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

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

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

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

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

Article 7. Information requirements

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

Chapter III. Use of electronic communications in international contracts

Article 8. Legal recognition of electronic communications

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

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

Article 9. Form requirements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 11. Invitations to make offers

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

Article 12. Use of automated message systems for contract formation

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

Article 13. Availability of contract terms

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

Article 14. Error in electronic communications

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

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

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

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

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

Chapter IV. Final provisions

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Article 18. Declarations on the scope of application

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

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

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

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

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

Article 19. Communications exchanged under other international conventions

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

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

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

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

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

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

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

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

3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of any contract or agreement to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.

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

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