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The Purpose, Scope and Underlying Principles of the UNECIC

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INTRODUCTION

On 23 November 2005 the United Nations General Assembly adopted a new draft convention on the use of electronic communications in international contracts which had been prepared by UNCITRAL. The United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (UNECIC) has, however, not yet come into operation.¹ The stated object of the Convention is 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*’.

It is a common perception that the law, and more particularly the law of contract, has been lagging behind in the development of solutions for the use of electronic communications in commerce, leading to legal uncertainty which in turn creates obstacles to trade.² This perception exists not only in respect of international law, but also in respect of most domestic legal systems. Some of the questions usually raised include: the legal value and validity of electronic communications; compliance with formalities; whether electronic signatures are possible and valid; determining the time and place of the conclusion of the contract; the validity of automated transactions; the applicable legal system; the evidential value of electronic records; and similar issues.

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¹ In terms of Article 23 the UNECIC only enters into force upon the deposit of the third instrument of ratification, acceptance, approval or accession. By May 2007 none of the 18 signatories has as yet deposited such an instrument.

² Par 4 Working Group Report 5-9 May 2003 A/CN.9/528 (19 May 2003); UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996) with Article 5 bis as adopted in 1998 par 2 and 3.

The fact that many of these issues could already be adequately accommodated in terms of existing flexible rules,³ has not removed these perceptions about legal uncertainty. It provided the ground for UNCITRAL to develop a Model Law on Electronic Commerce (1996)⁴ and a Model Law on Electronic Signatures (2001)⁵ and finally the UNECIC. The two model laws were aimed at standardising and facilitating the response of *domestic legal systems* to the challenges of electronic commerce and has subsequently been used in the drafting of the domestic legislation of a fairly large number of countries.⁶ The UNECIC, in turn, aims at establishing legal certainty in international trade by providing solutions and harmonizing rules on electronic communications for *international transactions*.

One of the major points of criticism against the international harmonisation of law is that such law is very often not uniform or harmonised in its application due to the varying interpretations given to the same provisions by courts in different jurisdictions.⁷ The experience with the CISG, possibly

³ Par 30 and 31 Working Group Report 5-9 May 2003 A/CN.9/528 (19 May 2003).

⁴ Adopted by UNCITRAL on 12 June 1996. See G.A.Res.51/162, adopted on 16 December 1996, UN Doc.A/RES/51/162 (30 January 1997).

⁵ Adopted by UNCITRAL on 5 July 2001. See G.A.Res56/80 adopted on 12 December 2001, UN Doc.A/RES/56/80 (24 June 2002).

⁶ Legislation implementing provisions of the Model Law has been adopted in: Australia (1999), China (2004), Colombia (1999), Dominican Republic (2002), Ecuador (2002), France (2000), India (2000), Ireland (2000), Jordan (2001), Mauritius (2000), Mexico (2000), New Zealand (2002), Pakistan (2002), Panama (2001), Philippines (2000), Republic of Korea (1999), Singapore (1998), Slovenia (2000), South Africa (2002), Sri Lanka (2006), Thailand (2002), Venezuela (2001) and Viet Nam (2005). Uniform legislation influenced by the Model Law and the principles on which it is based has been prepared in: the United States (Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law) and enacted in 49 of its states; Canada (Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada) and enacted in 11 of its provinces and territories.

⁷ Rosett, A (1984) 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods' (45) *Ohio State Law Journal* 265-305, available at: <http://www.cisg.law.pace.edu/cisg/biblio/bib2.html#r>; Stephan P (1999) 'The Futility of Unification and Harmonization in International Commercial Law' University of Virginia School of Law, Legal Studies Working Paper No. 99-10 available at SSRN: <http://ssrn.com/abstract=169209>; Ferrari, F (1994) 'Uniform Interpretation of the 1980 Uniform Sales Law' (24) *Georgia Journal of International and Comparative Law* 183-228, available at: <http://www.cisg.law.pace.edu/cisg/biblio/franco>.

one of the most successful instruments of legal harmonisation to date, however, has shown that the proper collection and dissemination of information, can play an important role in the consistent interpretation and application of a convention. The Herculean effort of Prof Al Kritzer and his team at the Institute of International Commercial Law at Pace University to collect, not only case law, but also commentary on the CISG and make it available on the internet cannot be overestimated in this process.⁸ In addition, a few leading commentaries have made that convention very accessible to courts and tribunals all over the world.⁹

In the interpretation of an international convention there are a number of aids that may be used by the interpreter, besides the wording of the convention itself. In addition to the wording itself, one is also entitled to have regard to the legislative history of the convention, its so-called *travaux préparatoires*. The UNECIC contains two internal aids for its interpretation, a definitions provision (article 4) and a general interpretative provision in Article 5.

Article 5 provides, firstly, that in the process of interpreting the CISG regard must be had to its international character, the need to promote uniformity and the observance of good faith in international law, and secondly that any gaps in the Convention are to be filled in conformance with the general principles underlying the Convention. It is only where there are no

html; Ferrari, F (1999) 'CISG Case Law: A New Challenge for Interpreters', (17) *Journal of Law and Commerce* 245-261, available at: <http://www.cisg.law.pace.edu/cisg/biblio/ferrari3.html>. However see also Van Alstine, M (1998) 'Dynamic Treaty Interpretation', (146) *University of Pennsylvania Law Review* 687-793, available at: <http://www.cisg.law.pace.edu/cisg/biblio/alstine2.html>; Andersen, C B (1998) 'Furthering the Uniform Application of the CISG: Sources of Law on the Internet' (10) *Pace International Law Review* 403-410, available at: <http://www.cisg.law.pace.edu/cisg/biblio/andersen1.html>.

⁸ See the website at <http://www.cisg.law.pace.edu/>.

⁹ See for instance Schlechtriem and Schwenger (2005) *Commentary on the UN Convention on the International Sale of Goods* 2nd (English) ed; Enderlein and Maskow (1992) *International Sales Law*, Honnold, J (1999) *Uniform Law of International Sales* 3rd ed also available at <http://www.cisg.law.pace.edu/cisg/biblio/honnold.html> and in Korean; and Bernstein and Lookofsky (2003) *Understanding the CISG in Europe* 2nd ed.

such principles which can fill the gap, that resort may be had to the applicable domestic law.¹⁰

This contribution will briefly traverse the legislative history of the UN-ECIC, its scope and purpose and the underlying principles on which it is based as a background or basis for its interpretation.

LEGISLATIVE HISTORY

The Working Group on Electronic Commerce within UNCITRAL, which was responsible for the development of the Model Law on Electronic Commerce (1996) and the Model Law on Electronic Signatures, started work on this Convention as a result of a United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) report in 2001. At that time it was of course not yet certain what form the eventual instrument would take on, ie a model law, a convention, a recommendation or the amendment of existing treaties. The Working Group made a number of recommendations, including 'the preparation of an international instrument dealing with selected issues on electronic contracting and a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments.'¹¹ From the outset one of the main aims of the work to be undertaken was to ensure that legal barriers created by existing international trade instruments be removed.¹² These recommendations by the Working Group was accepted by UNCITRAL.¹³

It was generally accepted that although the two model laws facilitated electronic commerce on the domestic front, those instruments could not solve the various problems of electronic trading in the international context.¹⁴ The Working Group considered various proposals at its thirty-eighth

¹⁰ Article 5(2). This provisions is identical to Article 7 of the CISG which may also be of assistance in the interpretation of Art 5(2).

¹¹ Report of the Working Group on Electronic Commerce on the work of its forty-fourth session (Vienna, 11-22 October 2004) A/CN.9/571 par 1.

¹² Report of the Working Group on Electronic Commerce on the Work of its 38th Session (New York 12-23 March 2001) A/CN.9/484 (24 April 2001).

¹³ At its 34th Session (Vienna, 25 June-13 July 2001).

¹⁴ Raymond, A (2006) 'Electronic Commerce and the New UNCITRAL Draft Convention' (23) *The Computer & Internet Lawyer* 9.

session¹⁵, including a possible convention to remove obstacles to electronic commerce in existing international conventions;¹⁶ dematerialization of documents of title,¹⁷ ; and electronic contracting.¹⁸ UNCITRAL, in reaction to these proposals, gave the Working Group a broad mandate to deal with issues of electronic contracting. It was, however, decided from the beginning that the Working Group would not deal with consumer contracts.¹⁹

The work soon proceeded on the assumption that the eventual instrument could take on the form of a stand-alone convention dealing with contract formation and electronic commerce. It was further assumed that such a convention should not interfere with the well established regime of the CISG or with the law of contract formation in general. Even at this early stage the principle of functional equivalence, namely that there should in principle be as little as possible difference between agreements concluded by traditional means and electronic agreements, was stressed.²⁰

The Working Group started work on a draft convention at its 39th session in New York in 2002. The eventual draft convention was developed over a number of sessions and years, culminating in the text that was included in the Report of their 44th Session in New York in October 2004.²¹ This draft was considered by UNCITRAL at its 38th Session on 4-15 July 2004 in New York and accepted with a number of smaller amendments and deletions.²² UNCITRAL thereupon recommended the acceptance of the draft convention to the General Assembly of the United Nations.²³

¹⁵ (New York, 12-23 March 2001).

¹⁶ A/CN.9/WG.IV/WP.89.

¹⁷ A/CN.9/WG.IV/WP.90.

¹⁸ A/CN.9/WG.IV/WP.91.

¹⁹ A/CN.9/WG.IV/WP.109 par 11.

²⁰ A/CN.9/WG.IV/WP.109 par 11.

²¹ For a more detailed outline of the process, see the Agenda of the Working Group for the 44th Session in A/CN.9/WG.IV/WP.109 par 11-34 available online at [<http://daccessdds.un.org/doc/UNDOC/LTD/V04/562/31/PDF/V0456231.pdf?OpenElement>].

²² For a detailed discussion of the amendments and deletions see Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session (4-15 July 2005) A/60/17 p 4-40.

²³ At its 810th meeting, on 15 July 2005 – see Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session (4-15 July 2005) A/60/17 p 40-41.

The *travaux préparatoires* of the UNECIC consist of the agendas, reports and working documents of the Working Group within UNCITRAL, UNCITRAL itself and the Secretariat Commentary on the CISG. All of this documentation, which is an invaluable interpretational aid to the Convention, is conveniently collected on and available at the UNCITRAL website.²⁴

The General Assembly at its 53rd Plenary Meeting on 23 November 2005 adopted the UNECIC. Although 18 states have to date signed the Convention,²⁵ no instrument of ratification, approval, accession or acceptance has as yet been deposited with the Secretary-General as required in Article 23. The Convention will only come into operation six months after the deposit of such instruments by at least three countries.

PURPOSE OF THE UNECIC

The general purpose of the UNECIC is to provide uniform practical solutions for legal issues emanating from the use of electronic methods of communication in international contracts.²⁶ This falls within the wider scope of UNCITRAL's mandate to further the progressive harmonisation and unification of international trade law.²⁷ In its Preamble to the adoption of the Convention, the General Assembly recognises that '*uncertainties as to the legal value of electronic communications exchanged in the context of international contracts constitute an obstacle to international trade,*' and that '*the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts*'.

From the outset UNCITRAL worked on the assumption that there existed perceptions that the use of electronic communications in domestic and international law creates legal uncertainty, which in turn creates obstacles

²⁴ Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html.

²⁵ Central African Republic, China, Lebanon, Madagascar, Paraguay, Russian Federation, Senegal, Sierra Leone, Singapore and Sri Lanka.

²⁶ Explanatory Note by the UNCITRAL Secretariat par 3 available online at [http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf].

²⁷ See the Prologue to the UNECIC.

in international trade. The UNECIC was therefore primarily conceived as an instrument that would remove legal uncertainty and provide commercial predictability in this area of the law.

According to its Preamble the Convention is also aimed at removing any obstacles that may exist as a result of provisions in existing conventions that do not adequately deal or provide for electronic communications. This issue was mentioned at an early stage of UNCITRAL's work and culminated in a report of the Working Group at its 40th Session in 2002 outlining a number of conventions that may be relevant, together with comments on each of these conventions.²⁸ Although the value of the survey was recognised by many commentators, the Italian delegation concluded:²⁹

What is striking in this connection is the absence, among the international legal instruments surveyed, of an instrument for which the proposed omnibus agreement would reach its intended general purpose. All the surveyed legal instruments, in one way or another, seem to require either no action or a very specific action that could not be confined to the mere establishment of the principle of the electronic equivalent, whenever the terms 'writing', 'signature' and 'document' are used. This should by no means lead to the conclusion that an omnibus agreement of the type envisaged in document A/CN.9/WG.IV/WP.89 would be useless; simply, the conclusion appears to be that the need for such an agreement is rather residual ...

At its 40th Session the Working Group, mindful of the Italian submission, analysed each of the international instruments mentioned in the earlier report with a view to possible action that may be needed.³⁰ This analysis, based on a provisional analysis by the Secretariat, led to the current formulation of Article 20, which lists 6 international instruments in respect of which the UNECIC will apply directly.

²⁸ See Legal barriers to the development of electronic commerce in international instruments relating to international trade Compilation of comments by Governments and international organizations A/CN.9/WG.IV/WP.94 (14 February 2002).

²⁹ Legal barriers to the development of electronic commerce in international instruments relating to international trade Compilation of comments by Governments and international organizations. A/CN.9/WG.IV/WP.98.

³⁰ Report of the Working Group IV (Electronic Commerce) on the work of its fortieth session (Vienna, 14-18 October 2002) A/CN.9/527.

In respect of any other international instrument (including those mentioned in the Working Group reports) states have the option in terms of Article 20(2) of excluding the application of the UNECIC to those conventions in accordance with the procedures set out in Article 21. It does not require a crystal ball to predict that if there should be widespread use of Article 20(2) exclusions, the result would cause a fair amount of legal uncertainty, rather than the legal certainty aimed at. It is to be hoped that states will show restraint in making use of this exclusion in the interests of uniformity and legal certainty, which remains one of the main objects of the Convention.

UNDERLYING PRINCIPLES

Article 5 of the Convention which deals with the interpretation of the convention has become a standard provision contained in most of UNCITRAL's texts and it is identical with the provisions of Article 7 of the CISG.³¹ The provision firstly contains some general rules to be used in the process of interpretation, and secondly, makes provision for the filling of gaps in the Convention by reverting to the general principles underlying the Convention rather than resorting to domestic law. It reads:

Article 5 Interpretation

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

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

[My emphasis]

The Secretariat Explanatory Note states:³²

³¹ Secretariat Explanatory Note par 107, Ulrich Magnus (2005) *Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Wiener UN-Kaufrecht* (Berlin) p 170 (Staudinger/Magnus).

³² Secretariat Explanatory Note par 107.

107. The principles reflected in article 5 of the Electronic Communications Convention have appeared in most of the UNCITRAL texts, and its formulation mirrors article 7 of the United Nations Sales Convention. The provision is aimed at facilitating uniform interpretation of the provisions in uniform instruments on commercial law. It follows a practice in private law treaties to provide self-contained rules of interpretation, without which the reader would be referred to general rules of public international law on the interpretation of treaties that might not be entirely suitable for the interpretation of private law provisions (see A/CN.9/527, para. 124).

Any potential gaps in the UNECIC are therefore to be filled in accordance with the provisions of Article 5(2). A gap can be said to exist if the CISG does not expressly make provision for a matter which falls within the scope of its application. The first step therefore, is to determine whether the issue at hand falls within its scope according to the provisions of Articles 1 to 4. If the matter is one that falls inside its scope, then the gap must be filled either in conformity with the underlying principles of the convention or, where no such principles exist or can be discerned, on the basis of the gap-filling domestic law, as a last resort.

Although provisions like Article 5 have become common place in UNCITRAL texts, at the time that Article 7(2) of the CISG was discussed, its inclusion was controversial as many delegations regarded such an approach to be too vague and unrealistic because the underlying principles had not been clearly formulated.³³ The fact that it is now commonly included in the UNCITRAL texts without much discussion, bears testimony to the fact that the fears expressed at the CISG diplomatic conference, were largely unfounded. The case law and commentary have developed a number of underlying principles which can and have been applied in order to fill gaps in the CISG.

³³ Schlechtriem in Schlechtriem & Schwenger *Commentary* supra fn 9; Honnold, J (1987) 'Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice' in Schlechtriem (ed) *Einheitliches Kaufrecht und Nationales Obligationenrecht* p 143-135, Staudinger/Magnus supra fn 31 p 170.

Magnus did ground breaking work in identifying a number of these underlying principles for the CISG. He states that there are four different ways in which these general principles can be derived from a convention:³⁴

- Some principles expressly state their applicability to the whole of the convention;
- Some principles are contained in a number of provisions, but may be absent from provisions where one would have expected them. That gap can then be filled by reference to that principle.
- In some cases a single provision may contain a principle which can be of general application.
- The overall context of the convention may indicate that a general principle is assumed.

In a similar fashion by deductive reasoning and analysis of the provisions of the UNECIC, and by looking at its legislative history, a number of general underlying principles can be discerned. The following list does not constitute a *numerus clausus*, but a first attempt to formulate some of the underlying principles of this Convention; there are certainly more.

(a) Internationality, Harmonization, Unification and Autonomous Interpretation

From the beginning it was recognised that the UNECIC should become an international instrument with the aim of harmonizing the use of electronic communications in international trade.³⁵ This is repeated throughout the working history of the Convention and in its acceptance. In the declaration to the adoption of the UNECIC, the General Assembly refers to the general purpose in establishing UNCITRAL, namely '*with a mandate to further the progressive harmonization and unification of the law of international trade*'

³⁴ Magnus, U (1995) 'Die Allgemeinen Grundsätze im UN-Kaufrecht' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 469-494, also available in translated form in (3/1997) *International Trade and Business Law Annual* (Australia) 33-56.

³⁵ Report of the Working Group on Electronic Commerce on the Work of its 38th Session (New York 12-23 March 2001) A/CN.9/484 (24 April 2001).

and, secondly, in respect of the UNECIC as an instrument that would '*aim at removing obstacles to electronic commerce in existing uniform law conventions and trade agreements*' .

This principle is also expressly stated in the Preamble of the Convention, namely that it was adopted with 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 principle of internationality, for instance, underlies the provisions of Article 1(1) which limits the scope of the convention to international transactions:

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

The principle of internationality and autonomous interpretation is furthermore expressly contained in Article 5 (quoted above) which deals specifically with the interpretation of the Convention and filling any gaps in it against its international character. The principle is also to be found in Article 20(1) and (2) where the provisions of this Convention is made specifically applicable to situations governed by a number of specifically named conventions, and deemed to apply to all other conventions, unless a state makes a specific declaration excluding such application.

In the application of the UNECIC courts and tribunals should therefore opt for interpretations and solutions for filling gaps that is in conformance with and will promote the international character of the Convention, uniformity and harmonization.³⁶

It remains a concern with all instruments of harmonisation that courts and tribunals in the process of interpretation could negate the harmonising effect with decisions showing a homeward trend or which are coloured by

³⁶ There are, however, a number of provisions that work against the principles of harmonisation and internationality, as these provisions fall back on the application of domestic law for purposes of legal certainty. These provisions include Article 13 (rules dealing with the availability of standard terms); Article 14(2) (rules governing the consequences of mistake or error); Article 19 (limiting application to contracts where both parties have their places of business in contracting states); Article 20(2) and (4) (excluding the application of the Convention to other conventions).

domestic influences. It is a topic that has been thoroughly discussed in regard to the CISG. Vogel, Shannon and Doernberg remarks that there are two problems with foreign decisions:³⁷

‘As a practical matter, decisions of other states can be inconsistent. . . . Moreover, because it would conflict with national sovereignty, even a majority or uniform legal view of foreign courts cannot be considered binding’.

The CISG’s response is to be found in its Preamble and in Article 7(1).³⁸ Internationality and uniformity of application are referred to generally in the Preamble to the Convention and more specifically in Article 7(1). The Secretariat Commentary on Article 7(1) states that it is of prime importance to avoid the situation where courts in different countries will come to different conclusions on the interpretation and application of the CISG and that the international character of the CISG should be heeded in all circumstances.

Enderlein/Maskow state in respect of the CISG:³⁹

‘To have regard to the international character of the Convention means, above all, not to proceed in interpreting it from national juridical constructions and terms . . . The meaning of terms and rules thus has to be concluded from the context and the function they have . . . If reference to other materials is necessary, then those should primarily be international documents, above all those documents which have a connection to the CISG, such as preparatory documents . . .’

Similarly Article 5(1) of the UNECIC should bar the use of purely local definitions and concepts in construing the international text.⁴⁰ This provision requires that the words of the Convention be projected against an international background and calls for tribunals to consider interpretations of the Convention established in other countries.⁴¹

³⁷ Vogel, Shannon & Doernberg (1989) *United States Income Tax Treaties* (Kluwer) Part I p 30.

³⁸ Similarly with the UNECIC it is found in its Preamble and Article 5.

³⁹ Enderlein, F & Maskow, D (1992) *International Sales Law* (Oceana) p 55.

⁴⁰ Honnold, J (1999) *Uniform Law for International Sales* 3d ed (Kluwer) p 89-90.

⁴¹ Enderlein/Maskow *Commentary* supra fn 39 at p 136, 142.

Honnold states in respect of the interpretation of the American Uniform Commercial Code:⁴²

‘Although [the] case-law of the 49 [U.S.] UCC States is not unified by national review, sales law has grown with an acceptable degree of uniformity because of the regard that courts in each state give to the development of the same legal text in other states. . . . The obvious need for harmony in international trade that has led to the preparation and acceptance of the Sales Convention can be expected to lead to similar cross-fertilization and harmonious growth of international sales law subject to the Convention’

This approach has since been confirmed in some case law on the CISG. For instance, in the German *Frozen pork case* it is stated:⁴³

The principles developed there [domestic law] cannot simply be applied to the case at hand, although the factual position - suspicion of foodstuffs in transborder trade being hazardous to health - is similar; that is so because, in interpreting the provisions of the CISG, we must consider its international character and the necessity to promote its uniform application and the protection of goodwill in international trade (Art. 7(1) CISG). The provisions of the CISG are, therefore, generally autonomous, i.e., by themselves and within the overall context of the Convention, without recourse to the rules developed regarding the standards of the non-uniform national laws. Only insofar as can be assumed that national rules are also recognized internationally - where, however, caution is advised - can they be considered within the framework of the CISG.

American case law on the CISG seems to adhere to these principles, but unfortunately sometimes also introduces a domestic element which is unacceptable. For instance in the *Delchi* case the court stated:⁴⁴

⁴² Testimony before U.S. Senate Committee on Foreign Relations, Hearings on the United Nations Convention on Contracts for the International Sale of Goods (Treaty Doc. No. 98-9) April 4, 1984, Annex B. Questions About the Sales Convention p 9.

⁴³ Bundesgerichtshof (Germany) 2 March 2005 available at: <http://cisgw3.law.pace.edu/cases/050302g1.html>.

⁴⁴ United States *Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024, 1028 n .1 (2d Cir.1995). See also United States *MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384, 1388-89, United States *Schmitz-Werke GmbH Co.*

Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ('UCC'), may also inform a court where the language of the relevant CISG provisions tracks that of the UCC. However, UCC caselaw 'is not per se applicable.' *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989).

Referring to instances where the language of the CISG tracks that of the UCC makes way for an interpretation based on a specific domestic law and not heeding the requirement of internationality and uniformity. The approach of the court in the *MCC-Marble Ceramic* case⁴⁵ is much to be preferred. The court states:

One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply. See Letter of Transmittal from Ronald Reagan, President of the United States, to the United States Senate, reprinted at 15 U.S.C. app. 70, 71 (1997). Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.

It is commonly accepted that courts will not be bound by the decisions of courts of foreign jurisdictions.⁴⁶ However it is important for the uniform

v. Rockland Indus., Inc., 271 F.Supp.2d. 734 (2002) 735, United States *Genpharm Inc. v. Pliva-Lachema a.s.* 361 F.Supp.2d 49 E.D.N.Y., 2005 where this sentiment was repeated. See however United States *Claudia v. Olivieri Footwear Ltd.* 1998 WL 164824 S.D.N.Y., 1998 where this issue was addressed more cautiously.

⁴⁵ United States *MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384, 1388-89.

⁴⁶ Schlechtriem/Schwenzer *Commentary* supra fn 9 at 97-98; Staudinger/Magnus supra fn 31 p 174; Bianca/Bonell (1987) *Commentary on the International Sales Law* at 91. However, see also Rosett, A (1984) 'Critical Reflections on Contracts for the International Sale of Goods' (45) *Ohio St. LJ* 297-298; Rabinowitz (1993) 'Implications of South Africa's Accession to the United Nations Convention on Contracts for the

application of the CISG that due consideration should be given to foreign authority, even if not binding. Schlechtriem states:⁴⁷

‘[C]ourts can be expected, if not to follow the theory of stare decisis, in any event to have benevolent regard to foreign court decisions on the matter’.

These sentiments are echoed in the Italian *Agricultural products case* where the court remarks:⁴⁸

Although not binding, as the minority view wishes, however, the jurisprudence on the Convention must be very carefully considered in order to assure uniformity in the application of [CISG], as required by its Art. 7(1). In fact, the mere autonomous interpretation of [CISG] -- interpretation that does not refer to the meaning attributed to specific expressions by a particular national regulation -- is by itself inadequate to assure the uniformity to which [CISG] aims in order to promote the development of international trade.

International Sale of Goods’ *Lex Mundi World Reports (Supplement No. 30, December 1993)* p 7.

⁴⁷ Schlechtriem, P (1983) ‘Recent Developments in International Sales Law’ (18) *Israel LR* 325-326. Accord: Honnold, J ‘Uniform Words and Uniform Application’ supra fn 33 at pp 120-124; Kastely, A (1988) ‘Rhetorical Analysis of the Convention’ (8) *NW J Intl L & Bus* 594; Audit (1990) ‘The Vienna Sales Convention and the Lex Mercatoria’ in Carbonneau (ed) *Lex Mercatoria and Arbitration*, (Transnational) pp 154-155; Maskow, D (1981) ‘The Convention on the International Sale of Goods from the Perspectives of Socialist Countries’ *La Vendita Internazionale*, Congress at S. Margherita Ligure September 26-28, 1980 (Giuffrè, Milan) p 54; and Enderlein/Maskow supra fn 9 at p 56, who state ‘What matters here is not a prejudicial effect of rulings by foreign courts or arbitral tribunals and not that the decision taken by an organ, which by accident was entrusted first to deal with a specific legal issue, is attached a particular great importance; rather the existing material in regard to relevant rulings has to be taken account of when giving the decision’.

⁴⁸ Tribunale Padova (Italy) 25 February 2004 (*Agricultural products case*) available at: <http://cisgw3.law.pace.edu/cases/040225i3.html>. See also DiMatteo et al (2004) ‘The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence’ (34) *Northwestern Journal of International Law and Business* 299-440 at n 590; Perales Viscasillas, P (2004) ‘Comment on a Spanish Decision’ available at <http://cisgw3.law.pace.edu/cases/030607s4.html>. The decision is Audiencia Provincial Valencia (Spain) 7 June 2003 (*Cherubino Valsangiacomo, S.A. v. American Juice Import, Inc.*) available at: <http://cisgw3.law.pace.edu/cases/030607s4.html>.

The number of cases where courts are extensively making use of foreign precedent in the application of the CISG have been increasing as these materials have become available more freely from a number of different sources, such as the website of the Pace Institute of International Commercial Law on the internet.⁴⁹ The most impressive example to date is probably the Italian decision in the *Rheinland Versicherungen* case.⁵⁰ Sant 'Elia comments as follows on this case:⁵¹

In a remarkable opinion of the Tribunale di Vigevano, Judge Alessandro Rizzieri, not only sought to apply the provisions of the CISG faithfully to the letter and spirit of the uniform law, but in so doing he also exhibited a willingness to employ the very means which so

⁴⁹ Collections of case law and other materials can also be found at the UNILEX website at <http://www.unilex.info/>; and the UNCITRAL website at http://www.uncitral.org/uncitral/en/case_law/abstracts.html. UNCITRAL also provides a case digest available at the same website.

⁵⁰ Tribunale Vigevano (Italy) 12 July 2000 (*Rheinland Versicherungen v. Atlarex*) available at: <http://cisgw3.law.pace.edu/cases/000712i3.html>. For other examples see also Tribunale Padova (Italy) 25 February 2004 available at: <http://cisgw3.law.pace.edu/cases/040225i3.html>; Landgericht Trier (Germany) 8 January 2004 available at: <http://cisgw3.law.pace.edu/cases/040108g1.html>; 11th Cir. Federal Court (United States) *MCC Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384, 1389; Oberster Gerichtshof (Austria) 13 April 2000 available at: <http://cisgw3.law.pace.edu/cases/000413a3.html>; Tribunale Rimini (Italy) 26 November 2002 (*Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*) available at: <http://cisgw3.law.pace.edu/cases/021126i3.html>; Tribunale Cuneo (Italy) 31 January 1996 (*Sport d'Hiver di Genevieve Culet v. Ets. Louys et Fils*) available at: <http://cisgw3.law.pace.edu/cases/960131i3.html>; Cour d'appel Grenoble (France) 23 October 1996 (*Aaec des Beauches v. Teso Ten Elsen*) available at: <http://cisgw3.law.pace.edu/cases/961023f1.html>; Obergericht Luzern (Switzerland) 8 January 1997 (*Blood infusion device case*) available at: <http://cisgw3.law.pace.edu/cases/970108s1.html>; Tribunale Pavia (Italy) 29 December 1999 (*Tessile v. Ixela*) available at: <http://cisgw3.law.pace.edu/cases/991229i3.html>; ICC Arbitration Case No. 11333 of 2002 (*Machine case*) available at: <http://cisgw3.law.pace.edu/cases/021333i1.html>.

⁵¹ Available at <http://cisgw3.law.pace.edu/cases/000712i3.html>. A number of other writers have also commented on this case: Ferrari, F (2001) 'Truly Uniform Application of CISG: Tribunale di Vigevano (Italy) 12 July 2000' *Uniform Law Review* 2001 203-215; Saidov, D (2001) *Damages under the CISG* nn 351, 353, 355, 357; Mazzotta, F (2003), 'The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example' (15) *Pace International Law Review* 437-452 (2003); DiMatteo et al supra fn 48 at nn.340, 402, 408, 567, 582, 589, 788, 866.

many jurists and scholars have exhorted courts and arbitral panels to use. Judge Rizzieri cited American, Austrian, Dutch, French, German, Italian, and Swiss court cases contained in national reporters, ICC arbitral awards, as well as two CISG websites and UNILEX. Conspicuously absent are references to civilian commentaries and treatises. For the most part, the judge firmly followed the majority and prevalent views announced by the above-mentioned tribunals.

(b) Trade Facilitation

A second stated aim of the UNECIC, which also forms an underlying principle, is that of facilitation of international trade.⁵² In the Preamble of the Convention it is expressly stated as follows:

Noting that the increased use of electronic communications improves the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

...

Convinced that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes,

The principle is also contained in Article 8(1) which provides that a communication or contract shall not be denied validity or enforceability solely on the ground that it is in the electronic form; and Article 9(1) which stipulates that nothing in the Convention requires a contract to be made or evidenced in any particular form. Freedom of form is also one of the principles found

⁵² See para 3 and 4 of the Preamble to the General Assembly's adoption quoted above.

in the CISG (Article 11) as it is a principle that is consonant with the requirements and usages of international trade.⁵³

(c) Legal certainty and Commercial Predictability

The principle of legal certainty was one of the driving forces of the UNEDIC from the outset and remains one of its stated objects.⁵⁴ In the Preamble it is recognised:

‘that problems created by uncertainty as to the legal value of the use of electronic communications in international contracts constitute an obstacle to international trade,’

Legal certainty, however, is a principle that needs to be balanced with reference to other principles such as flexibility, good faith and internationality which may introduce a measure of uncertainty due to their generalised nature. Legal certainty, for instance underlies the following provisions:

- Article 7: resort to domestic law on requirements on parties to disclose their identities, places of business or other information; and legal consequences for making misrepresentations);
- Article 8: legal recognition of electronic communications;
- Article 9(1)-(3): freedom of form, except where required by domestic law or other international instruments, in which case electronic communications are regarded as being in the written form; the recognition of electronic signatures where certain minimum requirements are met;
- Article 9(4): requirements to retain copies or original documents are deemed met under certain clear conditions;
- Article 10(2) and (3): determining the time and place of electronic communications;

⁵³ Magnus, U (1995) in *Rebels Zeitschrift für ausländisches und internationales Privatrecht* (1995) 469-494.

⁵⁴ See the para 3 and 4 of the Preamble to the General Assembly’s adoption (quoted above); para 3 and 4 to the Preamble to the Convention; the Report of the Working Group on Electronic Commerce on the Work of its 38th Session (New York 12-23 March 2001) A/CN.9/484 (24 April 2001).

- Article 11: electronic business sites are to be regarded as making an invitation to do business and not as an offer, unless there is a clear indication to the contrary; and
- Article 14: provision of clear rules in respect of mistakes in electronic communications.

The above examples give a clear indication of the rules which provide greater legal certainty in electronic communications and also improves commercial predictability.

(d) Technological Neutrality

The fifth paragraph of the Preamble contains two of the most important principles underlying the Convention and which guided the work of UNCITRAL throughout the drafting process, namely technological neutrality and functional equivalence.⁵⁵ It states:

Being of the opinion that uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological neutrality and functional equivalence, to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law,

These principles also provided important guidance to the Model Laws developed by UNCITRAL prior to this Convention.⁵⁶ It forms the substratum for all of the domestic legislation that have adopted or used the model laws mentioned above.

The dangers of provisions that do not comply with the principle of technological neutrality is readily apparent from Article 13 of the CISG, which so soon after its enactment seems curiously outdated in its reference to 'telegram' and 'telex', both forms of technology which have been overrun by other forms of communications such as fax and e-mail. Despite its antiquated

⁵⁵ See Explanatory Note of the Secretariat p 46; Connolly, C (2006) 'First UN Convention on eCommerce finalised' (22) *Computer Law & Security Report* at 32.

⁵⁶ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996) with Article 5 bis as adopted in 1998 par 2 and 3; and UNCITRAL Model Law on Electronic Signature (1991).

language, it is generally recognised that the reference to telex and telegram can be extrapolated to include more modern forms of electronic communication.⁵⁷ The CISG Advisory Committee has accepted the following formulation in respect of Article 13: *The term 'writing' in CISG also includes any electronic communication retrievable in perceivable form.*

The UNECIC tries to avoid this type of situation by using language informed by the principle of technological neutrality. The Secretariat explains the principle as follows:⁵⁸

47. The principle of technological neutrality means that the Electronic Communications Convention is intended to provide for the coverage of all factual situations where information is generated, stored or transmitted in the form of electronic communications, irrespective of the technology or the medium used. For that purpose, the rules of the Convention are 'neutral' rules; that is, they do not depend on or presuppose the use of particular types of technology and could be applied to communication and storage of all types of information.

The principle is important because of the speed at which technological advances and innovations are taking place, a problem which is compounded by the convergence between different types of technology. Until fairly recently the dividing line between voice communications and so-called pure electronic data messages was easy to perceive. This dividing line is being eroded quite quickly with many automated systems making use of pre-recorded automated voice messages and data systems which can recognise and react to voice prompts. It is becoming very difficult to exclude certain voice messages as electronic messages. The definitions of 'data message' and 'electronic communication' in Article 4 is certainly wide enough to include such voice messages used in an automated environment.⁵⁹

⁵⁷ Schlechtriem/Schwenzer *Commentary* supra fn 9 at p 173; Staudinger/Magnus supra fn 31 pp 213-214; CISG Advisory Council No 1, *Electronic Communications under CISG*, 15 August 2003, rapporteur: Professor Christina Ramberg, Gothenburg, Sweden.

⁵⁸ *Explanatory Note of the Secretariat* p 47.

⁵⁹ It remains an open question on whether these definitions are not so wide that they include all voice communications, including live person to person communications over the telephone or internet. Such an interpretation may cause havoc in regard to

The secretariat commentary remarks:

Indeed, language that directly or indirectly excludes any form or medium by way of a limitation in the scope of the Convention would run counter to the purpose of providing truly technologically neutral rules. Lastly, technological neutrality encompasses also 'media neutrality': the focus of the Convention is to facilitate 'paperless' means of communication by offering criteria under which they can become equivalents of paper documents, but the Convention is not intended to alter traditional rules on paper-based communications or create separate substantive rules for electronic communications.

The principle of technological neutrality finds its expression in the following articles:

- Article 4: the definitions of 'communication', 'electronic communication', 'data message', 'information system' and 'automated message system';
- Article 8(1): recognition and validity of electronic communications;
- Article 9(2)-(4): recognition of electronic communications as writing; recognition of electronic signatures; record retention requirements;
- Article 9(5)9b): assessment of standards of reliability according to the relevant circumstances, which will include technological standards and techniques available at that time. This makes provision for shifting and improving standards without having to constantly change the Convention;
- Article 10: determining the time and place of communications;
- Article 12: the use of automated messages systems for contract formation.

(f) Functional Equivalence

This principle is also one of the expressly stated principles in the Preamble.⁶⁰ The principle of functional equivalence is closely related to the principle of

the interpretation and application of Article 9 in terms of which such communications will be deemed to be 'in writing' where it is recorded.

⁶⁰ Preamble para 5. See also Connolly *supra* fn 55 at 32.

technological neutrality, but the emphasis is different: the latter is aimed at drafting which will avoid the Convention from becoming outdated, whereas the former is aimed at ensuring that there is as little difference as possible in the manner in which the law regards and deals with, on the one hand, traditional methods of communication and, on the other, with electronic communications. The Secretariat Explanatory Note states:

50 ...An electronic communication, in and of itself, cannot be regarded as an equivalent of a paper document because it is of a different nature and does not necessarily perform all conceivable functions of a paper document. Indeed, while paper-based documents are readable by the human eye, electronic communications are not—unless they are printed to paper or displayed on a screen. ...

51. ... The functional equivalent approach is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques. The Convention does not attempt to define a computer-based equivalent to any particular kind of paper document. Instead, it singles out basic functions of paper-based form requirements, with a view to providing criteria which, once they are met by electronic communications, enable such electronic communications to enjoy the same level of legal recognition as corresponding paper documents performing the same function.

It is also important that the legal regime applicable to traditional paper based forms of communication should not differ significantly in respect of electronic communications. Functional equivalence strives to create legal results which are similar if not identical, regardless of the medium of communication. The principle finds expression in the following provisions:

- Article 8(1): recognition of electronic communications;
- Article 9(2): recognition of electronic signatures;
- Article 10: time and place of the dispatch and receipt of electronic communications linked to the physical place of business of the parties;
- Article 12: use of automated message systems for contract formation.

(i) Freedom of Contract

The principle of freedom of contract or party autonomy is contained in Article 3 which stipulates:

Article 3 Party autonomy

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

During the drafting phase, UNCITRAL was aware that in practice the parties very often solved issues of legal uncertainty in respect of electronic communications by making appropriate provision in their transaction for those issues. Article 3 recognises that the solutions chosen by the parties should take precedence over any of the provisions of the Convention.⁶¹ Party autonomy is a principle that not only features strongly in this convention, but also in the CISG.⁶²

In the commercial contractual sphere, there exists in most legal systems a very high degree of contractual freedom, allowing parties to regulate their affairs in accordance with their own needs and understanding and with very little statutory interference. There are however certain areas, such as prescribed formalities or mandatory law, which the parties cannot change in their contract. The UNECIC aims to solve some of these difficulties, by deeming electronic communications as writing, recognising electronic signatures and allowing for the electronic storage of information.⁶³ The principle of party autonomy is also reflected in article 8(2) which stipulates that a party cannot be forced to accept electronic communications against its will.

(k) Good faith

Good faith as a requirement in the interpretation of the UNECIC, caused much less controversy than its inclusion in Article 7 for similar purposes in the CISG. This may partly be ascribed to the fact that the use of good faith principle in the application of the CISG, even as a substantive principle in

⁶¹ See also the Preamble par 5.

⁶² See Article 6, Staudinger/Magnus supra fn 31 p 149-150; Schlechtriem/Schwenzler *Commentary* supra fn 9 at 83-84.

⁶³ See Articles 8(2) and 9(3)(b)(i).

the conclusion and performance of the contract, has not caused the legal uncertainty feared by many (mainly common law) countries,⁶⁴ but also to the fact that this Convention contains a fairly limited number of substantive law provisions.⁶⁵ The Secretariat also remarks that this provision has become fairly standard in most UNCITRAL instruments.⁶⁶

The good faith principle is of necessity a fairly wide and imprecise instrument that will require judicial interpretation and precision over time. In respect of the CISG there is broad agreement that Art. 7(1) at least contains a prohibition against abuse as well as a prohibition against actions contrary to prior conduct, similar to estoppel in Common Law.⁶⁷

The provision dealing with the location of a party in Article 6(1) of the UNECIC reflects an embodiment of the good faith principle. In terms of that provision a party will be held bound to its representation in respect of its place of business; similarly by Article 8(2) which upholds an impression created by conduct. Article 10(2) gives legal effect to communications sent to an undesignated address, but where the addressee nevertheless became aware of it.

(j) Protection of Reasonable Reliance

The principle of good faith is closely related to the principle dealing with the protection of reasonable reliance. It is generally recognised that where one party has created an impression on which the other party relies, the reasonable reliance of the latter should be protected by the law.⁶⁸ The following instances of the protection of reliance can be found in the Convention:

- Article 1(2): convention only applicable if international nature of the agreement is apparent;

⁶⁴ See generally Schlechtriem/Schwenzer *Commentary* supra fn 9 from 95; Staudinger/Magnus supra fn 31 pp 170, 175; Magnus *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1995) 469-494.

⁶⁵ Connolly supra fn 55 at 32.

⁶⁶ *Secretariat Explanatory Note* par 107.

⁶⁷ Magnus *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1995) 469-494.

⁶⁸ *Ibid.*

- Article 49d)-(e): attribution of communications in the definitions of 'originator' and 'addressee';
- Article 6(1)-(2): presumed location of the party according to its indication or circumstances known and contemplated by the parties;
- Article 9(2)-(3): giving legal recognition to electronic communications and signatures where the parties intended and relied thereon;
- Article 12: legal recognition of automated transactions even though there may be no direct human interaction;
- Article 14(1): a party making use of automated transactions can rely on such transactions, provided the system gives the other party an opportunity to correct any input mistakes made. Where such an opportunity is not given, reliance is not protected.

(l) Freedom of Form

The point of departure is that there are no form requirements in terms of this Convention (Article 9(1)), but it is recognised that certain states may have mandatory statutory requirements for certain transactions such as writing or signature. In these cases the limiting nature of such provisions are eased considerably by the provisions of Article 9 which deems electronic communications to be in writing and recognises electronic signatures. The experience with the CISG shows that there are very few countries where writing as a formality is mandatory for international commercial sales.⁶⁹

(m) Physical Location of the Parties

The fact that electronic communications take place in cyberspace, is often cited as a factor which causes legal uncertainty because it may be very dif-

⁶⁹ The following countries have made an Article 96 declaration under the CISG requiring writing: Argentina, Belarus, Chile, China, Hungary, Latvia, Lithuania, Paraguay, Russia and the Ukraine. The Chinese reservation, however, is a curious one. At the time there were formal requirements for contracts under Chinese law, but since 1999 the Chinese Uniform Contract Law, which repealed the previous enactments requires no formalities. See Wang & Andersen 'The Chinese Declaration against Oral Contracts under the CISG' 8 (2004) *Vindobona Journal of International Commercial Law & Arbitration* at p. 148.

difficult to establish the locality of the other party, ie is it its place of business, place of residence or the place where its information system or server is situated.⁷⁰ The Secretariat Explanatory Note remarks:

109. Considerable legal uncertainty is caused at present by the difficulty of determining where a party to an online transaction is located. While that danger has always existed, the global reach of electronic commerce has made it more difficult than ever to determine location. This uncertainty could have significant legal consequences, since the location of the parties is important for issues such as jurisdiction, applicable law and enforcement. Accordingly, there was wide agreement within UNCITRAL as to the need for provisions that would facilitate a determination by the parties of the places of business of the persons or entities they had commercial dealings with (see A/CN.9/509, para. 44).

It is generally recognised that the location of the information system and server is not a useful connecting factor as its physical location may be spread out over various jurisdictions or may be entirely fortuitous or irrelevant as far as the parties are concerned.⁷¹

The UNCITRAL Model Law on Electronic Commerce recognised this issue and solved it by attributing physical localities to the parties, either with reference to place of business or usual place of residence.⁷² Similarly Article 6 determines where communications are deemed to be sent from and received, ie the place of business of the respective parties or their place of residence as a default. It is made clear in Article 6(4) that the location of information systems is irrelevant. Determining where communications were made and contracts concluded are important for purposes of validity (where formalities are prescribed), jurisdiction (where must a party lodge legal proceedings against the other party) and the applicable law (private international law).

The following provisions are an embodiment of this principle:

⁷⁰ Secretariat Explanatory Note par 109; Raymond, A supra fn 19; Connolly supra fn 55 at 36-37.

⁷¹ Ibid.

⁷² See Article 15 and para 100 of the *Model Law on Electronic Commerce Guide to Enactment*.

- Article 4(h): defining 'place of business' and linking it to a physical location;
- Article 6(1): presumption on the location of the party in accordance with its indication;
- Article 10(3)-(4): deemed place of dispatch and reception as place of business;

CONCLUSION

The UNECIC can in many ways be regarded as an updated version of the UNCITRAL Model Law for Electronic Commerce, tailored for its application in international commercial transactions. It draws on many of the concepts and principles embodied in that very successful Model Law, but also recognises that there are unique requirements in international trade that are not necessarily relevant in domestic law. The Convention also addresses a number of new issues that have been recognised since the adoption of the Model Law.⁷³

The Convention is drafted in language that is easily accessible and largely clear. The legislative history of the Convention is available on the internet, making reference to it for interpretative purposes very easy. The experience with the CISG has shown that the uniform application and interpretation of that convention have been greatly aided by the accessibility of sources at various websites, but none better or more comprehensive than that of the Pace Institute of International Commercial Law under the guidance of Al Kritzer. Hopefully similar initiatives will also evolve around the UNECIC as an aid to its uniform interpretation and application.

There are a number of clear and generally accepted principles that underlie the Convention as described above. Any gaps discovered in the interpretation or application of the UNECIC, must, in accordance with the provisions of Article 5(2), be filled by referring to these principles without having to resort to the applicable domestic law.

⁷³ Connolly *supra* fn 55 at 37-38.

With the increase in the use of electronic communications in the 21st century, the importance of the UNECIC is certain to grow. It is to be hoped that it will deservedly enjoy the same measure of acceptance and success as an instrument of harmonisation as the CISG.