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

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1. Background Information

The Convention on the Use of Electronic Communications in International Contracts[1] (CUECIC) was adopted by the United Nations General Assembly during its 38th session, which took place in New York on 23 November 2005. The United Nations Commission on International Trade (UNCITRAL) was drafting the Convention over six sessions, since year 2002. The Convention was opened for the signature at the United Nations Headquarters in New York from 16 January 2006 to 16 January 2008. Until now, it was signed by the Central African Republic, China, Lebanon, Madagascar, Senegal, Sierra Leone, Singapore and Sri Lanka.[2] To enter into force three instruments of ratification, acceptance, approval or accession are required. Hitherto none of the signatory states has taken such action.

The Convention consists of a Preamble and 25 articles organized into 4 chapters. First chapter (art. 1-3) defines the sphere of application of the Convention, and the lists of the exclusions. Second chapter covers the general provisions, and among them the definitions of the terms used (art. 4-7). Chapter third covers the use of electronic communications in the international contracts; it speaks about the provisions of legal recognition of electronic contracts, requirements according the form, time and place of electronic communications, invitations to make offers, the use of automated message systems and the input error situation (art. 7-14). Chapter four contains final provisions.

2. The aim of the Convention

The aim of the Convention, stated in the Preamble, is to enhance legal certainty and commercial predictability for international contracts. This effect is meant to be reached by removing the obstacles for the electronic communications in international contracts, some of which can be created by the existing international trade law instruments. Therefore, uniform rules should be adopted. In order to improve the efficiency of commercial activities, the Convention promotes the ideas of technological neutrality and functional equivalence, which both are repeated

[1] Full text of the Convention on the Use of Electronic Communication in International Contracts available at: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html, last visited on 13.12.2006.

[2] List of signatory countries available at: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html, last visited on 13.12.2006.

after UNCITRAL Model Law on Electronic Commerce, 1996[3]. Those two principles are the core of any legislation of transactions done with the use of electronic communications[4].

The intention of the principle of technological neutrality is to separate the application of the Convention from the used technology. The contracting parties should have a freedom of choice of any electronic communication media; hence the rules have to stay independent of that aspect. The Convention, neither can favor any of the available technologies of generating, storing, and transmitting information, nor can discriminate any of them, in order to remove the obstacles for international contracts made with the use of electronic communications. The additional reason of the importance of the principle of technological neutrality is undeniable technological progress. Future innovations or developments have to be taken into consideration in order to prevent possible obsolescence of the law[5]. To exclude such a situation, the Convention adopts terminology which does not refer to any particular technology of transmission or storage of information. This method is not new, as it has been used before in the UNCITRAL Model Law on Electronic Commerce.

The second principle, of functional equivalence, is considered to be one of the most fundamental principles of electronic commerce law[6]. The idea behind is, that the legal requirements for the use of paper-based documents, prescribing particular forms, hinder the development

of electronic communication means. With its approach to remove such obstacles, the Convention implements this idea by establishing functional equivalence between electronic and traditional documents, and also between electronic and hand-written signatures[7]. It is done by the presentation of the functions, as well as the purposes of the paper - based documents together with the criteria, which, when they are fulfilled by the electronic documents, allow them to gain the equal level of legal recognition[8]. In order to remove the obstacles imposed by the other international instruments adopted before, the Convention extends the scope of the terms like “signature”, and

[3] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, with additional article 5 bis as adopted in 1998, New York, 1999, available at: http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf, last visited on 27.12.2006.
[4] Connolly C., Rivandra P.: First UN convention on eCommerce finalized, Computer Law and Security Report 22 (2006), p.31 (32), available at: http://www.galexia.com, last visited on 14.12.2006.
[5] Legal aspects of electronic commerce. Explanatory note on the Convention on the Use of Electronic Communications in International Contracts, A/CN.9/608/Add.1, Thirty-ninth session, New York 19 June- 7 July 2006, available at: http://www.uncitral.org/uncitral/en/commission/sessions/39th.html, last visited on 14.12.2006.
[6] Report of the Working Group on Electronic Commerce on it 44th session A/CN.9/571, Vienna, 11- 20 October 2004, available at: http://www.uncitral.org/uncitral/en/commission/working_groups/4Electronic_Commerce.html, last visited on 26.12.2006.
[7] Polański P., P.: Convention on E-contracting: the rise of international law of electronic commerce? The presentation on 19th Bled eConference, eValues, Bled, Slovenia, 5- 7 June 2006, available at: http://www.bledconference.org/proceedings.nsf/Proceedings/48ECFCAE60F83BF6C12571800036BAE9/$File/49_Polanski.pdf, last visited on 15.12.2006.
[8] Explanatory note, *supra* note 5.

"writings" used in the other legal acts, some of which are listed in the Convention[9], so they cover electronic documents. The used strategy allows to give the new meaning to the rules contained in the previous acts, without a need to amend them, which, of course, would be problematic. Another fact is that this change had to be made to provide the international e-Commerce law with some factual power[10].

3. Sphere of application

The article 1 of the Convention delineates the scope of its application. Its par.1 states, that the Convention applies to the electronic communications related to the formation or performance of the contract, whose parties have their place of business in different states. The clear conclusion is, that the Convention does not apply to contracts itself, but to the electronic communications in connection with such contracts. The Convention does not intend to create any new law of contract, as such law can be found in the Convention on Contracts for the International Sale of Goods (CISG), or in the international private law[11]. The important assumption was to avoid creating a duality of regimes for contract formation: a uniform one for electronic contracts under the regulation of the Convention, and another regime for contracts made with the use of any other means of communication[12].

Information worth mentioning, is a lack of any limitation of type of contracts, it applies to contracts related to sale of goods, but also the services, and information which is a major difference between the Convention and the CISG. This change has met a positive reaction as it leads to an awaited legal recognition of international electronic services[13].

The requirement stated in the art. 1, that the contracting parties have to be located in the different states, does not mean that those have to be contracting states. The Convention broadens its scope of application by a reference to the principles of the private international law; hence, the Convention applies when the law of contracting states is applicable to the contract between the parties. The lack of cumulative requirement that the both states should be also contracting states

[9] Art. 20 of the Convention on Electronic Communications in International Contracts.
[10] Polański P.,P., *supra* note 7.
[11] Gregory J., D.: The UNCITRAL draft Convention on Electronic Communications in International Contracts, 25 October 2004, available at: http://legalminds.lp.findlaw.com/list/intpil/doc00098.doc, last visited at 15.12.2006.
[12] Report of the Working Group IV (Electronic Commerce) on the work of its 40th session, A/CN.9/527, Vienna, 14-18 October 2002, par. 76, available at: http://www.uncitral.org/uncitral/en/commission/sessions/36th.html, last visited on 16.12.2006.
[13] Polański P.,P., *supra* note 7.

emerges from the idea of simplifying the application of the Convention[14]. On the other hand, the contracting states were given an opportunity to restrict, to some extent, the broad scope of application presented in the art. 1[15]. According to art. 19, they can declare, if they want to apply the Convention solely when the states of the parties are contracting states, or is it going to depend on the parties' agreement.

Paragraph 2 of art.1 constitutes the rule, that if the information about the different states of the parties' place of business does not appear either from the contract, or from any other dealings between the parties, this fact is to be disregarded. In such situations, the Convention will not apply; therefore, those contracts will be regulated by the domestic law. This solution is meant to protect expectations of the parties, who given no information about the different state, can legitimately assume an operation under their domestic law[16].

In the paragraph 3 of the art. 1, it's expressed an idea, that neither the nationality, nor the civil or commercial character of the contract is relevant to the application of the Convention. Ignoring the nationality issue allows for an application of the Convention in situation, when the parties have the same nationality, as long as the requirement of the place of business in the different states is fulfilled. Civil or commercial character of the contract should not determine the application of the Convention. This regulation was designed to avoid the situation of the conflict that could arise between the systems which distinguish between the civil and commercial character of the parties, and those who don't[17].

Art. 2 of the Convention lists the exclusions, from which, the most important one, is an exclusion of the contracts involving consumers. The Convention does not apply to electronic communications related to contracts concluded for personal, family or household purposes. According to the Explanatory Note, rules contained in the Convention would not be appropriate for the regulation of the consumer related contracts[18]; therefore the Convention is limited to the Business-to-Business electronic commerce[19]. The reasons given for the explanation is that the rules of the Convention cannot impose the same standards of diligence on the individuals acting for personal, family or household purposes, and the persons engaged in commercial activities. The example can be found in art. 10, par. 2, which considers receipt of an electronic communication from the moment it became capable of being retrieved by the addressee. It is clear

[14] Explanatory note, *supra* note 5.
[15] Gregory J.,D., *supra* note 11.
[16] Report of the Working Group IV (Electronic Commerce) on the work of its 41st session, A/CN.9/528, New York, 5-9 May 2003, par. 45, available at: http://www.uncitral.org/uncitral/en/commission/sessions/36th.html, last visited on 16.12.2006.
[17] Explanatory note, *supra* note 5.
[18] *Ibidem.*
[19] Polański P.,P.; *supra* note 7.

that the consumers cannot be expected to check the email regularly, as well, as they don't have to be able to distinguish between legitimate commercial messages and unsolicited mail[20]. It was also highlighted that, when dealing with consumers, the treatment of errors and their consequences would require much more detailed regulation than contained in the Convention. Additionally, the typical consumer protection rules require the vendor to make available the contract terms in a manner accessible to the consumer[21]. Moreover, the rules protecting consumers in electronic transactions define the conditions under which it is possible to invoke standard contractual terms against a consumer, and also specify the situations in which it can be presumed that a consumer have expressed his consent to terms incorporated by reference into a contract[22]. None of the problems mentioned above is dealt with in the Convention in a manner that would offer a sufficient level of protection to the consumers, therefore the Working Group decided to exclude this issue from the ambit of the Convention[23].

It is important to acknowledge that, in the context of the Convention, the term "personal, family or household purposes" has a broader meaning. According to the Working Group it does not only cover purchase transactions, but also electronic communications related to contracts made under the rules of family law or the law of succession, to the extent they are entered into for "personal, family or household purposes". The example of such contract could be a matrimonial property contract[24]. Another significant issue is a fact that the exclusion in the art. 2 of the Convention is an absolute one. This means that it covers contracts entered for "personal, family or household purpose", even if such a purpose is not apparent to the other party of the contract. This regulation is different from the one presented in the Convention on Contracts for the International Sale of Goods ("CISG"), which strictly excludes the contracts entered for "personal, family, or household purpose" unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use. Such a construction was intended to promote a legal certainty[25]. It results in a situation when application of the CISG is not excluded if the seller was not aware of the purpose being personal, family or a household one, which means that lack of this information cannot be held against the seller. Otherwise the

[20] Report of the Working Group IV (Electronic Commerce) on the work of its 43rd session, A/CN.9/548, New York, 15-19 March 2004, par. 101, available at: http://www.uncitral.org/uncitral/en/commission/sessions/37th.html, last visited on 23.12.2006.
[21] *Ibidem*.
[22] *Ibidem*.
[23] *Ibidem*.
[24] Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session, A/60/17, New York, 4-15 July 2005, par. 28, 29, available at: http://www.uncitral.org/uncitral/en/commission/sessions/38th.html, last visited on 25.12.2006.
[25] Explanatory note, *supra* note 5, par. 33.

application of the CISG would depend on the ability of the seller to ascertain the purpose of the transaction[26]. The consequence of this regulation might be a contract falling under the CISG despite the fact it was entered by a consumer. This situation was accepted, as the consumer transactions in international environment were defined as "relatively few cases"[27]. It was however noticed that the possibilities for the use of the open communication systems, as Internet, by the consumers in the moment of creation of the CISG Convention was much lower. Its current accessibility effected in the increase of the contracts entered by the consumers in order to purchase goods from the sellers abroad[28]. This is a clear indication that UNCITRAL has noticed that over the time the idea of consumers entering the contracts with the sellers who have their place of business in another countries, using electronic communications stopped being only theoretical problem[29]. Due to that fact, UNCITRAL decided to exclude such contracts from the scope of the Convention, as its rules would not be appropriate for the consumer protection[30].

Further exemptions from the scope of the Convention are listed in the subparagraph 1 (b) and in the paragraph 2. The former names number of specific financial transactions such as: 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 intermediary. As an explanation for such a solution, it is said that the financial services mentioned above are already a subject to existing regulations and standards, which, in a well-defined way, address issues relating to international eCommerce, and allow for their worldwide functioning in an effective manner[31]. It was also felt that those matters should not be left to the exclusions under the country-based declarations from art.19[32].

In the paragraph 2 of art. 2 the Convention enumerates negotiable instruments and similar documents such as: bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer

[26] Report of the Working Group IV (Electronic Commerce), *supra* note 12, par. 86.
[27] *Ibidem*.
[28] *Ibidem*, par. 87.
[29] Martin C. H., The UNCITRAL Electronic Contracts Convention: will it be used or avoided, Pace International Law Review, vol. 17, Fall 2005, p. 262 (274), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893927, last visited on 26.12.2006.
[30] Report of the Working Group IV (Electronic Commerce), *supra* note 20, par. 101,102; Explanatory note, *supra* note 5, par.34.
[31] Explanatory note, *supra* note 5, par.35.
[32] Report of the Working Group on Electronic Commerce, *supra* note 6, par. 61; Report of the Working Group IV (Electronic Commerce), *supra* note 12, par. 95; Report of the Working Group IV (Electronic Commerce), *supra* note 16, par. 61; Report of the Working Group IV (Electronic Commerce), *supra* note 20, par. 109.

or beneficiary to claim the delivery of goods or the payment of a sum of money. The possible consequences of unauthorized duplication of such instruments lead to the exclusion of those from the scope of the Convention. The explanation presented by the UNCITRAL states that the mechanisms which would ensure the uniqueness of the documents need to be developed, and for that the combination of legal, technological and business solution is necessary. This issue goes however further than assuring the equivalence of the paper and electronic document, as the singularity of the document has to be provided[33].

Art. 3 of the Convention allows parties to exclude the application of the Convention or derogate from or vary the effect of any of its provisions, which means that unless opted-out, the Convention will govern any international contract that meets its jurisdictional requirements[34]. Nevertheless, it was noticed, that most of the difficulties arising by the use of the electronic communications, are usually sought within contracts. Hence, the UNCITRAL recognized the party autonomy as a crucial aspect of the contractual negotiations[35]. It was, however, brought up that, once deciding on them, the parties are not allowed to put aside or ease the statutory requirements concerning,

for example the signatures, and use the methods that would provide lower degree of reliability comparing to presented, as a standard, in the Convention, electronic signatures[36]. Which of course mean, that the parties don't have to accept electronic signatures or any electronic communication at all, if they choose so[37].

The form of derogation can be either explicit or implicit one, by agreeing to contract terms different than contained in the Convention[38].

4. General provisions

In the art. 4 of the Convention the definitions are being presented. It is worth to mention that most of them are based on the definitions used in the UNCITRAL Model Law on Electronic Commerce. The first definition given is the one of the "communication" which means any statement, declaration, notice, demand, or request, including an offer and the acceptance of an offer

[33] Report of the Working Group on Electronic Commerce, *supra* note 6, par. 136; *supra* note 24, par. 27.
[34] Martin C. H, *supra* note 29.
[35] Report of UNCITRAL, *supra* note 24, par.33.
[36] Report of the Working Group on Electronic Commerce, *supra* note 6, par. 76; Report of the Working Group IV (Electronic Commerce), *supra* note 12, par. 108.
[37] Report of the Working Group IV (Electronic Commerce), *supra* note 12, par. 108.
[38] Gregory J.,D., *supra* note 11; Report of the Working Group IV (Electronic Commerce), *supra* note 20, par.123; Report of UNCITRAL, *supra* note 24, par. 32,

that parties make in relation to the contract. This wide description is supposed to make clear that the definition applies to the broad range of ways of exchanging information, at any point of the performance of the contract[39]. Consequently, "electronic communication" means any communication made with the use of data messages. The definition of the "data messages" has already appeared in the UNCITRAL Model Law and has been preserved due to the fact that it applies to the great range of techniques, not only "electronic" ones[40]. "Data message" is an information generated, sent, received or stored by electronic, magnetic, optical or similar means including electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. The enumerated means are only examples and do not limit the range of possible paperless forms of communication. In order to include future technical developments, the Convention uses a phrase "similar means", which should be understood as "functionally equivalent", as it refers to the performed function[41]. Additionally, the focus of this definition is put on the information itself, not on the way of its transmission; therefore it can apply also to the data message transmitted without the use of telecommunication system. As an example, UNCITRAL mentions a magnetic disk with data message sent to the addressee through the courier[42].

The next definition is the one of the "originator" of the electronic communication who is described as a person, natural or legal (also any corporate body)[43], by whom, or on whose behalf the electronic communication has been sent, prior to the storage. The "addressee", on the other hand, is a party who is intended by the originator to receive the electronic communication. Both of those definitions do not include intermediaries. It is a relationship between the originator and the addressee of the message, what is highlighted. The intention of the originator is the defining factor. It allows to exclude from the scope of the Convention any party receiving the electronic communication, forwarding, or copying it in the course of the transmission, without the intention of the originator[44].

Next definition is of "information system" which is described as a system for generating, sending, receiving, storing or otherwise processing data messages. This list is intended to cover all possible ways of transmitting information. The location of the information system is not important for the purpose of the Convention, so it doesn't matter if it is located on the premises of the addressee or somewhere else[45].

[39] Explanatory note, *supra* note 5, par. 48.
[40] Report of the Working Group on Electronic Commerce, *supra* note 6, par. 80.
[41] UNCITRAL Model Law, *supra* note 3, par. 31; Explanatory note, *supra* note 5, par. 50.
[42] Explanatory note, *supra* note 5, par. 52.
[43] UNCITRAL Model Law, *supra* note 3, par. 35.
[44] UNCITRAL Model Law , *supra* note 3, par. 36; Explanatory note, *supra* note 5, par. 54-57.
[45] UNCITRAL Model Law , *supra* note 3, par. 40; Explanatory note, *supra* note 5, par. 58,59.

An "automated message system" means a computer program or other automated means, which can initiate an action or respond to the data message, without a review or intervention by a natural person each time the action is initiated or a response is generated by the system. The concerned system does not require an involvement of a person, at least on one side of the communication chain. The lack of the human actor is a crucial factor for this definition. It may occur on either one, or both ends of the chain of this system, which is used as a system for automatic negotiation and conclusion of contracts[46].

"Place of business" in the meaning of the Convention, is any place where a party maintains a non-transitory establishment to conduct an economic activity other than temporary provisions of goods or services out of a specific locations. This clearly shows that the business of one party can be placed in more than one country. In such a situation, the decisive factor is the "non-transitory" aspect[47]. Moreover, it is pointed out that the wording of the definition indicates that the Convention is focused rather on a physical address then a virtual one[48] and therefore the main concern of the Convention are click-and-mortar companies which run their business in both ways, traditional one and online[49].

Art. 5 of the Convention covers its interpretation. The notions which are crucial for it are: the international character of the Convention, the promotion of its uniformity in the application, and the good faith in international trade. Additionally, it states that any questions concerning the Convention, that are not cleared out by the Convention itself, should be settled according to the general principles it is based on. This means that in case of gaps, the Convention directs to the Preamble and the general principles of functional equivalence and technological neutrality contained in there[50]. In the case of the absence of those, the arising questions should be settled according to the law applicable, indicated by the private international law. Such rules of interpretation exist in most of the UNCITRAL texts, for example in the art. 7 of the United Nations Sales Convention. It is meant to facilitate the uniform interpretation of the instruments on commercial law[51].

Art. 6 of the Convention contains the rules concerning the location of the parties. This article was designed in order to allow the parties to ascertain the location of a place of business of the other party[52]. In the paragraph 1, it is said that the place of business of the party is assumed to be

[46] Report of the Working Group IV (Electronic Commerce), *supra* note 12, par.113.
[47] Gregory J., D., *supra* note 11.
[48] Polański P., P., *supra* note 7.
[49] Polański P.,P., *supra* note 7; Gregory J. D., *supra* note 11.
[50] Polański P.,P., *supra* note 7.
[51] Report of the Working Group IV (Electronic Commerce), *supra* note 12, par. 124.
[52] Explanatory note, *supra* note 5, par. 65.

the one indicated by the party. It however can be different, if the counterparty demonstrates that the location of the business is not in the indicated place. It is important to remember that the Convention does not impose an obligation of disclosure of the place of business[53]. If however, the place of the business is indicated by the party, it has to meet the requirements of art.4 subparagraph (h), as art. 6 is not allowing the parties to invent fictional places of business[54]. This notion indicates that the presumption of the place of business is not an absolute one and will not be upholded if not true[55].

In case a party has not indicated any place of business and has more than one place of business, then, for the purpose of this Convention, the decisive factor will be a closest relationship to the particular contract. This rule has originated from art. 10, subparagraph (a) of the United Nations Sales Convention, however, unlike CISG, it does not mention the closest relationship to the performance of the contract. The reason for that is an uncertainty which arose in situations where the particular contract's closest relationship is one place of business, whereas the performance of the same contract stays in the closest relationship with another place of business, what can happen quite often. The UNCITRAL decided to eliminate the cumulative reference to obtain more certainty[56]. It is worth to mention that this paragraph would be applicated in case the party did not indicate its place of business, or the place of business was rebutted under the paragraph 1[57].

Paragraph 3 of the article 6 of the Convention instructs that if a natural person does not have a place of business, the habitual residence of such person has to be referred to.

The location of equipment and technology supporting an information system used by a party to form a contract does not determine the location of a place of business, which also is not considered as such place solely because it is a place where the information system may be accessed by other parties. The two factors, of location of equipment and technology supporting the information system and its accessibility by the other parties do not constitute by themselves a place of business[58]. The information such as IP addresses, domain names, or a location of information systems are taken into account by the Convention with a great cautious, as it is considered, that they don't have much value for determining the physical location of the parties[59]. This argumentation is confirmed by subparagraph (i) of art. 6, which additionally decides, that the

[53] Report of UNCITRAL, *supra* note 24, par. 43.
[54] *Ibidem*, par. 41.
[55] Report of the Working Group IV (Electronic Commerce) on the work of its 39th session, A/CN.9/509, New York, 11-15 March 2002, par. 47, available at: http://www.uncitral.org/uncitral/en/commission/sessions/35th.html, last visited on 27.12.2006.
[56] *Ibidem*, par. 51
[57] Report of UNCITRAL, *supra* note 24, par. 46.
[58] Explanatory note, *supra* note 5, par. 74.
[59] Report of the Working Group on Electronic Commerce, *supra* note 6, par. 113.

presumption of a location of place of business in one country, cannot be made solely on the ground that a party uses a domain name or electronic address connected to that country. It is justified by the opinion that the differences in national standards and procedures of assignment of domain names and the lack of transparency of those procedures don't make them reliable enough for a presumption of party's location[60]. Nevertheless, in accordance to both mentioned subparagraphs, the Convention does not prohibit the courts, when necessary, to use the assignment of the domain name as one of the various elements, which could help to identify the location of a party[61]. It is important to acknowledge, that the "virtual companies", which do not have a place of business in the meaning of art. 4, subparagraph (h) will not be regulated by the Convention, as art. 1 clearly states that the Convention apply to the communication of the parties who have their place of business in a different states[62]. The UNCITRAL decided that the formulation of a default rule, covering such situations, which would be accepted universally, is too difficult task[63]. The exclusion of the companies that exist purely on the Internet from the scope of the Convention is considered as one of the shortcomings of the Convention. The opinion is that this solution leaves great area of eCommerce, which undoubtedly requires a uniform, international regulation, out of the Convention[64].

The Convention, in no case, affects the application of any rule of law, which may require disclosure of the identities, places of business and other information by the parties. Moreover it does not relieve the parties from any legal consequences connected with providing that information in an inaccurate, incomplete or false way. Art. 7 confirms the fact that the Convention does not impose on the parties any obligation to disclose the information; however it does not release the parties from such obligation existing under domestic law. That way the parties are reminded that they have to fulfill the requirements of the substantive law governing the contracts [65]. Any false or inaccurate statements do not comply with the notion of good faith, therefore are dealt with outside of the Convention, in the criminal or tort law of applying legal system[66]. It was felt that introducing the administrative sanctions or tort liability into the Convention was not the main goal of the Convention[67].

[60] *Ibidem*, par. 112.
[61] *Ibidem*, par. 113.
[62] Explanatory note, *supra* note 5, par. 75; Report of the Working Group on Electronic Commerce, *supra* note 6, par. 103.
[63] *Ibidem*.
[64] Polański, P.,P., *supra* note 7.
[65] Report of UNCITRAL, *supra* note 24, par. 49.
[66] Report of the Working Group IV (Electronic Commerce), *supra* note 55, par. 48.
[67] *Ibidem*, par. 63.

The Explanatory Note to the Convention states also in an unambiguous way, that any attempts to exclude the application of art. 7 by the parties will not be effective, and its requirements remain applicable[68].

5. Use of electronic communications in international contracts

Chapter III of the Convention regulates the use of electronic communications in international contracts. In the paragraph 1 of the art. 8 the Convention repeats the rule from the art. 5 of the UNCITRAL Model Law on Electronic Commerce, which expresses the principle of non-discrimination[69]. A communication or a contract should not be denied validity or enforceability only because it is in an electronic form[70]. This provision states that there should be no difference in considering the electronic documents and the paper-based ones. An electronic form cannot be the only motivation for depriving a document its legal effectiveness[71], which means that there may appear some different reasons for invalidity[72]. It is highlighted that this regulation is not intended to grant an absolute legal validity to any electronic communication. It is also not designed to override any of the form requirements given in the art. 9 of the Convention, which aim is only providing the same level of legal recognition to the electronic and paper-based documents[73].

Paragraph 2 of the art. 8 makes clear that the Convention, at any point, requires the party to use or accept electronic communication. However, the party's agreement to use it may be concluded from the party's conduct.

First part of this provision expresses the notion that the legal recognition of the electronic communication does not impose an obligation to use or accept it[74].

The party's consent to use the electronic communication can be inferred from its actions, which means that there is no need for an explicit indication of such choice. All circumstances should be taken into consideration when it is necessary to find a party's consent, so the conduct can be among

[68] Report of the Working Group IV (Electronic Commerce), *Supra* note 20, par.
[69] Legal aspects of electronic commerce. Explanatory note on the Convention on the Use of Electronic Communications in International Contracts, A/CN.9/608/Add.2, Thirty-ninth session, New York 19 June- 7 July 2006, par. 1, available at: http://www.uncitral.org/uncitral/en/commission/sessions/39th.html, last visited on: 27.12.2006.
[70] Report of the Working Group IV (Electronic Commerce) on the work of its 42nd session, A/CN.9/546, Vienna, 17-21 November 2003, par. 41, available at: http://www.uncitral.org/uncitral/en/commission/sessions/37th.html, last visited on 27.12.2006.
[71] UNCITRAL Model Law , *supra* note 3, par. 46.
[72] Gregory J., D., *supra* note 11.
[73] Report of the Working Group IV (Electronic Commerce), *supra* note 70, par. 41.
[74] Report of UNCITRAL, *supra* note 24, par. 52; Report of the Working Group IV (Electronic Commerce), *supra* note 12, par. 108.

them. The UNCITRAL lists couple examples of such circumstances indicating the agreement of the party. It can be: handing out a business card with a business e-mail address, inviting a potential client to visit a company's website or advertising goods on the Internet[75].

Art. 9 of the Convention is sometimes considered as its central article[76]. It covers the minimum standards required to give electronic communication an equal status to paper-based documents, what is an exact attempt of the "functional equivalence" principle. To obtain this goal, the Convention refers to requirements previously introduced in the UNCITRAL Model Law on Electronic Commerce[77]. First, in order to fulfill the requirements of writing, the information contained in the electronic communication has to be accessible in a way it can be usable for subsequent reference. This means, that the terms of electronic contract will be considered as written down, if they can be reproduced[78].

The next requirement is the one of signature. To reach it, the used method has to allow to identify the party, indicate its intensions and additionally has to be, either sufficiently reliable to its purpose, or proven in fact to fulfill described functions. Those provisions are rather general, but undoubtedly embrace electronic signatures. Even if the Conventions once again emphasize the notion of "technological neutrality"[79], the opinion is that to satisfy court proceedings other technologies may be too risky[80].

It is not rare for the legal systems to require a presentation of an original document, which demand can be fulfill if it can be reliably assured that the information kept its integrity from the time of its first generation in the final form and the information can be displayed to the requesting person. The criteria for assessing the integrity of information is whether it has remained complete and unaltered, apart from any change or endorsement which could arise in the normal course of communication. The standard of reliability required should be estimated in the light of the purpose for which the information was generated and of all the relevant circumstances.

It is important to notice that the Convention gives an order to the three described concepts, putting them in a hierarchical order which is based on distinct levels of reliability, traceability and integrity with respect to paper documents[81].

In the art. 10 of the Convention, the time and place of dispatch of the electronic communication are being addressed. Those rules are based on the UNCITRAL Model Law on Electronic

[75] Explanatory note, *supra* note 69, par. 4.
[76] Connolly C., Rivandra P., *supra* note 4, (35).
[77] Explanatory note, *supra* note 69, par.5.
[78] Polański P.,P., *supra* note 7.
[79] Explanatory note, *supra* note 69, par. 23-32.
[80] Polański P.,P., *supra* note 7.
[81] Explanatory note, *supra* note 69, par. 17, 38.

Commerce, which however had to be updated to the modern use of communication systems. The changes focus more on the Internet communication, instead of EDI, which was prevailing when the Model Law was written[82].

Art. 10 paragraph 1 describes the time of dispatch of an electronic communication as the moment when it leaves an information system under the control of the originator. This is a novelty comparing to the Model Law, in which the time of dispatch was the one when the communication entered an information system outside the control of the originator[83]. This small change is considered to make little temporal difference, but to effect in more logical and practical formation of the provision[84].

If the electronic communication does not leave the information system under the control of the originator, the time of dispatch is when the communication is received. This situation is supposed to cover the posting of messages on the websites[85].

The time of receipt of electronic communication is the time when it becomes capable of being retrieved by the addressee at a designated electronic address. In case the electronic address has not been designated, the time of receipt of the communication is when the addressee is aware of this fact, and the communication is capable of being retrieved. Due to that fact, the correct address is crucial. Described rule is well suited to email, and also EDI based commerce, however, it may not be so, when dealing with the web-based commerce, as such information is usually recorded only by one information system[86].

The place of dispatch of communication is where the originator has its place of business, whereas the place of receipt of communication is where the addressee has its place of business. The place where the information system supporting an electronic address is located is not relevant, providing that it stays in reasonable connection, and therefore may be different from the place where the electronic communication was deemed to be received.

The regulation concerning invitations to make offers is given in the art. 11 of the Convention. It is based on the art. 14 of the United Nations Sales Convention and states that a proposal to conclude a contract made through electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through

[82] Connolly C., Rivandra P., *supra* note 4, (36).
[83] Report of UNCITRAL*, supra* note 24, par. 78.
[84] Connolly C., Rivandra P., *supra* note 4, (36).
[85] *Ibidem*, (36).
[86] Polański P.,P., *supra* note 7.

such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

The purpose of this article is to clarify the issue of binding offer of goods or services advertised on the website[87]. The difference in treatment of a website as a binding offer or non-binding invitation to treat is considered to be one of the most controversial points of the electronic commerce[88]. It is clear that the consequences of this regulation are crucial for the online merchants.

UNCITRAL decided to regulate the issue in the same way as the advertisements in newspapers, radio and television, catalogues, brochures, price lists or displays of goods on the shop windows are regarded in the paper-based environment. It was thought that, as the situations are equivalent, solution for the online transactions should not be different from the traditional one[89]. There have to be, however, two conditions fulfilled. An electronic communication cannot be addressed to one or more specific persons and it cannot contain a clear indication of the intention to be bound in case of acceptance. The critic of this provision highlights the fact that the Convention fails to recognize the difference occurring when customers log into an interactive ordering systems, also called dynamic websites. Since that moment the proposals are addressed specifically to such customers. This causes the provision from art. 11 to be considered as not very fortunate one[90].

The use of automated message systems is covered in the art. 12. The provision says that a contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, should not be considered as invalid solely because no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

An automated message systems are also called “electronic agents” and their main feature is that they require no human intervention to undertake an action. However, the lack of human review does not hinder contract formation. The purpose of this article is, therefore, to present non-discrimination rule, as well as facilitating the use of automated message systems in electronic commerce[91].

The availability of contract terms is a next issue under the Convention’s regulation. It however does not affect the application of any rule of domestic law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make

[87]Report of the Working Group IV (Electronic Commerce), *supra* note 55, par. 75.
[88] Polański P.,P., *supra* note 7.
[89] Report of the Working Group IV (Electronic Commerce), *supra* note 55, par. 76, 77.
[90] Polański P.,P., *supra* note 7.
[91] Legal aspects of electronic commerce. Explanatory note on the Convention on the Use of Electronic Communications in International Contracts, A/CN.9/608/Add.3, Thirty-ninth session, New York 19 June- 7 July 2006, par. 14, available at: http://www.uncitral.org/uncitral/en/commission/sessions/39th.html, last visited on: 29.12.2006

available to the other party those electronic communications that contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.

The Convention itself does not create any obligation to provide a record of the transaction. Nevertheless, it reminds the parties that they have to comply with the rules imposed on them by a domestic law[92].

The next important issue addressed in the Convention is the problem of input errors in the electronic communications. The provision of art. 14 rules that if a person makes an input error on an interactive website and is not given the opportunity to correct it, he has the right to withdraw the portion of the electronic communication containing a mistake, providing that this person: first, notifies the other party of the error as soon as possible; and second, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

There are some aspects of this provision which require highlighting. First of all, en electronic mistake covered in the Convention can occur only in the interactive websites, therefore does not concerns mistakes which could be made via passive websites, email, chats or EDI. The provision of the art. 14 allows the parties to withdraw from the mistake, if only they promptly notify the party and has not benefit from the transaction. Additionally, there is no limitation of time mentioned in the Convention which creates a legal uncertainty[93]. It is considered as a drawback of the Convention, that it does not introduce an obligation to use methods of errors identification and correction[94].

6. Final provisions

Chapter IV of the Convention contains final provisions, most of which are relevant to the states only so not all of them will be presented here.

In the art. 17, the Convention additionally allows a regional economic integration organization, which was constituted by sovereign states and has competence over certain matters regulated by this Convention to sign, ratify, accept, approve or accede to the Convention. In such case, the regional organization would have rights and obligations of a contracting state. The area of the regulation is limited to the matters over which a competence has been transferred to the organization by the member states, what has to be stated in the declaration to the depositary.

[92] Report of the Working Group IV (Electronic Commerce), *supra* note 55, par. 63; Explanatory note, *supra* note 91, par. 21-26.
[93] Polański P.,P., *supra* note 7.
[94] *Ibidem*.

The definition of such organization is not given in the Convention; however the Explanatory Note lists two conditions it has to fulfill. The regional economic integration organization should be the grouping of states in a certain region, created for the realization of common purposes with the competencies relating to those common purposes transferred by its member states[95]. It is clear that only few organizations fulfill those requirements[96]. An example of such organization is the European Commission[97].

As it was mentioned above, art. 19 of the Convention gives contracting states a possibility to limit the broad scope of application of the Convention introduced in the art. 1. Such limitations are to be done through declarations of the states, in which they can place restrictions on criteria for applying the Convention or by excluding certain matters from its scope. A contracting state may declare that the Convention will apply only if states in which contracting parties have their place of business are contracting states, or if the parties agree that it applies. Additionally, contracting states may exclude from the scope of application matters specified in the declaration. First possibility reduces the scope of application from art. 1, which clearly allowed to apply the Convention when the states where the parties have their place of business are not contracting states, providing that the law of contracting state is the applicable law. As an explanation of this solution, UNCITRAL gives a possibility to facilitate accession to the Convention by the states which prefer the situation when the parties know in advance when the Convention applies. Making the application of the Convention independent from the private international law rules enhance the legal certainty of application of the Convention[98].

The reason of the second limitation of art. 19, paragraph 1, reducing the application of the Convention to the situations when parties agree on that, given in the Explanatory Note explains that its purpose is to assure wider adoption of the Convention. This solution is meant to promote the adoption of the Convention among states, which could see a problem in accepting general application of the Convention expressed in its art. 1[99].

The purpose of promoting wider adoption of the Convention is also a reason of the exclusion of specific matters under paragraph 2[100]. It is however pointed out, that the provisions of art. 19 may create an undesirable effect, opposite to the aim of the Convention. The flexibility granted

[95] Legal aspects of electronic commerce. Explanatory note on the Convention on the Use of Electronic Communications in International Contracts, A/CN.9/608/Add.4, Thirty-ninth session, New York 19 June- 7 July 2006, par. 8, available at: http://www.uncitral.org/uncitral/en/commission/sessions/39th.html, last visited on: 2.01.2007.
[96] *Ibidem*, par. 9.
[97] Connolly C., Rivandra P., *supra* note 4, (33).
[98] Explanatory note, *supra* note 95, par. 29.
[99] *Ibidem*, par. 33.
[100] *Ibidem*, par. 34.

to states can hinder the harmonization of eCommerce rules[101]. Potentially, regulation of art. 19 can lead to effect, the Convention was created to avoid and impose obstacles on international electronic commerce[102].

The provision expressed in the art. 20 of the Convention allows applying the rules of the Convention to other Conventions, some of which are listed in the paragraph 1[103]. This can be done by the states' declarations, which, under art. 21, can be made at any time. The solution presented in the art. 20 allows to apply these Conventions to electronic communication in international contracts without a need to alter them, which is a clever way to broaden the scope of the older Conventions[104]. It also creates a flexibility in opting in and out international instruments[105] as paragraph 2 declares that the Convention applies to any other international convention, treaty or agreement unless state chooses to opt it out. If the state elects to do so, it may still bind itself with a specified international instrument by opting it in, according to paragraph 3. However, if the state does not make a declaration under paragraph 2, it is given an opportunity to opt out only specific instrument under paragraph 4. The difference is that paragraph 2 refers to all international instruments, whereas paragraph 4 refers solely to those specified by the state.

Such a formation of art. 20 effects in a very flexible system of choice of international instruments to which the Convention applies. Nevertheless, the result may be once again the possible lack of harmonization, what is considered as a drawback of this solution[106].

7. Conclusions

The role of the new UNCITRAL Convention is an improvement of the functioning of electronic communications. The introduced rules are meant to bring more predictability

[101] Connolly C., Rivandra P., *supra* note 4, (32,33).
[102] *Ibidem*, (32,33).
[103] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958); Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991); United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995); United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).

[104] Polański P.,P., *supra* note 7.
[105] Connolly C., Rivandra P., *supra* note 4, (33).
[106] *Ibidem*.

to international electronic trade, therefore the Convention is considered as "the most important development in the field of Internet law"[107].

As it was pointed out above, the Convention was strongly influenced by the Convention on International Sales of Goods, and also the UNCITRAL Model Law on Electronic Commerce. The impact of the former can be clearly seen especially in the first chapter of the Convention, whereas the biggest influence of the latter can be easily found in the third chapter[108]. The Convention gives a new meaning to previous international instruments, what results in using terms from pre-Internet Conventions to cover electronic communications.

As the Convention applies to contracts concerning not only services and information, but also goods, it overlaps partially with the CISG, however the opinion is that the Convention will coexist with the CISG in relation to contracting states and it will complement the CISG in relation to non-contracting states[109].

It is also feared that, like CISG, the Convention might be avoided by the transaction parties, as it is optional law, due to the lack of understanding of its provisions by the parties, and unfamiliarity of domestic judges with techniques of jurisprudence under international commerce conventions[110].

Another drawback of the Convention, which can be found in the literature, points out that the intention of the Convention to harmonize legal surroundings of electronic contracting and remove such obstacles may not be fulfilled because of the flexibility to alter the application. A possibility to create varying application models through the declarations granted to the states may prevent the Convention from obtaining a harmonizing effect and creating legal certainty[111].

Despite mentioned problems, it is important to notice, that from European point of view, the Convention allows to fill the gap occurring in case of contracts, with use of electronic communication, made with parties from outside of the European Union. However important this appears, the effect and the role of the Convention in that matter depend on the amount of countries ratifying the Convention[112]. This condition is crucial also to achieve the main aim of the

[107] Polański P.,P., *supra* note 7.
[108] *Ibidem*.
[109] De Ly, F., Sources of International Sales Law: an eclectic model, Journal of Law and Commerce, vol. 25, 2005-2006, p. 4, available at: www.HeinOnline.org, last visited on 13.11.2006.
[110] Martin C. H., *supra* note 29, (298-300).
[111] Connolly C., Rivandra P., *supra* note 4, (38).
[112] Opinia Polskiej Izby Informatyki[PIIT] w sprawie podpisania i ratyfikowania przez Polskę Konwencji UNCITRAL o wykorzystaniu komunikacji elektronicznej w kontraktach międzynarodowych, available at: www.vagla.pl, last visited on 19.12.2006.

Convention, as the harmonisation and elimination of legal barriers to cross-border electronic commerce will be possible only if the Convention is widely adopted[113].

[113] Chong Kah Wei, Chao Suling Joyce, United Nations Convention on Use of Electronic Communication in International Contracts – a new global standard, 116 (182), available at: http://www.sal.org.sg/Pdf/2006-18-SAcLJ-116%20ChongChao.pdf, last visited on 5.1.2007.