

Articles

The Convention on the Use of Electronic Communications in International Contracts: Creating An International Legal Framework for Electronic Contracting

JUANA COETZEE*

University of Stellenbosch

1 The Need to Regulate Electronic Commerce Internationally

Although international trade can contribute to the economic growth and development of a country, the remoteness of trading parties remains a factor that influences the efficiency of such transactions. Not only are the goods to be transported over huge distances, something that creates the potential for damage and loss during transit, but in many instances trading partners have no personal or previous knowledge of each other.¹ International sales contracts are often concluded by brokers and other intermediaries on behalf of the actual parties involved. These aspects may increase the financial risk that is normally associated with the transaction. Although financial risks are to a large extent addressed by exchanging documents,² these documents have to be sent around the world to various interested parties, such as banks, customs officials and freight forwarders. Such an exercise may cause many a delay in the execution of the transaction. In the context of international trade, time means money, and it is therefore essential that a commercial transaction is negotiated, concluded and executed in the shortest time possible for the transaction to be efficient. Using electronic forms of communication may offer an effective solution to the problem.

Because of its fluid and borderless nature, the electronic medium lends itself ideally to international commerce. It enables traders to do business at relatively low cost across regions and national frontiers. Electronic commerce

* BA LLB LLM (Stellenbosch). Senior Lecturer in Mercantile Law, University of Stellenbosch.

¹ In these types of transactions, so-called 'reputational and relational sanctions' either do not exist or are inadequate to protect the parties against the risk of non-simultaneous exchange: cf J Linarelli 'The Economics of Uniform Laws and Uniform Lawmaking' (2003) 48 *Wayne LR* 1387 at 1395.

² The substitution of documents for goods often leads to the conclusion that documentary sales are so-called 'sales in documents' and not sales in goods. Apart from the contract of sale, the transaction involves a range of ancillary contracts regulating transport, insurance and finance. The buyer often is reluctant to pay before he has control over the goods, especially if the other party is unknown to him. The seller, again, is reluctant to part with the goods before being paid. Transport documents signifying control over the goods are exchanged for documents embodying a payment obligation. The simultaneous exchange of documents enables the buyer to safely pay before actual delivery of the goods and provides the seller with a payment instrument that entitles him to payment.

is considered to benefit countries in all stages of development because it improves competition as well as the economic efficiency and profitability of commercial transactions.³ By extending the general market reach of traders through electronic means, such as the Internet, new opportunities are generated, industries and services expanded, and new jobs created.

However, despite its apparent benefits, international surveys have shown that parties will be less willing to conduct transactions electronically if they are uncertain about the governing law, its contents, jurisdictional issues, or the availability of efficient alternative dispute-resolution mechanisms.⁴ Uncertainty about the legal validity of electronic contracts and the safety and authenticity of electronic messages create uneasiness and even scepticism towards conducting business electronically. If electronic commerce is to reach its full potential, it is essential that trust and confidence be created.

As a result more and more countries have passed laws regulating e-commerce. Many of these are modelled on the provisions of the 1996 United Nations Commission on International Trade Law ('UNCITRAL') Model Law on Electronic Commerce as well as the 2001 UNCITRAL Model Law on Digital Signatures. Notwithstanding these efforts, the full benefits of electronic contracting in the international context will be reaped only when inconsistencies between countries are removed and a coherent legal and regulatory framework for electronic commerce is established on an international level.⁵

It is generally accepted that harmonisation of laws enhances efficiency and facilitates international commerce by lifting barriers resulting from different legal systems. Effective harmonisation dispenses with the need to resort to conflict of laws and the opportunity for forum shopping. Harmonisation increases commercial predictability and legal certainty and thereby reduces the risk connected to international commerce. The replies to an International Chamber of Commerce ('ICC') questionnaire by a large number of international companies around the world, indicated that international harmonisation of the rules on electronic commerce would be instrumental in reducing legal uncertainty in online contracting.⁶ It is clear that there is a need for consistent

³ Alliance for Global Business ('AGB') *A Global Action Plan for Electronic Commerce* 3 ed (2002) at 10 (short version), also available on the International Chamber of Commerce ('ICC') website <http://www.iccwbo.org/home/e_business/word-document3rd%20Edition%20Global%20Action%20Plan.pdf> (visited on 20 Apr 2004).

⁴ The ICC undertook a survey on jurisdictional certainty which concluded that a large number of companies are dissuaded from international contracts because of the uncertainties surrounding jurisdiction. See in this regard http://iccwbo.org/home/news_archives/2003/stories/jurisdiction.asp (visited on 20 Apr 2004). See also the *Report* on the Draft UNCITRAL Convention on Electronic Contracting, dated 5 Dec 2001 and available at http://iccwbo.org/home/e_business/uncitral_convention_report.asp (visited on 20 Apr 2004).

⁵ States with different legal, social and economic systems approach commercial matters from different viewpoints. The same applies to the regulation of electronic commercial transactions. The results can be costly as parties have to appoint lawyers in different countries to advise them on the legal aspects of the contract. Cf J Vilus 'Electronic Commerce: An Incentive for the Modernisation and Harmonisation of Contract Law?' (2003) 8 *Uniform LR* 163 at 170; UNCITRAL Working Group on Electronic Commerce Press Release on the Draft e-Commerce Convention (ECO/55, L/3059, PI/1561). The need for a Convention also became apparent from the responses to an ICC Questionnaire sent out to companies. See also in this regard the *Report* on the Draft UNCITRAL Convention on Electronic Contracting op cit note 4.

⁶ *Report* on the Draft UNCITRAL Convention on Electronic Contracting op cit note 4.

global rules on electronic contract formation and enforcement to encourage parties to enter into cross-border electronic commercial transactions.

At the same time it is also so that existing instruments aimed at unifying international trade law may present obstacles in the path of conducting business electronically. Often international conventions regulating various aspects of international trade law refer to the concepts of 'writing', 'document' and 'signature'. Most of these conventions were negotiated long before the development of new technology, such as e-mail, electronic data interchange ('EDI') and the Internet, and therefore do not provide for electronic forms of communication. In these instances it is not clear whether electronic methods provide a legally valid and enforceable means of communication to conclude and perform commercial transactions.⁷ Developments in electronic commerce point towards a functional-equivalent approach,⁸ which means that either the existing conventions should be amended to bring them in line with this approach, or that a uniform law should be created to address the obstacles that might arise under existing international trade-law instruments.

In 2002, UNCITRAL's Working Group on Electronic Commerce commenced drafting a convention which will provide uniform rules to remove all obstacles to the use of electronic communications in international contracts.⁹ Its work was completed in October 2004 and the Commission adopted the New Draft Convention on the Use of Electronic Communications in International Contracting at its 38th Session in Vienna in July 2005. The Convention itself was adopted by the General Assembly of the United Nations at its 60th Annual Session in 2005.¹⁰

This article will discuss the scope of application and general content of the new Convention. In the final instance it will come to a conclusion on the Convention's general efficiency as an international framework for electronic contracting measured against the needs of international business.

⁷ For example, the 1980 UN Convention on Contracts for the International Sale of Goods ('CISG') unifies international sales law quite effectively, but in instances where the contract of sale is concluded by means of an electronic medium, problems of validity and interpretation problems remain. The issue is addressed either through analogous interpretation, furthering the scope of art 13 of the CISG Convention beyond telegram and telex, but still within the principles on which the Convention is based, or with reference to an Advisory Council Opinion (*CISG-AC Opinion no 1: Electronic Communications under CISG*) of 15 Aug 2003.

⁸ This approach was introduced by the 1996 UNCITRAL Model Law on Electronic Commerce.

⁹ The UNCITRAL Working Group on Electronic Commerce considered 33 international conventions that could have an impact on international commercial transactions conducted electronically: cf the *Official Records of the General Assembly A/CN.9/WG.IV/WP.94* and also *A/CN.9/527* in pars 33-48.

¹⁰ The Convention will be open for signature by all States at the UN Headquarters in New York as from 16 Jan 2006 until 16 Jan 2008. It is subject to ratification, acceptance or approval by the signatory States, and open for accession by all States that are not signatory States. The Convention will enter into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession. It is expected that a signature event will take place during UNCITRAL's 39th Session, to be held in New York from 19 Jun to 7 Jul 2006.

2 The Convention on the Use of Electronic Communications in International Contracts

2.1 General

The Convention on the Use of Electronic Communications in International Contracts (the ‘Convention’) complements and builds upon earlier instruments prepared by UNCITRAL, including the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Digital Signatures.

According to its Preamble, the Convention is aimed at providing legal certainty and predictability where electronic communications are used in relation to international contracts. The Convention will improve the legal framework for international commercial transactions and so enhance trade opportunities, which will, in turn, promote global trade and economic growth. The Preamble also expresses the desire ‘to provide a common solution to remove legal obstacles to the use of electronic communications in a manner acceptable to States with different legal, social and economic systems’.

The international and unifying character of the Convention is emphasised by the interpretation provision, art 5(1), which provides that the Convention should be interpreted ‘with regard to its international character and the need to promote uniformity in its application and the observance of goods faith in international trade’. The aim is to move away from the restrictions posed by domestic legal systems and to create a framework that is able to address the special needs of international trade in accordance with modern international commercial practice. The Convention can thus supplement existing international instruments that were formulated to address the needs of international trade.

The Convention is divided into four chapters. Chapter One deals with the sphere of application of the Convention, whilst Chapter Two contains general provisions, such as general definitions, rules on interpretation of the Convention, and how to determine the location of the parties. Chapter Three focuses on the legal aspects of electronic communications in international commerce, such as validity and enforceability, the criteria for establishing functional equivalence between electronic communications and paper documents, security, time and place of dispatch and receipt of electronic communications, as well as errors in electronic communications. Chapter Four refers to provisions which may affect the applicability of the Convention, such as ratification and the opportunity for Contracting States to make declarations in regard to its scope of application.

This article will focus on the scope of application of the Convention as well as the provisions aimed at introducing a functional-equivalent approach to paper-based contracts.

2.2 Scope of Application

Although the Convention is aimed at the use of electronic communications in connection with international contracts, its scope of application is limited to certain aspects of an international contract, and may be limited even further through declarations made by a Contracting State. Aspects falling outside the

scope of the Convention should, true to the international and autonomous nature of this instrument, be 'settled in conformity with the general principles on which it is based' and only in the absence of such principles, are these issues to be decided in accordance with the governing law of the contract.¹¹

2.2.1 Electronic Communications in Connection with Formation and Performance

The Convention expressly provides that its provisions will apply to electronic communications that are made in connection with the formation and performance of an international contract or agreement.¹² There is no indication that both parties should make use of electronic communications for the Convention to apply. It is possible, therefore, that its provisions can apply to situations where only one of the parties makes use of electronic means.

2.2.2 Parties Who Have Their Places of Business in Different States

The Convention gives effect to the requirement of internationality by prescribing that it applies to contracts by parties who have their places of business in different States.¹³

There is no requirement that both parties should have their businesses in Contracting States. This aspect is part of the overall vision of the Convention to have a broad application and not the specific narrow application associated with other international instruments such as the Convention on Contracts for the International Sale of Goods.¹⁴ The Convention will apply, therefore, even if the contract is formed and executed in the same State, as long as the parties have their places of business in different States at the time of conclusion of the contract.

Although there is no need for both parties to have their places of business in Contracting States, it is a requirement that the law of a Contracting State should apply to the parties' dealings.¹⁵ If the parties have not chosen the governing law, that law is determined with reference to the rules of private international law of the forum State.¹⁶ In that case the Convention will apply as the domestic governing law of the contract.

However, it is important to observe that art 1 should be read together with

¹¹ Article 5(2).

¹² Article 1.

¹³ Article 1(1).

¹⁴ *Official Records of the General Assembly: Report of the Working Group on Electronic Commerce on Its Forty-fourth Session*, A/CN.9/571 in pars 17 and 39; A/CN.9/548 in par 87; *Official Records of the General Assembly: United Nations Commission on International Trade Law Draft Convention on the Use of Electronic Communications in International Contracts: Note by the Secretariat* A/CN.9/577/Add 1 in pars 27-32.

¹⁵ A/CN.9/571 in par 19.

¹⁶ *Official Records of the General Assembly: Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-eighth Session* A/60/17 in pars 20-2. It was pointed out at this Session of the Commission, that art 1 is capable of two interpretations. Apart from the one mentioned in the text, it is also possible to interpret it as having an autonomous application if the forum court was located in a Contracting State. Such an approach could enhance legal certainty. The prevailing view, however, is to apply the Convention when the laws of a Contracting State apply to the underlying transaction. Cf A/CN.9/577/Add.1 in par 32; A/CN.9/571 in par 36.

arts 19 and 20 as the scope of application of the Convention could be influenced by a declaration made by a Contracting State.¹⁷

Nevertheless, the mere fact that the parties have their places [of business?] in different States will not be relevant unless this fact can be deduced from the contract, from the parties' dealings, or from any information disclosed by them before or at the conclusion of the contract.¹⁸ Article 1(3) specifically mentions that neither the nationality of the parties nor the civil or commercial character of the parties or the contract is to be taken into consideration when determining the application of the Convention. This measure therefore limits the application of the Convention to a situation where the parties have knowledge of the internationality of the contract at the time it is concluded, or to a situation where they intend it to apply.¹⁹

The word 'parties' only refers to the parties to the contract and do not therefore include agents or representatives who act on behalf of them. The place of business of an agent or representative is irrelevant as long as the party on whose behalf it is acting has his place of business in a different country than that of the other party to the contract, and as long as the actual parties to the contract are aware of this fact. In cases where an agent acts on behalf of an undisclosed principal, the knowledge requirement of art 1 will not be satisfied if the other party is not aware that the principal has his place of business in another State.²⁰

The concept 'place of business' is defined in the Convention in art 4(h) as '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'. A place of business is therefore a permanent or regular place for transacting business and conducting economic activity, and not merely the location of a temporary operation. However, it is not necessary that it should be the party's main office.²¹

To determine whether the parties have their places of business in different States, one has to determine the location of such businesses. Article 6 deals with the concept of location. The location of a 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'. Thus, the Convention does not place any positive duty on the parties to disclose their places of business or to provide other information, but merely provides a presumption in favour of a party's indication of its place of business which can be rebutted by an interested party.²² In situations where a party has not indicated a place of business and actually has more than one place of business,

¹⁷ Note that these articles were originally arts 18 and 19: cf par 2.2.4 below.

¹⁸ Article 1(2).

¹⁹ Party autonomy is specifically acknowledged by the Convention in art 3.

²⁰ See CF Hugo 'The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective' (1999) 11 *SA Merc LJ* 1 at 8 for the same argument in regard to the scope of application of the CISG Convention.

²¹ This is the interpretation given to the same concept under the CISG Convention: see Hugo op cit note 20 at 8.

²² A/CN.9/571 in par 93.

such as in the case of large multinational companies, the place of business will be the one that has the closest relationship to the contract, 'having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract'.²³ If a natural person does not have a place of business, his habitual residence will be used to determine the applicability of the Convention.²⁴

Because the electronic medium is a virtual medium which is accessible from any place in the world, it is impossible to determine the location of the parties with reference to any place connected to this medium. The Convention therefore elects to connect location to the parties' physical business operations.²⁵

In this regard it is also important to be aware of art 18. Article 18 deals with the legal effect of the Convention in domestic territorial units. Article 18(1) provides an opportunity for a Contracting State that has two or more territorial units, to declare at the time of signature, ratification, acceptance, approval or accession, that the Convention will not apply to all its territorial units. If by application of the laws of private international law, the law of the territorial unit that was excluded from the ambit of the Convention by means of such a declaration, is the applicable law, the Convention will not apply to the contract unless the parties have agreed that the Convention will apply to their contract.

2.2.3 Exclusions

Article 2 provides for exclusions on the Convention's scope of application. The Convention is aimed solely at commercial contracts and consumer contracts are excluded in art 2(a).²⁶ The Working Group noted that the financial-services sector already has well-defined regulations or industry standards that address issues relating to e-commerce in an effective way for international transacting.²⁷ No benefit would therefore be derived from including these matters within the ambit of the Convention.

The Convention also does not apply to negotiable instruments or documents of title as it is extremely difficult to create an electronic equivalent of paper-based negotiability and as special rules would have to be devised to ensure the singularity and originality of such documents.²⁸ Article 2(1)(b), therefore, excludes transactions on a regulated exchange; foreign-exchange transactions; inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; 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

²³ Article 6(2).

²⁴ Article 6(3).

²⁵ Articles 6(4) and (5), therefore, specifically provide that the location of a place of business is not the place where an information system used by a party is located, and also not the place where the information system may be accessed. Location is also not determined by a domain name or e-mail address which is located in a specific country. The Working Group also decided to refrain from defining a so-called 'virtual company' and to leave that to be elaborated by emerging jurisprudence. Cf A/CN.9/571 in par 107.

²⁶ The Convention will not apply to contracts for personal, family or household purposes.

²⁷ A/CN.9/571 in par 61.

²⁸ A/CN.9/577/Add/1 in par 37; A/CN.9/527 in pars 45, 55, 62, 65 and 136.

intermediary. Bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any other transferable documents or instruments that entitle the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money are also excluded in art 2(2).²⁹

2.2.4 Declarations Made by States to Restrict the Scope of Application

The Convention's scope of application may be restricted by means of a declaration made by a Contracting State.³⁰ States are not obliged to make such a declaration, but it is their prerogative to do that should they so wish.³¹ Such declarations are aimed at reducing the broad scope of application of the Convention as provided by art 1 and may be made by States for which that broad scope is not desirable.³²

Article 19 provides States with two choices.³³ Firstly, a declaration that the Convention will apply only if both parties to the contract have their places of business in a Contracting State; and secondly, application only if the parties to the contract have agreed that it will apply. It is always possible that a Contracting State can declare that the Convention will apply in both these cases.³⁴ In addition, art 19(2) provides a State with the opportunity to exclude from the Convention's scope of application any matters it may specify in an art 20 declaration.

Apart from addressing general problems relating to electronic commerce, the Convention is also aimed at removing obstacles caused by the content of numerous international instruments of international trade law, most of which do not facilitate the operation of electronic transactions. Article 20 intends to provide solutions to such obstacles and at the same time to remove doubts as to the relationship between the rules contained in the Convention and rules contained in other international conventions which are specifically referred

²⁹ It is also possible for a State to make a declaration in terms of art 19(2) by which it may exclude certain matters, apart from those mentioned in art 2, from the Convention's scope of application.

³⁰ Cf art 20 for the procedure and effect of declarations.

³¹ Article 19 provides that any State *may* declare the Convention to apply only in certain circumstances. It was decided to make use of declarations and not reservations since the Convention deals with law that would not apply to State actions but to private business transactions. It was pointed out to the Working Group that treating these issues as declarations rather than reservations would better serve the purpose of the Convention. Declarations also support the goal of flexibility that is crucial in areas, such as electronic commerce, which are still developing: A/CN.9/571 in pars 30-2.

³² A/CN.9/571 in par 39.

³³ The Draft prepared by the Working Group originally contained three choices in what was then art 18. In addition to the current two possibilities, the Draft included the possibility to restrict the application to situations where the application of the rules of private international law would lead to the application of the law of a Contracting State. However, this possibility was deleted by the Commission at its Session in Jul 2005 to reflect its understanding that the application of the Convention would in any event be subject to the rules of private international law and that a declaration to that effect would be superfluous.

³⁴ The fact that States may exercise a choice they deem appropriate, is emphasised by A/CN.9/571 in par 41.

to.³⁵ Unless a Contracting State makes a declaration that this provision will not apply, the Convention will apply also to electronic communications in connection with the formation or performance of a contract or agreement to which another international instrument, not specifically referred to in art 20(1) but to which a Contracting State is or will become a Contracting State, applies.³⁶ However, it is also possible for a Contracting State to reduce the scope of art 20(2) by making a declaration to the effect that only a specified international instrument to which it is or will become a Contracting State, will be relevant to the scope of application of the Convention.³⁷ It is also possible for a State to declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract to which any international instrument, including those mentioned in art 20(1), applies.³⁸ The result of such declaration is that the Convention will apply only to electronic contracts which are not regulated by another international convention, treaty or agreement.³⁹

2.2.5 The Influence of Party Autonomy

The principle of freedom of contract in the international sale of goods is enshrined in art 3 and provides parties with the possibility of excluding the Convention in situations where it would otherwise apply. It also provides parties with the opportunity of derogating from the application of the Convention by varying the content of its provisions through agreement, should they so desire.

The Convention may be excluded where the parties expressly state that the Convention or any of its provisions will not apply to the contract in issue. However, it is also possible that the application of the Convention may be excluded indirectly or impliedly. If the parties choose to have the use of electronic communications in connection with the formation or performance of their contract governed by another set of rules,⁴⁰ or if they use contract terms that are at variance with the provisions of the Convention, it will be considered that they have tacitly excluded its application.⁴¹ The same would

³⁵ A/CN.9/571 in pars 48-9. Observe that this provision was contained in art 19 in earlier drafts. The current art 20(1) provides that the Convention will apply to the use of electronic communications in connection with the formation or performance of a contract or agreement regulated by the international conventions listed in it and to which a Contracting State to this Convention is or may also become a Contracting State. These instruments are: the 1958 Convention on the Recognition and Enforcement of Arbitral Awards, the 1974 Convention on the Limitation Period in the International Sale of Goods, the 1980 UN CISG Convention, the 1991 UN Convention on the Liability of Operators of Transport Terminals in International Trade, the 1995 UN Convention on Independent Guarantees and Stand-by Letters of Credit, and the 2001 UN Convention on the Assignment of Receivables in International Trade.

³⁶ Article 20(2).

³⁷ Article 20(3).

³⁸ Article 20(4).

³⁹ This possibility was 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: cf A/CN.9/577/Add.1 in par 60.

⁴⁰ Which could include the governing law of a non-contracting State.

⁴¹ The Commission agreed that derogation may be made explicitly or impliedly: cf A/60/17 in par 32.

apply if they were to make use of a standard contract that regulates electronic communications.⁴²

Even in situations where the Convention would not otherwise govern the contract, either because it is not the applicable law or because of an art 19 declaration, the parties may still agree to have the provisions of the Convention made applicable to their contract. In such a case the provisions of the Convention will not apply as convention but as contract terms.⁴³

2.3 Content

By virtue of art 8, the Convention confers validity and enforceability on electronic communications.⁴⁴ However, it does not deal with the issue of contract formation. The Working Group realised that apart from contracts regulated by the CISG Convention, contract formation is not subject to a uniform international regime and that no rule should therefore be formulated on the time that and place where an electronic contract is formed.⁴⁵ Article 10 merely provides default rules on the time and place of dispatch and receipt of electronic communications which are intended to supplement national rules.⁴⁶

‘Dispatch’ is defined as the time when an electronic communication left an information system under the control of the originator,⁴⁷ whilst ‘receipt’ is linked to the time when the electronic communication becomes capable of being retrieved, which is presumed to be when it reaches the addressee’s electronic address.⁴⁸ The Convention, therefore, applies an objective test together with a set of presumptions.⁴⁹ A proposal which is not addressed to one or more specific parties, is considered to be merely an invitation to make an offer, as in the case of an advertisement, unless it clearly indicates that the party making the proposal intends to be bound by an acceptance.⁵⁰

The Convention is intended to provide functional equivalence between electronic communications and paper-based transactions insofar as formal requirements are concerned. Article 9 sets minimum standards to accommodate

⁴² Cf the observations by Hugo op cit note 20 at 22-4 as regards exclusion of the CISG.

⁴³ Cf idem at 26. See also the discussion of art 3 in par 2.2.5 below.

⁴⁴ This provision is based on art 8 of the UNCITRAL Model Law on Electronic Commerce and embodies the principle of party autonomy. Article 8(2) also highlights the principle of party autonomy and recognises that parties are not obliged to use or accept electronic communications.

⁴⁵ A/CN.9/577/Add.1 in par 42; A/CN.9/528 in par 103; A/CN.9/546 in pars 118-21.

⁴⁶ This provision differs slightly from art 15 of the UNCITRAL Model Law on Electronic Commerce by aligning the formulation of the relevant rules with general elements commonly used to define dispatch and receipt under domestic law in a non-electronic environment. The aim is to facilitate the operation of the Convention in various legal systems: cf A/CN.9/577/Add.1 in par 49.

⁴⁷ Article 10(1). 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, receipt is considered to occur at the time when the electronic communication is received. In practice that would mean the time the communication is delivered to the destination information system or an intermediary system.

⁴⁸ Article 10(2) distinguishes between delivery of electronic messages at a designated address and delivery to addresses not specifically designated. In respect of non-designated addresses, the Convention, in addition, requires that the addressee actually becomes aware that the communication was sent to that particular address.

⁴⁹ An electronic communication, furthermore, 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: cf art 10(3) read together with art 6.

⁵⁰ Article 11. This provision is in line with art 14 of the CISG and prevents parties from being bound to a contract when they run out of stock.

requirements of formality that may exist under the applicable law.⁵¹ Article 9(2) provides that the ‘writing’ requirement will be fulfilled by an electronic communication if the ‘information contained therein is accessible so as to be usable for subsequent reference’. The signature requirement is regulated by art 9(3) which sets certain criteria to protect the authenticity of a signature. After extensive debate, the Commission came to the conclusion that not all signatures indicate agreement with the content of the communication, but that some are used merely to identify the person who signed the electronic communication and to associate the information with such a person.⁵² Article 9 determines that a method should be used to identify the party and to associate that party with the information contained in the electronic communication, and, if appropriate, to indicate that party’s approval of the information contained in the electronic communication. It is also required that such method be ‘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’.⁵³ These requirements are formulated rather broadly,⁵⁴ in order to respect the freedom of parties to choose appropriate media and technologies.

Similarly formulated general criteria are laid down for the retention of information in its original form, namely that there should exist a reliable assurance as to the integrity of the information⁵⁵ and that the information should be capable of being displayed.⁵⁶ The criteria for determining the integrity of the information is determined by art 9(5)(a). Integrity will be assessed by ‘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’. The standard of reliability required will be assessed ‘in the light of the purpose for which the information was generated and in the light of all the relevant circumstances’.⁵⁷

Although the parties are therefore free to derogate from the application of the Convention, party autonomy does not empower them to ignore statutory requirements on form and authentication.⁵⁸

Article 12 recognises the validity of automated message systems for contract formation, whilst art 14 provides guidelines for withdrawing an electronic communication in situations where a natural person exchanging electronic communications with an automated system, makes an input

⁵¹ The Commission held that ‘law’ should encompass statutory or regulatory law, including international conventions or treaties ratified by a Contracting State, and also judicially created law and other procedural law. However, it does not include the so-called ‘law merchant’ or *lex mercatoria*: cf A/60/17 in par 58.

⁵² Such is the case with the signature of a notary or a commissioner of oaths: cf A/60/17 in pars 60-7.

⁵³ Article 9(3)(b)(i).

⁵⁴ The Convention elected to follow the general formulation used by art 7 of the UNCITRAL Model Law on Electronic Commerce. In most instances national laws regulating electronic contracts are more prescriptive in this regard.

⁵⁵ Article 9(4)(a).

⁵⁶ Article 9(4)(b).

⁵⁷ Article 9(5)(b).

⁵⁸ A/CN.9/571 in par 76; A/CN.9/577/Add.1 in par 48.

error and the system does not provide the party the right to withdraw that communication.⁵⁹

2.4 Conclusion

Does the Convention present an efficient framework law for conducting business internationally? This question will be answered with reference to the Convention's general goals, its nature as an instrument of harmonisation, and the needs international business.

The main aim of the Convention on the Use of Electronic Communications in International Contracts is to provide default rules that ensure legal certainty where electronic communications are employed in the formation and performance of international contracts. Legal certainty will enhance confidence and trust in electronic commerce conducted across national borders, so facilitating electronic contracts and international trade in general.

Because developments in the field of electronic communications take place at such a rapid pace, it is the most sensible solution to provide parties with a broad framework and to present them with the opportunity to adapt the general rule to their specific needs. This is exactly what the Convention aims to do. This article has attempted to show that the Convention proceeds from a broad scope of application but, at the same time, affords States the opportunity to reduce that scope should they so desire. By making a declaration in terms of arts 19 and 20, a State may reduce the general broad scope in accordance with its particular chosen declaration. The principle of party autonomy, furthermore, empowers parties to derogate from the Convention through agreement. Parties to a contract of sale may reduce the broad scope by excluding its provisions either in whole or in part, or by varying any of its provisions if the situation so requires. Party autonomy is a principle of great importance in international commercial transactions as it facilitates efficiency and reduces costs, and it is therefore of particular import that the Convention supports this principle.

The Convention is also aimed at removing obstacles caused by international conventions. The aim is to facilitate the operation of instruments of international trade and to supplement their operation in an effective way, without the need to amend individual conventions. The Convention can even provide an interpretation tool to domestic courts that have to interpret international instruments. A Contracting State may incorporate in its legal system a provision directing its judicial bodies to use the provisions of the Convention in addressing legal issues on the use of data messages in the context of other international conventions.⁶⁰

Application of the Convention is not confined to contract formation, as electronic communications are also used to exercise a number of rights arising

⁵⁹ The party who committed the error should notify the other party as soon as possible of the error after having become aware of it; he should take reasonable steps to return the goods or services received as a result of the error, and like steps not to have used or received any material benefit or value from such goods or services.

⁶⁰ A/CN.9/548 in par 49 and A/CN.9/577 Add. 1 in par 59.

from a contract, such as notices on the receipt of goods, notices of failure to perform, and notices of termination. They are also employed in the performance of the contract, for instance electronic fund transfers to satisfy the obligation of payment. The Convention, therefore, aims at facilitating electronic contracts in all respects, and that will improve the overall efficiency of commercial activities and promote trade and economic development as envisaged by its preamble.

Instruments of hard law, such as international conventions, are often considered to be unsuccessful instruments of harmonisation. Their relative inflexibility, as well as the fact that they are mostly products of diplomatic compromises, contribute to this view. Consequently, the success of a convention often depends on the ability to interpret its provisions in a way that provides for uniformity and certainty. The Convention under consideration seems to depart from the standard path and to present an instrument which provides legal certainty but at the same time also built-in flexibility. It proceeds from a broad and simplified scope of application to enhance its practical reach as far as possible, but then provides parties and States with the opportunity to restrict its application should they so desire.

A further innovation is the Convention's recognition of the importance of organisations of regional economic integration and the role they play in international trade. It was realised that there are more international players, apart from States, that should be recognised when it comes to ratifying or accepting an international instrument. Such regional organisations play an increasingly important role in international trade.⁶¹ The Convention provides for so-called 'Regional Economic Integration Organisations' to have the rights of a Contracting State to the extent that the organisation has competence over matters governed by this Convention. Article 17 provides an opportunity for such organisations to sign, ratify, accept, approve or accede to the Convention.

International business has indicated that governmental intervention, whether on the national or international level, should promote a stable, international legal framework, but at the same time should go no further than essential, and should be clear, transparent, objective, flexible and technologically neutral.⁶² Freedom of contract must prevail as the underlying principle in creating an appropriate legal environment for electronic contracting, while barriers to electronic contracting should be removed.⁶³

It may be concluded that the Convention provides an efficient legal framework, based on the functional equivalent approach, that promotes legal certainty in electronic commerce, but at the same time also contains the elements of flexibility necessary to ensure that States that are reluctant to accept the Convention, will be afforded the opportunity to share in its advantages insofar as they deem desirable. Ratification of, or accession to, this Convention could only be beneficial to States conducting international business.

⁶¹ The EU, in particular, has an enormous stake in international trade within its economic market.

⁶² See the fundamental principles as set out by the *Global Action Plan for Electronic Business* op cit note 3 at 9.

⁶³ *Idem* at 38.

Being an economic leader in Africa and in the Southern African Development Community region, South Africa could only benefit by ratifying or acceding to the Convention. For the most part, its provisions are based on the same underlying principles on which our own Electronic Communications and Transactions Act⁶⁴ rests. That will minimise the risk of conflict. Acceptance of this Convention might at the same time also act as an incentive for the South African Government to accede to the CISG Convention.

And even if South Africa never accedes to the Convention, it will still be important for local lawyers to be aware of its contents, given that the Convention could still apply to an electronic transaction involving a South African exporter or importer. As the applicability of the Convention is based on the operation of the rules of private international law, it could be that such a transaction is governed by the legal system of a country that has ratified or acceded to the Convention, so making its provisions applicable to the transaction to which the South African is a party.

⁶⁴ Act 25 of 2002.