CHAPTER 8
INTERNATIONAL CONVENTIONS ON E-CONTRACTS

8.1. INTRODUCTION

As it is known to everyone that modern international law is part of European legal system. Time and again it has developed in broader manner. Now international law is a separate and distinct unit in the English legal system just as much as the law of bankruptcy or of contracts, but it possesses this unity, not because it deals with one particular topic, but because it is always concerned with one or more of three questions, namely:

- Jurisdiction of the Courts
- The choice of law
- Jurisdiction

Now almost everyone is cognizant about the fact that in this era of information and technology, the world has become small. Till now we discussed about e-contract and its meaning, in this era a person sitting in India can enter into a contract with a person staying in some other country. The reason behind discussing international conventions is very simple; the UNO has adopted certain conventions for regularization of e-contracts. Following are the conventions which left mark in development of law relating to e-contracts:

- UNCITRAL Model Law on Electronic Commerce (hereinafter referred as MLEC)
- United Nations Convention on the Use of Electronic Communications in International Contracts
• United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred as CISG)
• UNCITRAL Model Law on Electronic Signatures

8.2. MODEL LAW ON ELECTRONIC COMMERCE

United Nations Commission on International Law was created with a mandate to progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade.

For execution of objective of UNCITRAL and at the same time number of transactions in international trade were carried out by means of electronic data interchange and other means of communication, commonly referred to as “electronic commerce”, so it felt to adopt MLEC.

Further model legislation on electronic commerce was adopted in response to the fact that in a number of countries the existing legislation governing communication and storage of information was inadequate or outdated because it does not contemplate the use of electronic commerce…. The lack of legislation in many countries in dealing with e-commerce as a whole results in uncertainty as to the legal nature and validity of information presented in a form other than a traditional paper document…. Inadequate legislation at the national level will inevitably create obstacles to international trade.
8.2.1. AIMS AND OBJECTIVES

1. The use of modern means of communication such as electronic mail and electronic data interchange (EDI) for the conduct of international trade transactions has been increasing rapidly and is expected to develop further as technical supports such as information highways and the INTERNET become more widely accessible. However, the communication of legally significant information in the form of paperless messages may be hindered by legal obstacles to the use of such messages, or by uncertainty as to their legal effect or validity. The purpose of the Model Law is to offer national legislators a set of internationally acceptable rules as to how a number of such legal obstacles may be removed, and how a more secure legal environment may be created for what has become known as “electronic commerce”. The principles expressed in the Model Law are also intended to be of use to individual users of electronic commerce in the drafting of some of the contractual solutions that might be needed to overcome the legal obstacles to the increased use of electronic commerce.

2. The decision by UNCITRAL to formulate model legislation on electronic commerce was taken in response to the fact that in a number of countries the existing legislation governing communication and storage of information is inadequate or outdated because it does not contemplate the use of electronic commerce. In certain cases, existing legislation imposes or implies restrictions on the use of modern means of communication, for example by prescribing the use of “written”, “signed” or “original” documents. While a few countries have adopted specific provisions to deal with certain aspects of electronic commerce, there exists no legislation dealing with electronic commerce as a whole. This may result in uncertainty as to the legal nature and validity of information presented in a form other than a traditional paper
document. Moreover, while sound laws and practices are necessary in all countries where the use of EDI and electronic mail is becoming widespread, this need is also felt in many countries with respect to such communication techniques as telecopy and telex.

3. The Model Law may also help to remedy disadvantages that stem from the fact that inadequate legislation at the national level creates obstacles to international trade, a significant amount of which is linked to the use of modern communication techniques. Disparities among, and uncertainty about, national legal regimes governing the use of such communication techniques may contribute to limiting the extent to which businesses may access international markets.

4. Furthermore, at an international level, the Model Law may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce, for example by prescribing that certain documents or contractual clauses be made in written form. As between those States parties to such international instruments, the adoption of the Model Law as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved.

5. The objectives of the Model Law, which include enabling or facilitating the use of electronic commerce and providing equal treatment to users of paper-based documentation and to users of computer based information, are essential for fostering economy and efficiency in international trade. By incorporating the procedures prescribed in the Model Law in its national legislation for those situations where parties opt to use electronic means of communication, an enacting State would create a media-neutral environment.
8.2.2. SCOPE OF MLEC

1. The title of the Model Law refers to “electronic commerce”. While a definition of “electronic data interchange (EDI)” is provided in Article 2, the Model Law does not specify the meaning of “electronic commerce”. In preparing the Model Law, the Commission decided that, in addressing the subject matter before it, it would have in mind a broad notion of EDI, covering a variety of trade-related uses of EDI that might be referred to broadly under the rubric of “electronic commerce”, although other descriptive terms could also be used. Among the means of communication encompassed in the notion of “electronic commerce” are the following modes of transmission based on the use of electronic techniques: communication by means of EDI defined narrowly as the computer-to-computer transmission of data in a standardized format; transmission of electronic messages involving the use of either publicly available standards or proprietary standards; transmission of free-formatted text by electronic means, for example through the INTERNET. It was also noted that, in certain circumstances, the notion of “electronic commerce” might cover the use of techniques such as telex and telecopy.

2. It should be noted that, while the Model Law was drafted with constant reference to the more modern communication techniques, e.g., EDI and electronic mail, the principles on which the Model Law is based, as well as its provisions, are intended to apply also in the context of less advanced communication techniques, such as telecopy. There may exist situations where digitalized information initially dispatched in the form of a standardized EDI message might, at some point in the communication chain between the sender and the recipient, be forwarded in the form of a computer-generated telex or in the form of a telecopy of a computer print-out. A data message may be
initiated as an oral communication and end up in the form of a telecopy, or it may start as a telecopy and end up as an EDI message. A characteristic of electronic commerce is that it covers programmable messages, the computer programming of which is the essential difference between such messages and traditional paper-based documents. Such situations are intended to be covered by the Model Law, based on a consideration of the users’ need for a consistent set of rules to govern a variety of communication techniques that might be used interchangeably. More generally, it may be noted that, as a matter of principle, no communication technique is excluded from the scope of the Model Law since future technical developments need to be accommodated.

3. The objectives of the Model Law are best served by the widest possible application of the Model Law. Thus, although there is provision made in the Model Law for exclusion of certain situations from the scope of articles 6, 7, 8, 11, 12, 15 and 17, an enacting State may well decide not to enact in its legislation substantial restrictions on the scope of application of the Model Law.

4. The Model Law should be regarded as a balanced and discrete set of rules, which are recommended to be enacted as a single statute. Depending on the situation in each enacting State, however, the Model Law could be implemented in various ways, either as a single statute or in several pieces of legislation.

8.2.3. STRUCTURE OF MLEC

The Model Law is divided into two parts, one dealing with electronic commerce in general and the other one dealing with electronic commerce in specific areas. It should be noted that part two of the Model Law, which deals with electronic commerce in specific areas, is composed of a chapter
I only, dealing with electronic commerce as it applies to the carriage of goods. Other aspects of electronic commerce might need to be dealt with in the future, and the Model Law can be regarded as an open-ended instrument, to be complemented by future work.

UNCITRAL intends to continue monitoring the technical, legal and commercial developments that underline the Model Law. It might, should it regard it advisable, decide to add new model provisions to the Model Law or modify the existing ones.

### 8.2.4. ANALYSIS OF MLEC

The issue is the possible electronic legislation. This issue is of principal importance, and decisions as to the application of possible legislation will require careful consideration of possible exceptions to coverage.

**Definitions**

It is clear that the language of electronic commerce is still developing. A number of definitions, including specifically technical ones, are being developed, but it is not always the case that these are appropriate for inclusion in a legal text. International texts, such as the International Chamber of Commerce’s General Usage for International Digitally Ensured Commerce (GUIDEC) are being developed. This text intended to serve as an indicator of the terms involved in electronic commerce and to provide general background to the issues raised by these terms. It also aims to set out standard practices or recommendations relating to ensuring or secure authentication of digital information. To the extent, those international texts represent both civil and common law treatment of the subject matter, they present both business and governments with a
comprehensive statement of best practices for the emerging global infrastructure.¹

Model law defines some of the terminologies which need uniformity and consistency among jurisdictions. Such as, Data message, Electronic Data Interchange (EDI), Originator, Addressee, Intermediary and Information system. The definitions of ‘Data Message’ and EDI requires special discussion, rest of others doesn’t require much stress.

**Data Message:** ² The notion of “data message” is not limited to communication but is also intended to encompass computer-generated records that are not intended for communication. Thus, the notion of “message” includes the notion of “record”. However, a definition of “record” in line with the characteristic elements of “writing” in Article 6 may be added in jurisdictions where that would appear to be necessary.

The reference to “similar means” is intended to reflect the fact that the Model Law was not intended only for application in the context of existing communication techniques but also to accommodate foreseeable technical developments. The aim of the definition of “data message” is to encompass all types of messages that are generated, stored, or communicated in essentially paperless form. For that purpose, all means of communication and storage of information that might be used to perform functions parallel to the functions performed by the means listed in the definition are intended to be covered by the reference to “similar means”, although, for example, “electronic” and “optical” means of

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communication might not be, strictly speaking, similar. For the purposes of the Model Law, the word “similar” connotes “functionally equivalent”.

The definition of “data message” is also intended to cover the case of revocation or amendment. A data message is presumed to have fixed information content but it may be revoked or amended by another data message.

**Electronic Data Interchange**: The Model Law does not settle the question whether the definition of EDI necessarily implies that EDI messages are communicated electronically from computer to computer, or whether that definition, while primarily covering situations where data messages are communicated through a telecommunications system, would also cover exceptional or incidental types of situation where data structured in the form of an EDI message would be communicated by means that do not involve telecommunications systems. For example, the case where magnetic disks containing EDI messages would be delivered to the addressee by courier. However, irrespective of whether digital data transferred manually is covered by the definition of “EDI”, it should be regarded as covered by the definition of “data message” under the Model Law.³

**Interpretation⁴**

It would be appropriate in the context of drafting legislation supporting electronic transactions to consider adoption of a purposes or interpretation provision. While this issue is not considered further in this text, an interpretation or purpose provision could be based upon Article 3 of the Model Law and refer to some of the issues dealt with, for example, by the

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³*ibid.*
⁴*Supra* Ref.1 p. 2008

**Legal Recognition**\(^5\)

Article 5 embodies the fundamental principle that data messages should not be discriminated against, i.e., that there should be no disparity of treatment between data messages and paper documents. It is intended to apply notwithstanding any statutory requirements for “writing” or an original. That fundamental principle is intended to find general application and its scope should not be limited to evidence or other matters covered in chapter II. It should be noted, however, that such a principle is not intended to override any of the requirements contained in Articles 6 to 10. By stating that “information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message”, Article 5 merely indicates that the form in which certain information is presented or retained cannot be used as the only reason for which that information would be denied legal effectiveness, validity or enforceability. However, Article 5 should not be misinterpreted as establishing the legal validity of any given data message or of any information contained therein.

**Form Requirements—Writing, Signature and Original**\(^6\)

The law in India includes a number of different form provisions, which require a document to be in writing; for a signature or for documents to be signed; for an original document; or for a combination of these. In a number of instances, it is unlikely that an electronic form of document or

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\(^5\) *ibid*

\(^6\) *ibid* p. 2009
signature would satisfy these requirements, or at the very least there would be uncertainty on this point. These form requirements only apply to a limited number of transactions and, at least historically, there are sound policy reasons underlying their introduction and development.

Some jurisdictions have recognised new forms of technology such as the use of facsimiles and attached legal effect to their use. Similarly, some legislation has been updated to take account of the use of electronic documents and recognizes their use in certain circumstances. Overall, however, requirements for writing, signatures and originals generally would not be satisfied by the use of electronic data and electronic signatures.

Evidence

A number of jurisdictions have legislative provisions dealing with the admissibility and evidential weight of electronic documents/data messages. These provisions, however, are not uniform, although a number of States are considering adopting the uniform evidence laws.

Retention of Data Messages

Article 10 establishes a set of alternative rules for existing requirements regarding the storage of information (e.g., for accounting or tax purposes) that may constitute obstacles to the development of modern trade. Paragraph (1) of Article 10 is intended to set out the conditions under which the obligation to store data messages that might exist under the applicable law would be met. Following are the conditions:

\[\text{\footnotesize\textit{ibid.}}\]
a) the information contained therein is accessible so as to be usable for subsequent reference; and
b) the data message is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and
c) such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.

Paragraph (2) of Article 10 covers few elements transmittal information. And Paragraph (3) provides that in meeting its obligations under paragraph (1), an addressee or originator may use the services of any third party, not just an intermediary.

**Formation and Validity of Contracts**

Article 11 of the Model Law is not adopted to interfere with the law on formation of contracts but rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means. It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed.

Paragraph (1) covers not merely the cases in which both the offer and the acceptance are communicated by electronic means but also cases in which only the offer or only the acceptance is communicated electronically. As to the time and place of formation of contracts in cases where an offer or the acceptance of an offer is expressed by means of a data message, no specific

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*ibid*
rule has been included in the Model Law in order not to interfere with national law applicable to contract formation.

**Attribution of Data Messages**

Article 13 of the Model Law creates rules entitling the addressee to assume that a data message is that of the apparent originator (attribution) and that the data message as received is the same as that sent (message integrity). Article 13 moves beyond the existing common law position... which applies to paper-based transactions by presumptively allocating the risk of loss arising from unauthorized or altered messages to the apparent originator rather than the addressee.

**Time and Place of Dispatch and Receipt of Data Message⁹**

Article 15 of the Model Law deals about time and place of dispatch and receipt of data message. Paragraphs (1) defines the time of dispatch of a data message as the time when the data message enters an information system outside the control of the originator, which may be the information system of an intermediary or an information system of the addressee. The concept of “dispatch” refers to the commencement of the electronic transmission of the data message. Where “dispatch” already has an established meaning, Article 15 is intended to supplement national rules on dispatch and not to displace them. If dispatch occurs when the data message reaches an information system of the addressee, dispatch under paragraph (1) and receipt under paragraph (2) are simultaneous, except where the data message is sent to an information system of the addressee that is not the information system designated by the addressee under paragraph (2)(a).

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⁹ibid.
Paragraph (2), the purpose of which is to define the time of receipt of a data message, addresses the situation where the addressee unilaterally designates a specific information system for the receipt of a message (in which case the designated system may or may not be an information system of the addressee), and the data message reaches an information system of the addressee that is not the designated system. In such a situation, receipt is deemed to occur when the data message is retrieved by the addressee. By “designated information system”, the Model Law is intended to cover a system that has been specifically designated by a party, for instance in the case where an offer expressly specifies the address to which acceptance should be sent. The mere indication of an electronic mail or telecopy address on a letterhead or other document should not be regarded as express designation of one or more information systems.

Paragraph (3) is a non-obstante in nature which says, Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).

Paragraph (4) of Article 15 establishes an irrebuttable presumption regarding a legal fact, to be used where another body of law (e.g., on formation of contracts or conflict of laws) require determination of the place of receipt of a data message.

**Carriage of Goods**

Articles 16 and 17 contain provisions that apply equally to non-negotiable transport documents and to transfer of rights in goods by way of transferable bills of lading. The principles embodied in articles 16 and 17
are applicable not only to maritime transport but also to transport of goods by other means, such as road, railroad and air transport.

8.3. UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

On 23 November 2005 the United Nations General Assembly adopted a new Convention on the Use of Electronic Communications in International Contracts (Convention on e-contracting). The Convention is the most important and long awaited development in international electronic commerce law. This is the first international convention designed specifically to recognize the growing use of electronic communication in international. India is not signatory party to this Convention. For better understanding of e-contracts in whole it is necessary for one to discuss this Convention.

8.3.1. BACKGROUND INFORMATION

The Convention was drafted by the United Nations Commission on International Trade Law Working over six sessions since 2002. It is not binding law yet. It will be open for signature by all states at the United Nations Headquarters in New York from 16 January 2006 to 16 January 2008. According to communication from the UNCITRAL Secretariat, “it is expected that a signature event would take place during the UNCITRAL’s thirty-ninth session, to be held in New York from 19 June to 7 July 2006, to promote participation in the Convention by states and awareness of its provisions.” (United Nations, 23 November 2005) The Convention is

subject to ratification, acceptance or approval by three signatory states. Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

The Convention is short and consists of a Preamble and 25 Articles. It is organized into four chapters. The first part delineates the sphere of application of the instrument. The second chapter contains general provisions including the definitions of the terms used. Chapter III, which covers the use of electronic communications in international contracts, contains provisions on legal recognition of electronic communications, form requirements of a contract or a communication, time and place of electronic communications, invitation to make offers, use of automated systems for contract formation, availability of contract terms and treatment of input error. The last part contains final provisions.

8.3.2. THE AIM OF THE CONVENTION

The aim of the Convention is to remove legal obstacles to electronic commerce, including those which arose under other instruments, on the basis of the principle of functional equivalence – which is one of the most fundamental principles of electronic commerce law. The Convention sets the criteria to be used for establishing functional equivalence between electronic communications and paper documents as well as between electronic and hand-written signatures. Furthermore, the Treaty aims to provide a common solution in a manner acceptable to states with different legal, social and economic systems.11

The unique technique of this Convention can be found in Article 20, which has the goal of removing obstacles to e-commerce found in other international instruments adopted before the Internet era. It reads as follows:

Article 20 (1). The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

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

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

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

8.3.3. SCOPE OF THE CONVENTION\textsuperscript{12}

The Convention regulates 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. Nationality or character of the online entrepreneurs is irrelevant. In other words, the Convention applies to any transactions performed electronically provided that commercial parties are located in different states.

The Convention applies to electronic contracts between parties located in two different states, even if one or both are not Contracting States. Such wording may give the Convention an excessively broad scope of

\textsuperscript{12}ibid.
application (UNCITRAL Working Group IV (Electronic Commerce), 2005) and suggests a universal character of the Treaty. The prevailing view is that the Convention should only apply when the laws of a Contracting State applied to the underlying transaction. Therefore the Convention applies, so long as the law of a Contracting State applies to the dealings of the parties. Furthermore, any Contracting State may declare that it will apply this Convention only when the states are Contracting States or when parties have agreed that it applies.

The Convention is limited to Business-to-Business (B2B) electronic commerce. In consequence, its provisions do not create any rights or obligations for online entrepreneurs with respect to consumer contracts (B2C, C2C or C2B). Not all B2B e-commerce transactions are covered in the Convention, it does not apply to electronic financial services and international transferable documents such as bills of exchange.

8.3.4. ANALYSIS OF CONVENTION

Sphere of Application

The Electronic Communications Convention applies to the “use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States”. “Electronic communication” includes any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, made by electronic, magnetic, optical or similar means in connection with the formation or performance of a contract. The word “contract” in the Convention is used in a broad way and includes,

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13 Articles 1 & 2, of Convention on the Use of Electronic Communications in International Contracts, 2005, [ibid.](#)
for example, arbitration agreements and other legally binding agreements whether or not they are usually called “contracts”.

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

The Convention does not apply to electronic communications exchanged in connection with contracts entered into for personal, family or household purposes. However, unlike the corresponding exclusion under Article 2 (a) of the United Nations Convention on Contracts for the International Sale of Goods (the “United Nations Sales Convention”), the exclusion of these transactions under the Electronic Communications Convention is an absolute one, meaning that the Convention would not apply to contracts entered into for personal, family or household purposes, even if the particular purpose of the contract was not apparent to the other party. Furthermore, the Convention does not apply to transactions in certain financial markets subject to specific regulation or industry standards. These transactions have been excluded because the financial service sector is already subject to well-defined regulatory controls and industry standards that address issues relating to electronic commerce in an effective way for the worldwide functioning of that sector. Lastly, the Convention does not apply to negotiable instruments or documents of title, in view of the particular difficulty of creating an electronic equivalent of paper-based negotiability, a goal for which special rules would need to be devised.
Location of the Parties and Information Requirements\textsuperscript{14}

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

The Convention takes a cautious approach to peripheral information related to electronic messages, such as Internet Protocol addresses, domain names or the geographic location of information systems, which despite their apparent objectivity have little, if any, conclusive value for determining the physical location of the parties.

Treatment of Contracts\textsuperscript{15}

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

Article 12 of the Convention recognizes that contracts may be formed as a result of actions by automated message systems (“electronic agents”), even

\textsuperscript{14} Articles 6 & 7, of Convention on the Use of Electronic Communications in International Contracts, 2005, \textit{ibid.}

\textsuperscript{15} Articles 8, 11, 12 and 13 of Convention on the Use of Electronic Communications in International Contracts, 2005, \textit{ibid.}
if no natural person reviewed each of the individual actions carried out by the systems or the resulting contract. However, Article 11 clarifies that the mere fact that a party offers interactive applications for the placement of orders—whether or not its system is fully automated—does not create a presumption that the party intended to be bound by the orders placed through the system.

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

**Form Requirements**

Article 9 of the Electronic Communications Convention reiterates the basic rules contained in Articles 6, 7 and 8 of the UNCITRAL Model Law on Electronic Commerce concerning the criteria for establishing functional equivalence between electronic communications and paper documents—including “original” paper documents—as well as between electronic authentication methods and handwritten signatures. However, unlike the

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16 Article 9 of Convention on the Use of Electronic Communications in International Contracts, 2005, *ibid*
Model Law, the Convention does not deal with record retention, as it was felt that such a matter was more closely related to rules of evidence and administrative requirements than to contract formation and performance.

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

Time and place of Dispatch and Receipt of Electronic Communications

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

17 Article 10 of Convention on the Use of Electronic Communications in International Contracts, 2005, ibid
elements commonly used to define dispatch and receipt under domestic law.

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

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

**Relationship to Other International Instruments**

UNCITRAL hopes that States may find the Electronic Communications Convention useful to facilitate the operation of other international instruments—particularly trade-related ones. Article 20 intends to offer a possible common solution for some of the legal obstacles to electronic communications.

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18 Articles 20 on Convention on the Use of Electronic Communications in International Contracts, 2005, *ibid*
commerce under existing international instruments in a manner that obviates the need for amending individual international conventions.

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

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

8.4. UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The United Nations Convention on Contracts for the International Sale of Goods provides a uniform text of law for international sales of goods. The Convention was prepared by the United Nations Commission on
International Trade Law (UNCITRAL) and adopted by a diplomatic conference on 11 April 1980. India is not signatory party to this Convention also. For better understanding of e-contracts in whole it is necessary for one to discuss this Convention too.

Preparation of a uniform law for the international sale of goods began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT) in Rome. After a long interruption in the work as a result of the Second World War, the draft was submitted to a diplomatic conference in The Hague in 1964, which adopted two conventions, one on the international sale of goods and the other on the formation of contracts for the international sale of goods.

Almost immediately upon the adoption of the two conventions there was widespread criticism. As a result, one of the first tasks undertaken by UNCITRAL on its organization in 1968 was to enquire of States whether or not they intended to adhere to those conventions and the reasons for their positions. In the light of the responses received, UNCITRAL decided to study the two conventions to ascertain which modifications might render them capable of wider acceptance by countries of different legal, social and economic systems. The result of this study was the adoption by diplomatic conference on 11 April 1980 of the United Nations Convention on Contracts for the International Sale of Goods, which combines the subject matter of the two prior conventions.

The Convention is divided into four parts. Part One deals with the scope of application of the Convention and the general provisions. Part Two contains the rules governing the formation of contracts for the international sale of goods. Part Three deals with the substantive rights and obligations of buyer and seller arising from the contract. Part Four contains the final clauses of the Convention concerning such matters as
how and when it comes into force, the reservations and declarations that are permitted and the application of the Convention to international sales where both States concerned have the same or similar law on the subject.

8.4.1. SCOPE OF APPLICATION

The articles on scope of application indicate both what is covered by the Convention and what is not covered. The Convention applies to contracts of sale of goods between parties whose places of business are in different States and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State. A few States have availed themselves of the authorization in Article 95 to declare that they would apply the Convention only in the former and not in the latter of these two situations. As the Convention becomes more widely adopted, the practical significance of such a declaration will diminish. Finally, the Convention may also apply as the law applicable to the contract if so chosen by the parties. In that case, the operation of the Convention will be subject to any limits on contractual stipulations set by the otherwise applicable law.

The final clauses make two additional restrictions on the territorial scope of application that will be relevant to a few States. One applies only if a State is a party to another international agreement that contains provisions concerning matters governed by this Convention; the other permits States that have the same or similar domestic law of sales to declare that the Convention does not apply between them.

Contracts of sale are distinguished from contracts for services in two respects by article 3. A contract for the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials
necessary for their manufacture or production. When the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services, the Convention does not apply.

The Convention contains a list of types of sales that are excluded from the Convention, either because of the purpose of the sale (goods bought for personal, family or household use), the nature of the sale (sale by auction, on execution or otherwise by law) or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity). In many States some or all of such sales are governed by special rules reflecting their special nature.

Several articles make clear that the subject matter of the Convention is restricted to formation of the contract and the rights and duties of the buyer and seller arising from such a contract. In particular, the Convention is not concerned with the validity of the contract, the effect which the contract may have on the property in the goods sold or the liability of the seller for death or personal injury caused by the goods to any person.

**Party Autonomy**

The basic principle of contractual freedom in the international sale of goods is recognized by the provision that permits the parties to exclude the application of this Convention or derogate from or vary the effect of any of its provisions. This exclusion will occur, for example, if parties choose the law of a non-contracting State or the substantive domestic law of a contracting State as the law applicable to the contract. Derogation from the Convention will occur whenever a provision in the contract provides a different rule from that found in the Convention.
**Interpretation of the Contract; Usages**

The Convention contains provisions on the manner in which statements and conduct of a party are to be interpreted in the context of the formation of the contract or its implementation. Usages agreed to by the parties, practices they have established between themselves and usages of which the parties knew or ought to have known and which are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned may all be binding on the parties to the contract of sale.

**Form of the Contract**

The Convention does not subject the contract of sale to any requirement as to form. In particular, Article 11 provides that no written agreement is necessary for the conclusion of the contract. However, if the contract is in writing and it contains a provision requiring any modification or termination by agreement to be in writing, Article 29 provides that the contract may not be otherwise modified or terminated by agreement. The only exception is that a party may be precluded by his conduct from asserting such a provision to the extent that the other person has relied on that conduct.

In order to accommodate those States whose legislation requires contracts of sale to be concluded in or evidenced by writing, Article 96 entitles those States to declare that neither Article 11 nor the exception to Article 29 applies where any party to the contract has his place of business in that State.
8.4.2. FORMATION OF THE CONTRACT

Part Two of the Convention deals with a number of questions that arise in the formation of the contract by the exchange of an offer and an acceptance. When the formation of the contract takes place in this manner, the contract is concluded when the acceptance of the offer becomes effective.

In order for a proposal for concluding a contract to constitute an offer, it must be addressed to one or more specific persons and it must be sufficiently definite. For the proposal to be sufficiently definite, it must indicate the goods and expressly or implicitly fix or make provisions for determining the quantity and the price.

The Convention takes a middle position between the doctrine of the revocability of the offer until acceptance and its general irrevocability for some period of time. The general rule is that an offer may be revoked. However, the revocation must reach the offeree before he has dispatched an acceptance. Moreover, an offer cannot be revoked if it indicates that it is irrevocable, which it may do by stating a fixed time for acceptance or otherwise. Furthermore, an offer may not be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Acceptance of an offer may be made by means of a statement or other conduct of the offeree indicating assent to the offer that is communicated to the offeror. However, in some cases the acceptance may consist of performing an act, such as dispatch of the goods or payment of the price. Such an act would normally be effective as an acceptance the moment the act was performed.
A frequent problem in contract formation, perhaps especially in regard to contracts of sale of goods, arises out of a reply to an offer that purports to be an acceptance but contains additional or different terms. Under the Convention, if the additional or different terms do not materially alter the terms of the offer, the reply constitutes an acceptance, unless the offeror without undue delay objects to those terms. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

If the additional or different terms do materially alter the terms of the contract, the reply constitutes a counter-offer that must in turn be accepted for a contract to be concluded. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or settlement of disputes are considered to alter the terms of the offer materially.

8.4.3. SALE OF GOODS

Obligations of the Seller

The general obligations of the seller are to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to when, where and how the seller must perform these obligations.

The Convention provides a number of rules that implement the seller’s obligations in respect of the quality of the goods. In general, the seller must deliver goods that are of the quantity, quality and description required by the contract and that are contained or packaged in the manner
required by the contract. One set of rules of particular importance in international sales of goods involves the seller’s obligation to deliver goods that are free from any right or claim of a third party, including rights based on industrial property or other intellectual property.

In connection with the seller’s obligations in regard to the quality of the goods, the Convention contains provisions on the buyer’s obligation to inspect the goods. He must give notice of any lack of conformity with the contract within a reasonable time after he has discovered it or ought to have discovered it, and at the latest two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

**Obligations of the Buyer**

The general obligations of the buyer are to pay the price for the goods and take delivery of them as required by the contract and the Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to how the price is to be determined and where and when the buyer should perform his obligations to pay the price.

**Remedies for Breach of Contract**

The remedies of the buyer for breach of contract by the seller are set forth in connection with the obligations of the seller and the remedies of the seller are set forth in connection with the obligations of the buyer. This makes it easier to use and understand the Convention.

The general pattern of remedies is the same in both cases. If all the required conditions are fulfilled, the aggrieved party may require performance of the other party’s obligations, claim damages or avoid the
contract. The buyer also has the right to reduce the price where the goods delivered do not conform with the contract.

Among the more important limitations on the right of an aggrieved party to claim a remedy is the concept of fundamental breach. For a breach of contract to be fundamental, it must result in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the result was neither foreseen by the party in breach nor foreseeable by a reasonable person of the same kind in the same circumstances. A buyer can require the delivery of substitute goods only if the goods delivered were not in conformity with the contract and the lack of conformity constituted a fundamental breach of contract. The existence of a fundamental breach is one of the two circumstances that justifies a declaration of avoidance of a contract by the aggrieved party; the other circumstance being that, in the case of non-delivery of the goods by the seller or non-payment of the price or failure to take delivery by the buyer, the party in breach fails to perform within a reasonable period of time fixed by the aggrieved party.

Other remedies may be restricted by special circumstances. For example, if the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A party cannot recover damages that he could have mitigated by taking the proper measures. A party may be exempted from paying damages by virtue of an impediment beyond his control.

**Passing of Risk**

Determining the exact moment when the risk of loss or damage to the goods passes from the seller to the buyer is of great importance in
contracts for the international sale of goods. Parties may regulate the issue in their contract either by an express provision or by the use of a trade term such as, for example, an INCOTERM. The effect of the choice of such a term would be to amend the corresponding provisions of the CISG accordingly. However, for the frequent case where the contract does not contain such a provision, the Convention sets forth a complete set of rules.

The two special situations contemplated by the Convention are when the contract of sale involves carriage of the goods and when the goods are sold while in transit. In all other cases the risk passes to the buyer when he takes over the goods or from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery, whichever comes first. In the frequent case when the contract relates to goods that are not then identified, they must be identified to the contract before they can be considered to be placed at the disposal of the buyer and the risk of their loss can be considered to have passed to him.

**Suspension of Performance and Anticipatory Breach**

The Convention contains special rules for the situation in which, prior to the date on which performance is due, it becomes apparent that one of the parties will not perform a substantial part of his obligations or will commit a fundamental breach of contract. A distinction is drawn between those cases in which the other party may suspend his own performance of the contract but the contract remains in existence awaiting future events and those cases in which he may declare the contract avoided.

**Exemption from Liability to Pay Damages**

When a party fails to perform any of his obligations due to an impediment beyond his control that he could not reasonably have been expected to
take into account at the time of the conclusion of the contract and that he could not have avoided or overcome, he is exempted from the consequences of his failure to perform, including the payment of damages. This exemption may also apply if the failure is due to the failure of a third person whom he has engaged to perform the whole or a part of the contract. However, he is subject to any other remedy, including reduction of the price, if the goods were defective in some way.

**Preservation of the Goods**

The Convention imposes on both parties the duty to preserve any goods in their possession belonging to the other party. Such a duty is of even greater importance in an international sale of goods where the other party is from a foreign country and may not have agents in the country where the goods are located. Under certain circumstances the party in possession of the goods may sell them, or may even be required to sell them. A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them and must account to the other party for the balance.

**8.4.4. FINAL CLAUSES**

The final clauses contain the usual provisions relating to the Secretary-General as depositary and providing that the Convention is subject to ratification, acceptance or approval by those States that signed it by 30 September 1981, that it is open to accession by all States that are not signatory States and that the text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.
8.5. UNICITRAL MODEL LAW ON ELECTRONIC SIGNATURES

The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures has suggested the need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use of such modern techniques (which may be referred to generally as “electronic signatures”). The risk that diverging legislative approaches be taken in various countries with respect to electronic signatures calls for uniform legislative provisions to establish the basic rules of what is inherently an international phenomenon, where legal harmony as well as technical interoperability is a desirable objective.

Building on the fundamental principles underlying article 7 of the UNCITRAL Model Law on Electronic Commerce with respect to the fulfillment of the signature function in an electronic environment, this new Model Law is designed to assist States in establishing a modern, harmonized and fair legislative framework to address more effectively the issues of electronic signatures. In a modest but significant addition to the UNCITRAL Model Law on Electronic Commerce, the new Model Law offers practical standards against which the technical reliability of electronic signatures may be measured. In addition, the Model Law provides a linkage between such technical reliability and the legal effectiveness that may be expected from a given electronic signature. The Model Law adds substantially to the UNCITRAL Model Law on Electronic Commerce by adopting an approach under which the legal effectiveness of a given electronic signature technique may be predetermined (or assessed prior to being actually used). The Model Law is thus intended to foster the understanding of electronic signatures and the confidence that
certain electronic signature techniques can be relied upon in legally significant transactions. Moreover, by establishing with appropriate flexibility a set of basic rules of conduct for the various parties that may become involved in the use of electronic signatures (i.e. signatories, relying parties and third-party certification service providers) the Model Law may assist in shaping more harmonious commercial practices in cyberspace.

The objectives of the Model Law, which include enabling or facilitating the use of electronic signatures and providing equal treatment to users of paper-based documentation and users of computer-based information, are essential for fostering economy and efficiency in international trade. By incorporating the procedures prescribed in the Model Law (and also the provisions of the UNCITRAL Model Law on Electronic Commerce) in its national legislation for those situations where parties opt to use electronic means of communication, an enacting State would appropriately create a media-neutral environment. The media-neutral approach also used in the UNCITRAL Model Law on Electronic Commerce is intended to provide in principle for the coverage of all factual situations where information is generated, stored or communicated, irrespective of the medium on which such information may be affixed. The words “a media-neutral environment”, as used in the UNCITRAL Model Law on Electronic Commerce, reflect the principle of non-discrimination between information supported by a paper medium and information communicated or stored electronically. The new Model Law equally reflects the principle that no discrimination should be made among the various techniques that may be used to communicate or store information electronically, a principle that is often referred to as “technology neutrality”.

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The new Model Law on Electronic Signature was prepared on the assumption that it should be directly derived from article 7 of the UNCITRAL Model Law on Electronic Commerce and should be considered as a way to provide detailed information as to the concept of a reliable “method used to identify” a person and “to indicate that person’s approval” of the information contained in a data message.

One of the main features of the new Model Law is to add certainty to the operation of the flexible criterion set forth in Article 7 of the UNCITRAL Model Law on Electronic Commerce for the recognition of an electronic signature as functionally equivalent to a handwritten signature.

Article 7 of the UNCITRAL Model Law on Electronic Commerce reads as follows:

1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:
   a) a method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and
   b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

3) The provisions of this article do not apply to the following: [...].

Article 7 is based on the recognition of the functions of a signature in a paper-based environment.
The Model Law on Electronic Signature does not deal in any detail with the issues of liability that may affect the various parties involved in the operation of electronic signature systems. Those issues are left to applicable law outside the Model Law. However, the Model Law sets out criteria against which to assess the conduct of those parties, that is, the signatory, the relying party and the certification service provider.

Given the pace of technological innovation, the Model Law provides criteria for the legal recognition of electronic signatures irrespective of the technology used (e.g. digital signatures relying on asymmetric cryptography; biometric devices (enabling the identification of individuals by their physical characteristics, whether by hand or face geometry, fingerprint reading, voice recognition or retina scan, etc.); symmetric cryptography, the use of PINs; the use of “tokens” as a way of authenticating data messages through a smart card or other device held by the signatory; digitized versions of handwritten signatures; signature dynamics; and other methods, such as clicking an “OK-box”). The various techniques listed could be used in combination to reduce systemic risk.

The Model Law establishes as a basic principle that the place of origin, in and of itself, should in no way be a factor determining whether and to what extent foreign certificates or electronic signatures should be recognized as capable of being legally effective in an enacting State. Determination of whether, or the extent to which, a certificate or an electronic signature is capable of being legally effective should not depend on the place where the certificate or the electronic signature was issued but on its technical reliability. That basic principle is elaborated upon in article 12.
After having discussed international conventions about e-contracts, now we will deal with conclusions coming out of this study and the suggestions to improve e-contracts