

**COMESA
MODEL LAW ON
ELECTRONIC
TRANSACTIONS
AND
GUIDE TO ENACTMENT
2010**



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EXECUTIVE SUMMARY

A. Introduction

COMESA has been following a programme on e-Legislation in order to assist the Member States to come up with appropriate legislation to support e-commerce. A study was done to develop e-Legislation guidelines for the COMESA region and this was followed by two workshops on e-Legislation in general and on e-commerce laws.

During the Council of Ministers Meeting held in Vitoria Falls, Zimbabwe in June 2009, the following decisions were made regarding e-Legislation:

- (i) *Member States are urged to accede to the UN Convention on the Use of Electronic Communications in International Contracts (2005), and to incorporate the provisions of the Convention in their respective national laws, particularly, in view of the launch of the Customs Union. Member States are therefore encouraged to set a deadline for the enactment of these laws*
- (ii) *COMESA Secretariat should develop regulations to facilitate secure electronic transactions*
- (iii) *The COMESA Court of Justice should be empowered to facilitate online mediation to resolve disputes that may arise from electronic transactions*
- (iv) *COMESA's e-Legislation programme should have a component on e-Waste, specifically to outline how such waste should be disposed of in the Member states.*

This report has been commissioned to give effect to the above decision of the Council of Ministers. The report firstly provides practical guidance for the accession to the UN Convention on the Use of Electronic Communications in International Contracts (2005) (UNECIC). The commentary by the UNCITRAL Secretariat on the UNECIC is attached as Annexure A. Secondly the report contains a Model Law on Electronic Transactions and a detailed guide to the enactment of the Model Law. The Model Law also includes a section dealing with consumer protection in online transactions and provisions empowering the COMESA Court of Justice to act as conciliator in disputes arising from electronic transactions. The Guide to Enactment gives guidance on the reason for each article in the Model Law and their practical importance.

B. Scope of the project

The Council of Ministers outlined the scope of this project as follows:

A project to customize the UN Convention on the Use of Electronic Communications in International Contracts 2005 into a Model Law and Model Regulations on Electronic Signatures which COMESA Member States may

implement in their respective jurisdiction and, where necessary, to include explanatory notes for the provisions of the Model Law and Regulations.

C. Accession to the UNECIC

(a) Reasons for acceding to the UNECIC

The first paragraph of the decision of the Council of Ministers urges member States to accede to the UNECIC. Although this Convention is not yet in operation (it requires one more accession) there are strong indications that it will come into operation soon with a number of countries currently considering accession. The provisions of this Convention are aimed at applying to international transactions only and will therefore not apply to domestic transactions. However, the accompanying Model Law has been drafted to provide for domestic transactions. As the text of the UNECIC cannot be changed unilaterally, Member States must accede to it in its entirety, although there is provision for a number of exclusions. The Model Law which will apply to domestic transactions has therefore been drafted taking into account the provisions of the UNECIC to ensure that their provisions are in harmony. The UNECIC is of recent origin and therefore reflects current international thinking on the regulation of electronic transactions in law.

(b) Process of accession

Although the UNECIC is not open for signature any longer (signature being only a symbolic gesture with no legal consequences), it is a multilateral convention open to any member of the United Nations. COMESA Member States are therefore free to accede to this convention at any time by depositing their act of accession with the Secretary-General of the United Nations. It is submitted that there are sound reasons for Member States to accede to the UNECIC as recommended by the Council of Ministers.

The UNECIC is an overarching convention aimed at facilitating the use of electronic transactions in international trade, and more specifically to augment a number of other international conventions which were drafted prior to the internet era. These conventions typically make no provision for electronic transactions and refer only to older forms of communications such as telegram, fax and telefax.

(c) Guide to Enactment

Chapter 2 of this document contains a guide to the enactment or accession to the UNECIC. Although the Convention prohibits any reservations, it does make provision for a number of declarations which may extend or limit the application of the Convention. The Guide to Enactment deals with each one of these declarations. It also deals with the issue whether COMESA should accede to the Convention as a Regional Economic Integration Organization.

(d) Adoption of other harmonizing conventions

Article 20 of the UNECIC lists a number of conventions which will fall into the scope of application of the UNECIC. These conventions all deal with the harmonization of international trade law and they have achieved a remarkable level of international

harmonization already. It is submitted that COMESA Member States should also consider acceding to these conventions, in so far as they have not done so as yet as this will aid the harmonization of trade law within the COMESA region.

The conventions COMESA Member States should consider adopting are the following six conventions complimentary to the UNECIC:

- 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).

These conventions are all aimed at the facilitation of trade law within the world and provide an ideal vehicle for trade harmonization within a regional economic integration zone such as COMESA. The adoption of the Vienna Convention on Contracts for the International Sale of Goods, 1980 (CISG) is of particular importance to harmonize sales law in the region. It will also bring COMESA into step with the harmonization of sales law world wide as the CISG has been adopted world-wide in 74 countries representing more than 80% of world trade.¹

¹ For a more in depth discussion of the reasons why COMESA Member States should consider adopting the CISG, see the following sources:

- New Zealand Law Reform Commission: The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance (1992) available online at [<http://www.cisg.law.pace.edu/cisg/wais/db/articles/newz2.html>].
- Eiselen S Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa 116 South African Law Journal 323-370 available online at [<http://www.cisg.law.pace.edu/cisg/biblio/eiselen.html>]
- UNCITRAL Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods available online at [<http://www.cisg.law.pace.edu/cisg/text/p23.html>]
- Schwenger I & Hachem P The CISG - Successes and Pitfalls 57 (2009) American Journal of Comparative Law available online at [<http://www.cisg.law.pace.edu/cisg/biblio/schwenger-hachem.html>]

D. COMESA Model Law on Electronic Transactions

(a) Introduction

The COMESA Model Law has been drafted on the basis of the UNECIC, reflecting the latest international thinking on harmonized rules for electronic transactions, the UNCITRAL Model Law on Electronic Commerce of 1996 and the UNCITRAL Model Law on Electronic Signatures of 2001. The UNCITRAL Model Laws were specifically developed to aid countries around the world to adopt appropriate legislation providing for electronic commerce or transactions. These instruments are therefore reasonably robust and drafted to be as acceptable as possible in different legal systems with different backgrounds and foundations. The Model Law on Electronic Commerce has been particularly successful having been used in the legislation of more than 60 countries worldwide. In the COMESA region the legislation of Mauritius has been based on the Model Law.

The advantage of a Model Law is that it is able to achieve a high level of harmonization without the restrictions of a convention. Countries are therefore able to tailor the Model Law to take account of the differences and needs of domestic law. Despite this flexibility, the majority of countries which have used the Model Law have not made substantial amendments to the text of the Model Law.

(b) Background to the Drafting of the COMESA Model Law

In drafting the COMESA Model Law on Electronic Transactions the following sources were taken into consideration:

- The UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996
- The UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001
- The United Nations Convention on the Use of Electronic Communications in International Contracts
- The UNCITRAL Report - Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods 2007
- The UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment of 2002
- The UNCITRAL Conciliation Rules of 1980
- The provisions of the COMESA Treaty dealing with the founding of the COMESA Court of Justice and its Rules
- The Mauritian Electronic Transactions Act of 2000
- South African Electronic Communications and Transactions Act 25 of 2002
- Other legislation worldwide based on the UNCITRAL Model Law

- Online dispute resolution mechanisms already in use and being developed
- Academic commentary on the latest developments and issues involving e-commerce, management of e-waste and online dispute resolution
- Consumer protection legislation in respect of ecommerce
- Case law worldwide dealing with ecommerce

The Model Law is divided into five parts, one dealing general issues, one dealing with the legal requirements for data messages, one dealing with the communication of data messages, one dealing with consumer protection and one dealing with online dispute conciliation. The provisions dealing with the general issues and the legal requirements for data messages are generally uncontroversial and have been accepted in all jurisdictions which have used the UNCITRAL Model Law. The issue of electronic signatures is however problematic and is dealt with specifically in the next section.

(c) *Electronic signatures*

The biggest problem and accordingly also the issue on which the most differences are encountered, is on the issue of electronic signatures. The terms “electronic authentication” and “electronic signature” are used to refer to various techniques currently available on the market or still under development for the purpose of replicating in an electronic environment some or all of the functions identified as characteristic of handwritten signatures or other traditional authentication methods.

Creating trust in electronic commerce is of great importance for its development. Special rules may be needed to increase certainty and security in its use. Such rules may be provided in a variety of legislative texts: international legal instruments (treaties and conventions); transnational model laws; national legislation (often based on model laws); self-regulatory instruments; or contractual agreements.

Electronic authentication legislation and regulation has taken many different forms at the international and domestic levels. Three main approaches for dealing with signature and authentication technologies can be identified: (a) the minimalist approach; (b) the technology specific approach; and (c) the two-tiered or two-pronged approach

Some jurisdictions recognize all technologies for electronic signature, following a policy of technological neutrality. This approach is called minimalist because it gives a minimum legal status to all forms of electronic signature. Under the minimalist approach, electronic signatures are considered to be the functional equivalent of handwritten signatures, provided that the technology employed is intended to serve certain specified functions and in addition meets certain technology-neutral reliability requirements.

When legislation adopts the minimalist approach, the issue of whether electronic signature equivalence has been proved normally falls to a judge, arbitrator or public authority to determine, generally by means of the so-called “appropriate reliability test”. Under this test, all types of electronic signature that satisfy the requirements are

considered valid; hence, the test embodies the principle of technological neutrality.

The disadvantages of the technology-specific approach are that, in favouring specific types of electronic signature, it “risks excluding other possibly superior technologies from entering and competing in the marketplace.” Rather than facilitating the growth of electronic commerce and the use of electronic authentication techniques, such an approach may have the opposite effect. Technology-specific legislation risks fixing requirements before a particular technology matures. The legislation may then either prevent later positive developments in the technology or become quickly outdated as a result of later developments. A further point is that not all applications may require a security level comparable with that provided by certain specified techniques, such as digital signatures. Requiring the use of an overly secure means of authentication could result in wasted costs and efforts, which may hinder the diffusion of electronic commerce.

The definition of “electronic signature” in UNCITRAL texts is deliberately broad, so as to encompass all existing or future “electronic signature” methods. As long as the methods used are “as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement”, they should be regarded as meeting legal signature requirements. UNCITRAL texts relating to electronic commerce, as well as a large number of other legislative texts, are based on the principle of technological neutrality and therefore aim at accommodating all forms of electronic signature. Thus the UNCITRAL definition of electronic signature would cover the entire spectrum of “electronic signature” techniques, from higher-level security, such as cryptographically based signature assurance schemes associated with a PKI scheme (a common form of “digital signature”, to lower levels of security, such as unencrypted codes or passwords. The simple typing of the author’s name at the end of an e-mail message, which is the most common form of electronic “signature”, would, for instance, fulfil the function of correctly identifying the author of the message whenever it was not unreasonable to use such a low level of security.

For these reasons the COMESA Model Law uses the minimalist approach in regard to electronic signatures. In practice many countries which have used the technology specific approach have experienced difficulties in putting into practice more secure forms of electronic signatures or advanced electronic signatures. The result is that although such signatures may exist in theory, they are not used in practice. It is therefore regarded as a more pragmatic and effective approach to follow the minimalist approach leaving it to the parties to determine the level of security they require of electronic signatures. In respect to certain types of transactions such as property transactions, there may be issues of public policy which may require the state to require higher levels of security for the acceptability of electronic signatures. In those cases those transactions may either be excluded from the scope of application of the Model Law or specific requirements may be specified by way of regulation under the appropriate legislation. A list of transactions which are typically excluded in many jurisdictions is provided.

(c) Consumer protection

Online trading by consumers provides fertile ground for unscrupulous suppliers to take advantage of consumers. The actions of some rogue suppliers are undermining the trust of consumers and therefore inhibiting the growth of this sector of the economy. The type of problems encountered here are similar to the problems experienced in old fashioned distance selling agreement.

The European Union has long recognised the need to provide consumer with protection against the negative practices and consequences of some long distance selling agreements. In response it has issued a directive on distance selling which has been implemented in member states. The provisions of the Model providing for consumer protection have been modelled in part on the Distance Selling Directive of the European Union as well as on the current practices of responsible internet traders such as Amazon.com and major airline booking sites. These provisions have also been successfully introduced in the South African Electronic Communications and Transactions Act 25 of 2002.

The Model Law makes provision for certain core information that must be provided to consumers as well as a right to withdraw from transactions if these requirements have not been met. There is also a provision for a general cool-down period during which the consumer may withdraw from the agreement and get a full refund. This is a necessary requirement because of the fact that in these transactions consumers do not have an opportunity to inspect the goods as they would normally do in a shop. Thirdly, the Model Law addresses the issue of **secure payment methods**, providing for trader liability if the necessary standards are not employed.

These provisions do not strictly adhere to the underlying principle of functional equivalence because they provide rights to consumers which may not exist for other consumers in respect of similar transactions. Member States are therefore encouraged to consider extending these consumer rights also to other similar contracts such as distance selling contracts relying on older forms of communication.

D. Guide to Enactment of the Model Law on Electronic Commerce

The COMESA Model Law is accompanied by a detailed Guide to Enactment. The Guide is based in part on the following documents: (a) the UNCITRAL Guide to Enactment to the Model Law on Electronic Commerce, (b) the UNCITRAL Guide to Enactment on the Model Law on Electronic Signatures; (c) the UNCITRAL Secretariat's Explanatory Note to the UNECIC; the UNCITRAL Guide to Enactment to the Model Law on International Commercial Conciliation.

The Guide to Enactment provides a detailed description of the manner in which each article is supposed to function in practice. The Guide, as the legislative background to the Model Law, should also be used in the interpretation of the Model Law once it is enacted by Member States. Resort to the Guide for interpretational purposes will also enhance the harmonizing effect of the Model Law within the region.

E. Extending the jurisdiction of the COMESA Court of Justice

(a) Amendment of the COMESA Treaty

The current jurisdiction of the COMESA Court of Justice is limited to the following areas: (a) disputes between a COMESA Member and another Member or the Council about their obligations under the COMESA Treaty (Article 24); (b) matters referred to the Court by the Secretary-General on the failure of a Member to fulfil its obligations under the Treaty (Article 25); (c) matters referred by any resident of a COMESA Member on the failure of a Member or the Council to fulfil its obligations under the Treaty or its infringement of the Treaty (Article 26); (d) disputes between the Common Market and its employees (Article 27(1)); and (e) claims by any person against the Common Market or its institutions for acts of their servants or employees in the performance of their duties (Article 27(2)).

The jurisdiction of the Court will have to be extended by an appropriate amendment to the COMESA Treaty to enable the Court to deal with online dispute resolution by way of mediation or conciliation. The suggested approach here is the following:

- (a) An amendment to the COMESA Treaty to extend the jurisdiction of the Court. An appropriate draft amendment is provided in Chapter 4 paragraph A of this document.
- (b) Appropriate provisions in the COMESA Model Law to provide for the possibility of online dispute resolution.

(b) Additional Rules of Court

The provisions of the Model Law dealing with conciliation (Chapter 4 of the Model Law), read with the Draft Rules to amend the Rules of the Court (chapter 4 paragraph B of this document), is partly based on the UNCITRAL Conciliation Rules of 1980 and the UNCITRAL Model Law on International Commercial Conciliation of 2002 and on the very successful online conciliation procedures found on some commercial internet sites such as that of eBay.

The provisions have been tailored to take into account the unique situation of the Court. It also takes into account that the conciliation procedures should be available to commercial parties in business-to-business transactions as well as consumer transactions. The empowerment of the Court also gives recognition to the fact that more and more electronic transactions are being concluded irrespective of international borders. Such international transactions are not limited to commercial transactions, but also very often involve consumer transactions.

The provisions are divided between those higher level aspects establishing the Court's jurisdiction to perform conciliation that are dealt with in the Treaty and the Model Law and those more practical aspects that belong more properly in the Rules of the Court. The various provisions must however be read as a whole to obtain a full understanding of the process.

CHAPTER 1

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

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

The General Assembly, Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Considering that problems created by uncertainties as to the legal value of electronic communications exchanged in the context of international contracts constitute an obstacle to international trade,

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 may help States gain access to modern trade routes,

Recalling that, at its thirty-fourth session, in 2001, the Commission decided to prepare an international instrument dealing with issues of electronic contracting, which should also aim at removing obstacles to electronic commerce in existing uniform law conventions and trade agreements, and entrusted its Working Group on Electronic Commerce with the preparation of a draft,²

Noting that the Working Group devoted six sessions, from 2002 to 2004, to the preparation of the draft Convention on the Use of Electronic Communications in International Contracts, and that the Commission considered the draft Convention at its thirty-eighth session in 2005,³

² *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr. 3), paras. 291-295..*

³ *Ibid., Sixtieth Session, Supplement No. 17 (A/60/17), chap. III..*

Being aware that all States and interested international organizations were invited to participate in the preparation of the draft Convention at all the sessions of the Working Group and at the thirty-eighth session of the Commission, either as members or as observers, with a full opportunity to speak and make proposals,

Noting with satisfaction that the text of the draft Convention was circulated for comments before the thirty-eighth session of the Commission to all Governments and international organizations invited to attend the meetings of the Commission and the Working Group as observers, and that the comments received were before the Commission at its thirty-eighth session,⁴

Taking note with satisfaction of the decision of the Commission at its thirty-eighth session to submit the draft Convention to the General Assembly for its consideration,⁵

Taking note of the draft Convention approved by the Commission,⁶

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for preparing the draft Convention on the Use of Electronic Communications in International Contracts;
2. *Adopts* the United Nations Convention on the Use of Electronic Communications in International Contracts, which is contained in the annex to the present resolution, and requests the Secretary-General to open it for signature;
3. *Calls upon* all Governments to consider becoming party to the Convention.

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

The States Party to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

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,

Considering 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,

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

⁴ A/CN.9/578 and Add.1-17.

⁵ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 167. **8 A/60/515.**

⁶ *Ibid.*, annex I..

legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes,

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,

Desiring 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,

Have agreed as follows:

Chapter I Sphere of application

Article 1

Scope of application

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

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

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

Article 2

Exclusions

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

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

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

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

Article 3

Party autonomy

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

Chapter II General provisions

Article 4

Definitions

For the purposes of this Convention:

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

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

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

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

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

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

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

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

Article 5

Interpretation

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

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

Article 6

Location of the parties

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

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

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

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

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

Article 7

Information requirements

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

Chapter III: Use of electronic communications in international contracts

Article 8

Legal recognition of electronic communications

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

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

Article 9

Form requirements

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

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

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

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

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

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

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

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

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

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

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

Article 10

Time and place of dispatch and receipt of electronic communications

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

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

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

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

Article 11

Invitations to make offers

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

Article 12

Use of automated message systems for contract formation

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

Article 13

Availability of contract terms

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

Article 14

Error in electronic communications

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

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

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

2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.

Chapter IV Final provisions

Article 15

Depositary

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 16

Signature, ratification, acceptance or approval

1. This Convention is open for signature by all States at United Nations Headquarters in New York from 16 January 2006 to 16 January 2008.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 17

Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the regional economic integration organization shall not count as a Contracting State in addition to its member States that are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in States members of any such organization, as set out by declaration made in accordance with article 21.

Article 18

Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 19

Declarations on the scope of application

1. Any Contracting State may declare, in accordance with article 21, that it will apply this Convention only:

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

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

2. Any Contracting State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 21.

Article 20

Communications exchanged under other international conventions

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

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);
- Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980);

- United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991);
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995);
- United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).

2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 21, that it will not be bound by this paragraph.

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

4. Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 21.

Article 21

Procedure and effects of declarations

1. Declarations under article 17, paragraph 4, article 19, paragraphs 1 and 2, and article 20, paragraphs 2, 3 and 4, may be made at any time. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. Any State that makes a declaration under this Convention may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the

depository.

Article 22

Reservations

No reservations may be made under this Convention.

Article 23

Entry into force

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 24

Time of application

This Convention and any declaration apply only to electronic communications that are made after the date when the Convention or the declaration enters into force or takes effect in respect of each Contracting State.

Article 25

Denunciations

1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depository.

2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depository. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depository.

DONE at New York, this twenty-third day of November 2005, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

CHAPTER 2

GUIDE TO ENACTMENT: UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS (UNECIC)

A. Accession to the UNECIC

1. The United Nations Convention on the Use of Electronic Communications in International Contracts (UNECIC) is a multilateral international convention that was adopted in 2005.
2. The UNECIC was open for signature by all states from 16 January 2006 to 16 January 2008. The Convention was signed by 18 states. The signature of the convention is merely a symbolic act indicating that a state supports the Convention and is considering ratifying or acceding to it. It creates no binding obligation on the signatory.
3. Acceptance or approval of a treaty following signature has the same legal effect as ratification, and the same rules apply. Accession has the same legal effect as ratification, acceptance or approval. However, unlike ratification, acceptance or approval, which must be preceded by signature, accession requires only the deposit of an instrument of accession. Accession as a means of becoming party to a treaty is generally used by States wishing to express their consent to be bound by a treaty if, for whatever reason, they are unable to sign it. This may occur if the deadline for signature has passed or if domestic circumstances prevent a State from signing a treaty.
4. The UNECIC is not yet in operation as it requires the deposit of one more ratification, acceptance, approval or accession in terms of Article 23. To date Honduras and Singapore have deposited ratifications or accessions with the Secretary-General of the United Nations.
5. The UNECIC will enter into force six months after the deposit of one more ratification..
6. It is suggested that COMESA member states should consider depositing their ratifications or accessions on the same date as a symbolic gesture of the unity of the Member States. It will also ensure that the Convention will enter into operation on the same date throughout the region promoting legal unification and legal certainty in the region.

B. Article 17: Participation by COMESA as a Regional Economic Integration Organization

7. Some multilateral international conventions allow Regional Economic Integration Organizations to become a member of such conventions. UNCITRAL acknowledged the growing importance of regional economic integration organizations, which are already allowed to participate in several trade-related treaties, including recent international conventions in the field of international commercial law, such as the UNIDROIT Convention on International Interests in Mobile Equipment (Cape Town, 2001)⁶⁵ (the “Cape Town Convention”).
8. There are a number of issues that should be taken into account in the question whether COMESA should become a member to the UNECIC. Although there is no definition of a Regional Economic Integration Organization in the Convention, there is no doubt that COMESA may qualify as such an organization for purposes of this Convention subject to the considerations set out below.
9. The UNECIC is not concerned with the internal procedures leading to signature, acceptance, approval or accession by a regional economic integration organization. The Convention itself does not require a separate act of authorization by the member States of the organization and does not answer, in one way or the other, the question as to whether a regional economic integration organization has the right to ratify the convention if none of its member States decides to do so. For the Convention, the extent of treaty powers given to a regional economic integration organization is an internal matter concerning the relations between the organization and its own member States. Article 17 does not prescribe the manner in which regional economic integration organizations and their member States divide competences and powers among themselves.
10. Notwithstanding its neutral approach in respect of the internal affairs of a regional economic integration organization, the Convention only allows ratification by an organization that “has competence over certain matters governed by this Convention”, as clearly stated in paragraph 1 of article 17. This competence needs further to be demonstrated by a declaration made to the depositary pursuant to paragraph 2 of the article, specifying the matters governed by the Convention in respect of which competence has been transferred to that organization by its member States. Article 17 does not provide a basis for ratification if the regional economic integration organization has no competence on the subject matter covered by the Convention.
11. The first issue therefore is whether COMESA has the necessary competence over the matters governed by the Convention. Although the Council has general powers under Articles 9 and 10 of the Agreement Establishing the Common Market for Eastern and Southern Africa (COMESA) (“the COMESA Convention” to make regulations, there are no specific provision that would allow the Council to make regulations concerning the matters falling within the scope of the UNECIC. It is therefore doubtful that the Council has the necessary competence to adopt the

UNECIC as a Regional Economic Integration Organization as it does not have the necessary competence in making binding regulations on the harmonization of contract law.

12. Aside from the lack of competence, it is submitted that there is no real advantage for COMESA to accede as a Regional Economic Integration Organization. It could create all kinds of legal uncertainties as pointed out above which should be avoided.
13. A unified commitment by COMESA members to accede to the UNECIC will achieve the same effect without any of the legal difficulties.

C. Article 19 Declaration – Scope of Application: Parties

14. The possibility for contracting States to make declarations aimed at adjusting the scope of application of a particular convention is not uncommon in private international law and commercial law conventions. In this area of treaty practice, they are not regarded as reservations—which the Convention does not permit—and do not have the same consequences as reservations under public international law.
15. Pursuant to article 1, paragraph 1, the UNECIC applies whenever the parties exchanging electronic communications have their places of business in different States, even if those States are not contracting States to the Convention, as long as the law of a contracting State is the applicable law. Article 19, paragraph 1 (a), allows contracting States to declare, however, that notwithstanding article 1, paragraph 1, they will apply the Convention only when both States where the parties have their places of business are contracting States to the Convention.
16. This type of declaration will have the following practical consequences:
 - (a) Forum State is a contracting State that has made a declaration under article 19, paragraph 1 (a). The Convention will have “autonomous” application and will therefore apply to the exchange of electronic communications between parties located in different contracting States regardless of whether the rules of private international law of the forum State lead to the application of the laws of that State or of another State;
 - (b) Forum State is a contracting State that has not made a declaration under article 19, paragraph 1 (a). The applicability of the Convention will depend on three factors: (a) whether the rules of private international law point to the law of the forum State, of another contracting State or of a non-contracting State; (b) whether the State the law of which is made applicable under the rules of private international law of the forum State has made a declaration pursuant to article 19, paragraph 1 (a); and, if so, (c) whether or not both parties have their places of business in different contracting States. Accordingly, if the applicable law is the law of a contracting State that has made a declaration under paragraph 1 (a), the Convention applies only if both parties have their places of business in different contracting States. If the applicable law is the

law of the forum State or of another contracting State that has not made this declaration, the Convention applies even if the parties do not have their places of business in different contracting States. If the applicable law is the law of a non-contracting State, the Convention does not apply;

- (c) Forum State is a non-contracting State. The Convention will apply, *mutatis mutandis*, under the same conditions as described in paragraph 16 (b) above.
17. The possibility for contracting States to make this declaration has been introduced so as to facilitate accession to the Convention by States that prefer the enhanced legal certainty offered by an autonomous scope of application, which allows the parties to know beforehand, and independently from rules of private international law, when the Convention applies.
 18. The declaration that is possible in terms of Article 19 is similar to the declaration that is possible under Article 95 of the Vienna Convention on Contracts for the International Sale of Goods, 1980. Only a handful of countries have made use of that declaration and most commentators have been critical of those declarations because there is neither rational reason for this declaration nor any advantage to a country to make such a declaration. Most commentators agree that those countries should change their declarations because it would make the CISG applicable more widely and consistently.
 19. UNCITRAL itself is critical of the retention of this declaration in the Convention but decided to retain it in order to ensure the possibility of as wide an acceptance as possible of the Convention as possible.
 20. An Article 19 declaration would unnecessarily complicate the interpretation and application of the UNECIC
 21. Accordingly it is recommended that COMESA countries should adopt the Convention without making an Article 19 declaration.

D. Article 20 Declaration – Scope of Application: Conventions

22. The UNECIC was drafted and adopted because of the view that certain international conventions that were drafted before the internet era were incapable of sufficiently dealing with electronic transactions. During the discussions the six conventions were specifically mentioned and are now contained in Article 20. Article 20 provides that the UNECIC will apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the five conventions mentioned there apply.
23. The UNECIC was therefore drafted to specifically augment, enhance and interact with those five conventions. However, Article 20 states that the Convention will apply to other conventions generally even if they are not mentioned in article 20.
24. One of the objectives of the work of UNCITRAL towards the removal of possible legal obstacles to electronic commerce in existing international instruments was to

formulate solutions that obviated the need for amending individual international conventions. Article 20 of the UNECIC intends to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments that had been identified by the Secretariat in its survey.

25. The intended effect of the Convention in respect of electronic communications relating to contracts covered by other international conventions is not merely to interpret terms used elsewhere, but to offer substantive rules that allow those other conventions to operate effectively in an electronic environment. However, article 20 is not meant to formally amend any international convention, treaty or agreement, whether or not listed in paragraph 1, or to provide an authentic interpretation of any other international convention, treaty or agreement.
26. The combined effect of paragraphs 1 and 2 of article 20 of the UNECIC is that, by ratifying the Convention, and except as otherwise declared, a State would automatically undertake to apply the provisions of the Convention to electronic communications exchanged in connection with any of the conventions listed in paragraph 1 or any other convention, treaty or agreement to which a State is or may become a contracting State. These provisions aim at providing a domestic solution for a problem originating in international instruments.
27. They are based on the recognition that domestic courts already interpret international commercial law instruments. Paragraphs 1 and 2 of article 20 of the UNECIC ensure that a contracting State would incorporate into its legal system a provision that directs its judicial bodies to use the provisions of the Convention to address legal issues relating to the use of data messages in the context of other international conventions.
28. Article 20 makes provision for members of the Convention to make declarations about the applicability of the Convention by excluding specific conventions from the scope of its application. Considering the nature and purpose of the UNECIC as a Convention that is enabling and harmonizing of electronic transactions, there does not seem to be any need or good ground to exclude any of these or any other convention to which COMESA members may be party to. Given the enabling nature of the provisions of the Convention, it was felt that States would be more likely to be inclined to extending its provisions to trade-related instruments than to excluding their application to other instruments. Under paragraph 2, such an expansion operates automatically, without the need for contracting States to submit numerous opt-in declarations to achieve the same result.
29. It is submitted that COMESA members should refrain from making any declarations under Article 20 and 21 as there does not seem to be any good grounds at present to make such declarations. Furthermore such declarations would run counter to the harmonizing and enabling nature of the UNECIC.

E. Article 22 Reservations

30. Article 22 of the UNECIC excludes the right of contracting States to make reservations to the Convention. The intention of the provision is to prevent States

from limiting the application of the Convention by making reservations beyond the declarations specifically provided for in articles 17 to 20.

31. Although it could be argued that an express statement of the rule was not necessary, as it might be considered to be implicit in the Convention, its presence certainly excludes any ambiguity which might otherwise exist in the light of article 19 of the Vienna Convention on the Law of Treaties, which permits the formulation of reservations unless (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specific reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

CHAPTER 3

COMESA MODEL LAW ON ELECTRONIC TRANSACTIONS

The COMESA Council,

Bearing in mind its mandate to further the progressive harmonization and unification of the law of international trade in the Region;

Noting that an increasing number of transactions are carried out by means of electronic data interchange and other means of communication, commonly referred to as “electronic commerce”, which involve the use of alternatives to paper-based methods of communication and storage of information, and

Convinced that the establishment of a model law facilitating the use of electronic commerce that is acceptable to Member States with different legal, social and economic systems, could contribute significantly to the development of harmonious economic relations in the Region,

Believing that the adoption of the Model Law on Electronic Transactions by the Council will assist all Member States significantly in enhancing their legislation governing the use of alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists,

Recognizing the value for international trade and consumer transactions of methods for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that such dispute settlement methods, referred to by expressions such as conciliation and mediation and expressions of similar import, are increasingly used in international and domestic commercial practice as an alternative to litigation,

Noting that such dispute settlement methods are increasingly being offered online or by electronic methods,

Considering that the use of such dispute settlement methods results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of an online conciliation system that is acceptable to Member States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Recommends that all COMESA Member States give favourable consideration to the enactment of the Model Law, in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information;

Chapter I. General Provisions

Article 1. Sphere of application

- (1) This Law applies to any kind of information in the form of a data message, including electronic signatures used in the context of commercial activities.
- (2) The provisions of this Law shall not apply to the following: [...].

Article 2. Definitions

For the purposes of this Law:

- (a) “addressee” of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;
- (b) “automated message system” means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;
- (d) “consumer” means any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier;
- (e) “communication” means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;
- (f) “data message” means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to,
 - (i) electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;
 - (ii) voice, where the voice is used in an automated transaction; and
 - (iii) a stored record;
- (h) “electronic communication” means a communication by means of data messages;
- (i) “electronic signature” means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message;
- (j) “intermediary”, with respect to a particular data message, means a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data message;
- (k) “information system” means a system for generating, sending, receiving, storing or otherwise processing data messages and includes the Internet.

- (l) “originator” of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;
- (m) “place of business” means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.

Article 3. Interpretation

- (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
- (2) In the interpretation of this Law, regard may be had to the COMESA Guide to Enactment to the COMESA Model Law on Electronic Transactions.
- (3) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 4. Variation by agreement

- (1) The parties involved in generating, sending, receiving, storing or otherwise processing data messages, may derogate from or vary any of the provisions of Chapter III by agreement.
- (2) Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II.

Article 5. Location of the parties

- (1) For the purposes of this Law, a party’s place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.
- (2) If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Law is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.
- (3) If a natural person does not have a place of business, reference is to be made to the person’s habitual residence.
- (4) A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.

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

Chapter II. Application of Legal Requirements to Data Messages

Article 6. Legal recognition of data messages

- (1) Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.
- (2) Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.
- (3) Information is regarded as having been incorporated into a data message by mere reference if such information is-
 - (a) referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof; and
 - (b) accessible in a form in which it may be read, stored and retrieved by the other party, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.
- (4) Nothing in this Law requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.

Article 7. Writing

- (1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.
- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.
- (3) The provisions of this article do not apply to the following: [...].

Article 8. Signature

- (1) Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:
 - (a) a method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and

- (b) the method used is either:
 - (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
 - (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.
- (2) The provisions of this article do not apply to the following: [...].

Article 9. Original

- (1) Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if:
 - (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and
 - (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.
- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being presented or retained in its original form.
- (3) For the purposes of subparagraph (a) of paragraph (1):
 - (a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and
 - (b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.
- (4) The provisions of this article do not apply to the following: [...].

Article 10. Admissibility and evidential weight of data messages

- (1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:
 - (a) on the sole ground that it is a data message; or,
 - (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
- (2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the

reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

Article 11. Retention of data messages

- (1) Where the law requires that certain documents, records or information be retained, that requirement is met by retaining data messages, provided that the following conditions are satisfied:
 - (a) the information contained therein is accessible so as to be usable for subsequent reference; and
 - (b) the data message is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and
 - (c) such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.
- (2) An obligation to retain documents, records or information in accordance with paragraph (1) does not extend to any information the sole purpose of which is to enable the message to be sent or received.
- (3) A person may satisfy the requirement referred to in paragraph (1) by using the services of any other person, provided that the conditions set forth in subparagraphs (a), (b) and (c) of paragraph (1) are met.

Chapter III. Communication of Data Messages

Article 12. Formation and validity of contracts

- (1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.
- (2) The provisions of this article do not apply to the following: [...].

Article 13. Use of automated message systems for contract formation

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

systems or the resulting contract.

Article 14. Error in electronic communications

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

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

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

(2) Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.

Article 15. Invitations to make offers

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

Article 16. Recognition by parties of data messages

(1) As between the originator and the addressee of a data message, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.

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

Article 17. Attribution of data messages

(1) A data message is that of the originator if it was sent by the originator itself.

(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent:

(a) by a person who had the authority to act on behalf of the originator in respect

- of that data message; or
- (b) by an information system programmed by, or on behalf of, the originator to operate automatically.
- (3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:
- (a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or
 - (b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.
- (4) Paragraph (3) does not apply:
- (a) as of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to act accordingly; or
 - (b) in a case within paragraph (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.
- (5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.
- (6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate.

Article 18. Acknowledgement of receipt

- (1) Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged.
- (2) Where the originator has not agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, an acknowledgement may be given by
 - (a) any communication by the addressee, automated or otherwise; or

- (b) any conduct of the addressee sufficient to indicate to the originator that the data message has been received.
- (3) Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received.
- (4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time, the originator:
 - (a) may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time by which the acknowledgement must be received; and
 - (b) if the acknowledgement is not received within the time specified in subparagraph (a), may, upon notice to the addressee, treat the data message as though it had never been sent, or exercise any other rights it may have.
- (5) Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. That presumption does not imply that the data message corresponds to the message received.
- (6) Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.
- (7) Except in so far as it relates to the sending or receipt of the data message, this article is not intended to deal with the legal consequences that may flow either from that data message or from the acknowledgement of its receipt.

Article 19. Time and place of dispatch and receipt of data messages

- (1) The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.
- (2) The time of receipt of an electronic communication is:
 - (i) the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee;
 - (ii) the time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address.

- (3) An electronic communication is deemed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.
- (4) An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 5.
- (5) Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.
- (6) The provisions of this article do not apply to the following: [...].

Article 20. Notarisation, acknowledgement and certification

- (1) Where a law requires a signature, statement or document to be notarised, acknowledged, verified or made under oath, that requirement is met if the prescribed electronic signature of the person authorised to perform those acts is attached to, incorporated in or logically associated with the electronic signature or data message.
- (2) Where a law requires or permits a person to provide a certified copy of a document and the document exists in electronic form, that requirement is met if the person provides a print-out certified to be a true reproduction of the document or information.
- (3) Where a law requires or permits a person to provide a certified copy of a document and the document exists in paper or other physical form, that requirement is met if an electronic copy of the document is certified to be a true copy thereof and the certification is confirmed by the use of a prescribed electronic signature.

Article 21. Other requirements

- (1) A requirement in a law for multiple copies of a document to be submitted to a single addressee at the same time, is satisfied by the submission of a single data message that is capable of being reproduced by that addressee.
- (2) An expression in a law, whether used as a noun or verb, including the terms 'document', 'record', 'file', 'submit', 'lodge', 'deliver', 'issue', 'publish', 'write in', 'print' or words or expressions of similar effect, must be interpreted so as to include or permit such form, format or action in relation to a data message unless otherwise provided for in this Law.

Chapter IV. Consumer Protection

Article 22. Scope of application

- (1) This Chapter applies only to electronic transactions with consumers.
- (2) Section 24 does not apply to an electronic transaction-
 - (a) for financial services, including but not limited to, investment services, insurance and reinsurance operations, banking services and operations relating to dealings in securities;
 - (b) by way of an auction;
 - (c) for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer;
 - (d) for services which began with the consumer's consent before the end of the seven-day period referred to in section 24 (1);
 - (e) where the price for the supply of goods or services is dependent on fluctuations in the financial markets and which cannot be controlled by the supplier;
 - (f) where the goods-
 - (i) are made to the consumer's specifications;
 - (ii) are clearly personalised;
 - (iii) by reason of their nature cannot be returned; or
 - (iv) are likely to deteriorate or expire rapidly;
 - (g) where audio or video recordings or computer software were unsealed by the consumer;
 - (h) for the sale of newspapers, periodicals, magazines and books;
 - (i) for the provision of gaming and lottery services; or
 - (j) for the provision of accommodation, transport, catering or leisure services and where the supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specific period.

Article 23. Information to be provided

- (1) A supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction must make the following information available to consumers on the web site where such goods or services are offered:
 - (a) its full name and legal status;
 - (b) its physical address and telephone number;
 - (c) its web site address and e-mail address;

- (d) membership of any self-regulatory or accreditation bodies to which that supplier belongs or subscribes and the contact details of that body;
 - (e) any code of conduct to which that supplier subscribes and how that code of conduct may be accessed electronically by the consumer;
 - (f) in the case of a legal person, its registration number, the names of its office bearers and its place of registration;
 - (g) the physical address where that supplier will receive legal service of documents;
 - (h) a sufficient description of the main characteristics of the goods or services offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction;
 - (i) the full price of the goods or services, including transport costs, taxes and any other fees or costs;
 - (j) the manner of payment;
 - (k) any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers;
 - (l) the time within which the goods will be dispatched or delivered or within which the services will be rendered;
 - (m) the manner and period within which consumers can access and maintain a full record of the transaction;
 - (n) the return, exchange and refund policy of that supplier;
 - (o) any alternative dispute resolution code to which that supplier subscribes and how the wording of that code may be accessed electronically by the consumer;
 - (p) the security procedures and privacy policy of that supplier in respect of payment, payment information and personal information;
 - (q) where appropriate, the minimum duration of the agreement in the case of agreements for the supply of products or services to be performed on an ongoing basis or recurrently; and
 - (r) the rights of consumers in terms of article 24, where applicable.
- (2) The supplier must provide a consumer with an opportunity-
- (a) to review the entire electronic transaction;
 - (b) to correct any mistakes; and
 - (c) to withdraw from the transaction, before finally placing any order.
- (3) If a supplier fails to comply with the provisions of subsection (1) or (2), the consumer may cancel the transaction within 14 days of receiving the goods or services under the transaction.

- (4) If a transaction is cancelled in terms of subsection (3)-
 - (a) the consumer must return the performance of the supplier or, where applicable, cease using the services performed; and
 - (b) the supplier must refund all payments made by the consumer minus the direct cost of returning the goods.
- (5) The supplier must utilise a payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned.
- (6) The supplier is liable for any damage suffered by a consumer due to a failure by the supplier to comply with subsection (5).

Article 24. Cooling-off period

- (1) A consumer is entitled to cancel without reason and without penalty any transaction and any related credit agreement for the supply-
 - (a) of goods within seven days after the date of the receipt of the goods; or
 - (b) of services within seven days after the date of the conclusion of the agreement.
- (2) The only charge that may be levied on the consumer is the direct cost of returning the goods.
- (3) If payment for the goods or services has been effected prior to a consumer exercising a right referred to in subsection (1), the consumer is entitled to a full refund of such payment, which refund must be made within 30 days of the date of cancellation.
- (4) This section must not be construed as prejudicing the rights of a consumer provided for in any other law.

Article 25. Unsolicited goods, services or communications

- (1) Any person who sends unsolicited commercial communications to consumers, must provide the consumer-
 - (a) with the option to cancel his or her subscription to the mailing list of that person; and
 - (b) with the identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer.
- (2) No agreement is concluded where a consumer has failed to respond to an unsolicited communication.
- (3) Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to a maximum fine of [currency and amount].

- (4) Any person who sends unsolicited commercial communications to a person who has advised the sender that such communications are unwelcome, is guilty of an offence and liable, on conviction, to a maximum fine of [currency and amount].

Article 26. Performance

- (1) The supplier must execute the order within 30 days after the day on which the supplier received the order, unless the parties have agreed otherwise.
- (2) Where a supplier has failed to execute the order within 30 days or within the agreed period, the consumer may cancel the agreement with seven days' written notice.
- (3) If a supplier is unable to perform in terms of the agreement on the grounds that the goods or services ordered are unavailable, the supplier must immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification.

Article 27. Applicability of foreign law

The protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question.

Article 28. Non-exclusion

Any provision in an agreement which excludes any rights provided for in this Chapter is null and void.

Article 29. Consumer Complaints

A consumer may lodge a complaint with the [Government Department or Consumer Protection Organisation] in respect of any non-compliance with the provisions of this Chapter by a supplier.

Chapter V. Online Dispute Resolution

Article 30. Conciliation before the Court of Justice of the Common Market

- (1) "Court" in this Chapter shall mean the Court of Justice of the Common Market.
- (2) Any party to a dispute arising from a transaction governed by this Law, may refer the dispute to the Court for conciliation.
- (3) The conciliation shall be conducted according to the Conciliation Rules of the Court.

- (4) All conciliation proceedings shall take place by electronic means.
- (5) Any party shall be entitled to withdraw from or terminate the conciliation proceedings at any time by giving electronic notice to the other party and to the Registrar of the Court.
- (6) Where a party has elected to take part in the conciliation proceedings, it may not instigate or proceed with other legal or arbitral proceedings until the conciliation has been concluded or where that party has formally withdrawn from the conciliation proceedings in terms of paragraph (5); except where judicial or arbitral proceedings may be necessary for the preservation of that party's rights.
- (7) Any settlement agreement reached between the parties under the conciliation proceedings shall be final and binding [*and may be made an order of court*].
- (8) The conciliation proceedings and any information provided to the Conciliator or the other party shall be confidential and may not be disclosed without the express permission of all parties concerned.
- (9) The Conciliator shall act in an independent and impartial manner in an attempt to aid the parties to reach an amicable settlement of their dispute.
- (10) The Conciliator may not be called as a witness in any subsequent legal or arbitral proceedings.
- (11) A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:
 - (a) an invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;
 - (b) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
 - (c) statements or admissions made by the other party in the course of the conciliation proceedings;
 - (d) proposals made by the conciliator;
 - (e) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator; or
 - (f) a document prepared solely for purposes of the conciliation proceedings.
- (12) The disclosure of the information referred to in paragraph (11) of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph (11) of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.
- (13) The provisions of paragraphs (11) and (12) of this article shall apply whether or not

the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.

- (14) Subject to the limitations of paragraph (1) of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation.

Chapter VI. Final Provisions

Article 31. Regulations

The Minister may make regulations regarding any matter that may or must be prescribed in terms of this Law or any matter which it is necessary or expedient to prescribe for the proper implementation or administration of this Law.

Article 32. Short title and commencement

This Law is called the Electronic Transactions Law, and comes into operation on [date].

CHAPTER 4

CONCILIATION RULES OF THE COURT OF JUSTICE OF THE COMMON MARKET

A. Amendment of the COMESA Treaty

The COMESA Treaty is amended by the inclusion of the following Article.

Article 28A

The Court shall have jurisdiction to act as conciliator in any dispute referred to it by a party whose transaction is subject to the United Nations Convention on the Use of Electronic Communications in International Contracts or an enactment by a Member State of the COMESA Model Law on Electronic Transactions.

B. Amendment of the Rules of the COMESA Court of Justice

The Rules of the Court of Justice of the Common Market are amended by addition of the following Part 24.

Part 24: Conciliation Rules

Rule 101: Application of the Rules

The Rules contained in Part 24 shall apply to the referral to the Court of any dispute by a party in terms of a transaction subject to:

- (a) the United Nations Convention on the Use of Electronic Communications in International Contracts; or
- (b) subject to any enactment of the COMESA Model Law for Electronic Commerce conferring jurisdiction on the Court.

Rule 102: Nature of Proceedings

- (1) All conciliation proceedings shall take place by the electronic submission of all communications, documents and information.
- (2) The President may prescribe the use of specific forms to be used for conciliation and the electronic means which may be used by parties in the conduct of the proceedings.

Rule 103: Commencement of Conciliation Proceedings

- (1) The party initiating conciliation shall send an electronic notice to the other party and the Registrar [in the prescribed court format].
- (2) The notice must:
 - (a) identify all concerned parties;
 - (b) briefly set out the nature of the dispute; and
 - (c) provide the electronic address of that party where it will receive all electronic communications;
 - (d) a request to the other party to respond to the reference of the dispute in not less than 30 calendar days; and
 - (e) notice of the fact that the other party may elect to participate in the conciliation or reject the reference for conciliation and that the participation in the conciliation may be terminated at any time.
- (3) A party receiving such a notice may:
 - (a) accept the invitation to conciliate by giving written electronic notice to the other party and the Registrar within 30 calendar days. The acceptance notice must contain the electronic address where that party will receive all communications; or
 - (b) reject the invitation to conciliation by giving written electronic notice to the referring party and the Registrar.
- (4) In the event that the party receiving a referral notice fails to respond to the notice within 14 days, the conciliation proceedings will be deemed to be terminated or rejected.

Rule 104: Appointment of Conciliators

- (1) The President shall allocate a reference for conciliation to a single Conciliator or to three Conciliators if the President is of the opinion that the matter is sufficiently complex.
- (2) The Conciliator appointed shall act as Conciliator and not as judge or arbitrator.

Rule 105: Conciliation Process

- (1) The Conciliator, upon appointment, requests each party to submit a brief written statement describing the general nature of the dispute and the points at issue.
- (2) Each party must send a copy of that statement to the other party.
- (3) The conciliator may request each party to submit a further written statement of that party's position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate.
- (4) At any stage of the conciliation proceedings the conciliator may request a party to

submit such additional information as the Conciliator deems appropriate.

(5) When the Conciliator receives factual information concerning the dispute from a party, he must disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which is considered appropriate, subject to the provisions in paragraph (6) and (7).

(6) Any party may provide the Conciliator with information or documents subject to the condition that such information or documents should be kept confidential.

(7) Where such information or documents have been provided subject to confidentiality, the Conciliator may not disclose such information or documents to the other party without the express written permission of the party providing the information or documents.

(8) The conciliator may communicate with the parties together or with each of them separately.

Rule 106: Role of the Conciliator

(1) The Conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The Conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he or she considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be accompanied by a statement of the reasons therefor.

Rule 107: Co-operation of the Parties

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials and provide evidence.

Rule 108: Settlement Suggestions by the Parties

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Rule 109: Settlement Agreement

(1) When it appears to the Conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up a written settlement agreement.

(3) If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(4) The parties signify their assent to the settlement agreement by depositing the prescribed Settlement Assent Form with the Conciliator and the Registrar.

(5) The Registrar gives notice of the deposit of the Settlement Assent Form to all other parties.

Rule 110: Confidentiality of Proceedings

The Conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Rule 111: Costs

(1) Each party bears its own costs in respect of the conciliation.

(2) The Conciliator is not entitled to make any cost order.

CHAPTER 5

GUIDE TO ENACTMENT OF THE COMESA MODEL LAW ON ELECTRONIC COMMERCE

Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996)

Purpose of this guide

1. In preparing and adopting the UNCITRAL Model Law on Electronic Commerce (hereinafter referred to as "the Model Law"), COMESA was mindful that the Model Law would be a more effective tool for Member States modernizing their legislation if background and explanatory information would be provided to executive branches of Governments and legislators to assist them in using the Model Law.

2. This Guide, much of which is drawn from the UNCITRAL Model Law and Guide to Enactment (1996), the UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (2001) and the UNCITRAL Secretariat's Explanatory Note on the UNECIC , is intended to be helpful to users of electronic means of communication as well as to scholars in that area. The information presented in this Guide is intended to explain why the provisions in the Model Law have been included as essential basic features of a statutory device designed to achieve the objectives of the Model Law. Such information might assist Member States also in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular national circumstances. In general, however, it is submitted that Member States should deviate as little as possible from the provisions of the Model Law except where it is indicated that such deviations may be necessary or where the local law of a Member State necessitates such changes. It will be in the interest of all Member States that there is as much harmonization of this part of the law to encourage free trade within the COMESA region without unnecessary legal barriers being opposed by the differences in domestic law.

I. INTRODUCTION TO THE MODEL LAW

A. OBJECTIVES

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

4. The decision by COMESA to formulate model legislation on electronic commerce was taken in response to the fact that in a number of countries the existing legislation governing communication and storage of information is uncertain, inadequate or outdated because it does not contemplate the use of electronic commerce. In certain cases, existing legislation imposes or implies restrictions on the use of modern means of communication, for example by prescribing the use of "written", "signed" or "original" documents. While some countries may have adopted specific provisions to deal with certain aspects of electronic commerce, only Mauritius has adopted legislation dealing with electronic commerce as a whole. The Mauritian Electronic Transactions Act 2000 however is based on the UNCITRAL Model Law and was taken into account in the drafting of this Model Law. This may result in uncertainty as to the legal nature and validity of information presented in a form other than a traditional paper document. Moreover, while sound laws and practices are necessary in all countries where the use of EDI and electronic mail is becoming widespread, this need is also felt in many countries with respect to such communication techniques as telecopy and telex.

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

6. The objectives of the Model Law, which include enabling or facilitating the use of electronic commerce and providing equal treatment to users of paper-based documentation and to users of computer-based information, are essential for fostering economy and efficiency in international trade. By incorporating the procedures prescribed in the Model Law in its national legislation for those situations where parties opt to use electronic means of communication, Member States will be creating a media-neutral environment.

B. SCOPE

7. The title of the Model Law refers to "electronic commerce". Among the means of communication encompassed in the notion of "electronic commerce" are the following modes of transmission based on the use of electronic techniques: communication by means of EDI defined narrowly as the computer-to-computer transmission of data in a standardized format; transmission of electronic messages involving the use of either publicly available standards or proprietary standards; transmission of free-formatted text by electronic means, for example through the Internet. It was also noted that, in certain circumstances, the notion of "electronic commerce" might cover the use of techniques such as telex and telecopy.

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

9. The objectives of the Model Law are best served by the widest possible application of the Model Law. Thus, although there is provision made in the Model Law for exclusion

of certain situations from its scope Member States may well decide not to enact in its legislation substantial restrictions on the scope of application of the Model Law.

10. The Model Law should be regarded as a balanced and discrete set of rules, which are recommended to be enacted as a single statute.

C. STRUCTURE

11. The Model Law is divided into five parts, one dealing general issues, one dealing with the legal requirements for data messages, one dealing with the communication of data messages, one dealing with consumer protection and one dealing with online dispute conciliation.

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

D. A "FRAMEWORK" LAW TO BE SUPPLEMENTED BY TECHNICAL REGULATIONS

13. The Model Law is intended to provide essential procedures and principles for facilitating the use of modern techniques for recording and communicating information in various types of circumstances. However, it is a "framework" law that does not itself set forth all the rules and regulations that may be necessary to implement those techniques in an enacting State. Moreover, the Model Law is not intended to cover every aspect of the use of electronic commerce. Accordingly, an enacting State may wish to issue regulations to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing, circumstances at play in the enacting State, without compromising the objectives of the Model Law. It is recommended that, should it decide to issue such regulation, an enacting State should give particular attention to the need to maintain the beneficial flexibility of the provisions in the Model Law. However, COMESA does not provide any specific Draft or Model Regulations.

14. It should be noted that the techniques for recording and communicating information considered in the Model Law, beyond raising matters of procedure that may need to be addressed in the implementing technical regulations, may raise certain legal questions the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial-procedure law, which the Model Law is not intended to deal with.

E. THE "FUNCTIONAL-EQUIVALENT" APPROACH

15. The Model Law is based on the recognition that legal requirements prescribing the use of traditional paper-based documentation constitute the main obstacle to the development of modern means of communication. In the preparation of the Model Law, consideration was given to the possibility of dealing with impediments to the use of electronic commerce posed by such requirements in national laws by way of an extension of the scope of such notions as "writing", "signature" and "original", with a view to encompassing computer-based techniques. Such an approach is used in a number of existing legal instruments, e.g., article 7 of the UNCITRAL Model Law on International Commercial Arbitration and article 13 of the United Nations Convention on Contracts for the International Sale of Goods. It was observed that the Model Law should permit States to adapt their domestic legislation to developments in communications technology applicable to trade law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements. At the same time, it was said that the electronic fulfilment of writing requirements might in some cases necessitate the development of new rules. This was due to one of many distinctions between EDI messages and paper-based documents, namely, that the latter were readable by the human eye, while the former were not so readable unless reduced to paper or displayed on a screen.

16. The Model Law thus relies on a new approach, sometimes referred to as the "functional equivalent approach", which 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. For example, among the functions served by a paper document are the following: to provide that a document would be legible by all; to provide that a document would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts. It should be noted that in respect of all of the above-mentioned functions of paper, electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met. However, the adoption of the functional-equivalent approach should not result in imposing on users of electronic commerce more stringent standards of security (and the related costs) than in a paper-based environment.

17. A data message, in and of itself, cannot be regarded as an equivalent of a paper document in that it is of a different nature and does not necessarily perform all conceivable functions of a paper document. That is why the Model Law adopted a flexible standard, taking into account the various layers of existing requirements in a paper-based environment: when adopting the "functional-equivalent" approach, attention was given to the existing hierarchy of form requirements, which provides distinct levels of reliability, traceability and inalterability with respect to paper-based documents. For example, the requirement that data be presented in written form (which constitutes a "threshold requirement") is not to be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act".

18. The Model Law does not attempt to define a computer-based equivalent to any 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 data messages, enable such data messages to enjoy the same level of legal recognition as corresponding paper documents performing the same function. It should be noted that the functional-equivalent approach has been taken in articles 6 to 8 of the Model Law with respect to the concepts of "writing", "signature" and "original" but not with respect to other legal concepts dealt with in the Model Law. For example, article 10 does not attempt to create a functional equivalent of existing storage requirements.

F. DEFAULT RULES AND MANDATORY LAW

19. The decision to undertake the preparation of the Model Law was based on the recognition that, in practice, solutions to most of the legal difficulties raised by the use of modern means of communication are sought within contracts. The Model Law embodies the principle of party autonomy in article 4 with respect to the provisions contained in Chapter III. Chapter III contains a set of rules of the kind that would typically be found in agreements between parties, e.g., interchange agreements or "system rules". It should be noted that the notion of "system rules" might cover two different categories of rules, namely, general terms provided by communication networks and specific rules that might be included in those general terms to deal with bilateral relationships between originators and addressees of data messages. Article 4 (and the notion of "agreement" therein) is intended to encompass both categories of "system rules".

20. The rules contained in Chapter III of part one may be used by parties as a basis for concluding such agreements. They may also be used to supplement the terms of agreements in cases of gaps or omissions in contractual stipulations. In addition, they may be regarded as setting a basic standard for situations where data messages are exchanged without a previous agreement being entered into by the communicating parties, e.g., in the context of open-networks communications.

21. The provisions contained in Chapter II are of a different nature. One of the main purposes of the Model Law is to facilitate the use of modern communication techniques and to provide certainty with the use of such techniques where obstacles or uncertainty resulting from statutory provisions could not be avoided by contractual stipulations. The provisions contained in Chapter II may, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. Such well-established rules are normally of a mandatory nature since they generally reflect decisions of public policy. The provisions contained in Chapter II should be regarded as stating the minimum acceptable form requirement and are, for that reason, of a mandatory nature, unless expressly stated otherwise in those provisions. The indication that such form requirements are to be regarded as the "minimum acceptable" should not, however, be construed as inviting States to establish requirements stricter than those contained in the Model Law.

II. ARTICLE-BY-ARTICLE REMARKS

Chapter I. General provisions

Article 1. Sphere of application

22. The purpose of article 1, which is to be read in conjunction with the definition of "data message" in article 2(f), is to delineate the scope of application of the Model Law. The approach used in the Model Law is to provide in principle for the coverage of all factual situations where information is generated, stored or communicated, irrespective of the medium on which such information may be affixed. It was felt during the preparation of the Model Law that exclusion of any form or medium by way of a limitation in the scope of the Model Law might result in practical difficulties and would run counter to the purpose of providing truly "media-neutral" rules. However, the focus of the Model Law is on "paperless" means of communication and, except to the extent expressly provided by the Model Law, the Model Law is not intended to alter traditional rules on paper-based communications.

23. COMESA has endeavoured to achieve consistency between the provisions of the UNECIC and the Model Law in order to achieve as much harmonization in domestic transactions as well as international transactions. However, the scope of the two instruments are somewhat different necessitating some differences between the provisions of the UNECIC which must be adopted by COMESA member states in its entirety and without any changes, and the Model Law which may be tailored to cater for local variances and needs. The field of application of the Model Law should therefore not contain all of the exclusions contained in the UNECIC which is aimed at

international commercial transactions. The Model Law in contrast will and should be applicable to for instance consumer contracts which is specifically excluded by the UNEDIC.

24. The Model Law applies to all kinds of data messages that might be generated, stored or communicated, and nothing in the Model Law should prevent an enacting State from extending the scope of the Model Law to cover uses of electronic commerce outside the commercial sphere. For example, while the focus of the Model Law is not on the relationships between users of electronic commerce and public authorities, the Model Law is not intended to be inapplicable to such relationships.

25. Some countries have consumer protection laws that may govern certain aspects of the use of information systems. There are however a number of specific issues arising in the context of electronic transactions and interaction with consumers that which needs to be specifically addressed. This has been done in Chapter IV. Enacting States should review the possible interaction or overlapping between the provisions of their domestic law and the provisions of the Model Law. The provisions of Chapter IV is based on the European distance selling directive which is particularly appropriate in this context and which has for instance also been used in the South African Electronic Communications and Transactions Act 25 of 2002.

26. Another possible limitation of the scope of the Model Law is contained in the first footnote. In principle, the Model Law applies to both international and domestic uses of data messages. However where Member States adopt both the UNEDIC and the Model Law, the former will apply to international commercial transactions, whereas the Model Law will apply to all other transactions and those aspects not governed by the UNEDIC such as consumer protection, evidential questions, retention of data messages, originality etc.

27. It is recommended that application of the Model Law be made as wide as possible. Furthermore, the variety of procedures available under the Model Law (particularly articles 7 to 9) to limit the use of data messages if necessary (e.g., for purposes of public policy) may make it less necessary to limit the scope of the Model Law. As the Model Law contains a number of articles (articles 1, 7, 8, 9, 12, 17, and 19) that allow a degree of flexibility to enacting States to limit the scope of application of specific aspects of the Model Law, a narrowing of the scope of application of the text to international trade should not be necessary.

28. Article 2 (2) is aimed at providing general exclusions and may be used in place of the specific exclusions provided for in articles 7, 8, 9, 12, 17, and 19.

29. The type of transactions that are usually excluded by countries include the following (as contained in the Mauritian Electronic Transactions Act of 2000):

- (a) the creation or execution of a will;
- (b) contracts regulating family relationships such as ante-nuptial contracts;
- (b) a negotiable instrument;
- (c) a power of attorney;
- (d) a contract for the sale or other disposition of immovable property, or any interest in such property; and
- (e) the conveyance of immovable property or the transfer of any interest in immovable property.

30. The Mauritian Act makes further provision that certain other transaction may be excluded by Regulation. The list is a non-exhaustive list and Member States may include other types of transactions according to their local needs. The exclusions should however be kept to a minimum.

Article 2. Definitions

“Addressee”

31. The "addressee" under the Model Law is the person with whom the originator intends to communicate by transmitting the data message, as opposed to any person who might receive, forward or copy the data message in the course of transmission. The "originator" is the person who generated the data message even if that message was transmitted by another person.

32. The definition of "addressee" contrasts with the definition of "originator", which is not focused on intent. It should be noted that, under the definitions of "originator" and "addressee" in the Model Law, the originator and the addressee of a given data message could be the same person, for example in the case where the data message was intended for storage by its author. However, the addressee who stores a message transmitted by an originator is not itself intended to be covered by the definition of "originator".

“Automated message systems”

33. The notion of “automated message system” refers essentially to a system for automatic negotiation and conclusion of contracts without involvement of a person, at least on one of the ends of the negotiation chain. It differs from an “information system” in that its primary use is to facilitate exchanges leading to contract formation. An automated message system may be part of an information system, but that need not necessarily be the case.

34... The critical element in this definition is the lack of a human actor on one or both sides of a transaction. For example, if a party orders goods through a website, the transaction would be an automated transaction because the vendor took and confirmed the order via its machine. Similarly, if a factory and its supplier do business through EDI, the factory's computer, upon receiving information within certain pre-programmed parameters, will send an electronic order to the supplier's computer. If the supplier's computer confirms the order and processes the shipment because the order falls within pre-programmed parameters in the supplier's computer, this would be a fully automated transaction. If, instead, the supplier relies on a human employee to review, accept, and process the factory's order, then only the factory's side of the transaction would be automated. In either case, the entire transaction falls within the definition.

"Communication"

35.. The definition of "communication" is intended to make clear that the Model Law applies to a wide range of exchanges of information between parties to a contract, whether at the stage of negotiations, during performance or after a contract has been performed.

"Data message"

36. The notion of "data message" is not limited to communication but is also intended to encompass computer-generated records that are not intended for communication. Thus, the notion of "message" should also include the notion of "record".

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

38. The examples mentioned in the definition of "data message" highlight that this definition covers not only electronic mail but also other techniques that may still be used in the chain of electronic communications, even if some of them (such as telex or telecopy) may not appear to be novel

39. With the convergence that is taking place between various forms of electronic communications, many transactions are now being concluded between natural persons using voice over the telephone or the internet, but where they interact with an information system. The interaction with the information system may take place either by speaking specific words which the information system will recognize or by keying in certain information via the telephone's keypad or the computer's keyboard. The information system may use pre-recorded voice data messages to communicate with the natural person in a structured and automated manner. The definition is aimed at distinguishing between those types of transactions between a natural person and an automated agent, and voice transactions over the telephone or the internet between natural persons which should be excluded from the application of the Model Law. This definition is also aimed at excluding transactions where one natural person leaves a voice messages on a voice messaging system and where the message is then later retrieved and acted upon by another natural person.

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

41. The definition of "data message" focuses on the information itself, rather than on the form of its transmission. Thus, for the purposes of the Model Law it is irrelevant whether data messages are communicated electronically from computer to computer, or whether data messages are communicated by means that do not involve telecommunications systems, for example, magnetic disks containing data messages delivered to the addressee by courier.

"Electronic communication"

24. The definition of "electronic communication" establishes a link between the purposes for which electronic communications may be used and the notion of "data messages", which already appeared in the UNCITRAL Model Law on Electronic Commerce and has been retained in view of the wide range of techniques it encompasses, beyond purely "electronic" techniques.

"Electronic signature"

Electronic signature as functional equivalent of handwritten signature

43. The notion of "electronic signature" is intended to cover all traditional uses of a handwritten signature for legal effect, such uses to identify a person and to associate that person with the content of a document being no more than the smallest common denominator to the various approaches to "signature" found in the various legal systems. Thus, defining an electronic signature as capable of indicating approval of

information, amounts primarily to establishing a technical prerequisite for the recognition of a given technology as capable of creating an equivalent to a handwritten signature. The definition does not disregard the fact that technologies commonly referred to as “electronic signatures” could be used for purposes other than creating a legally significant signature. The definition simply illustrates the focus of the Model Law on the use of electronic signatures as functional equivalents of handwritten signatures. In order not to introduce or suggest any technical limitation regarding the method that could be used by a signatory to perform the functional equivalent of a handwritten signature, flexible wording referring to “data” that “may be used” has been preferred to any reference to the means used by the signatory being “technically capable” of performing such functions.

Possible other uses of an electronic signature

44. A distinction should be drawn between the legal notion of “signature” and the technical notion of “electronic signature”, a term of art that covers practices that do not necessarily involve the production of legally significant signatures. In the preparation of the Model Law, it was felt that the attention of users should be brought to the risk of confusion that might result from the use of the same technical tool for the production of a legally meaningful signature and for other authentication or identification functions. Such a risk of confusion might arise regarding the intent of the signatory, in particular, if the same “electronic signature” technique was used to express the signatory’s approval of the information being “signed” and could be used also to perform identification functions that would merely associate the signatory’s name with the transmission of the message, without indicating approval of its contents. To the extent an electronic signature is used for the purposes expressly covered in the Model Law (i.e. to express the signatory’s approval of the information being signed), it might happen in practice that the creation of such an electronic signature occurs prior to its actual use. In such a case, the signatory’s approval should be gauged at the time when the electronic signature is affixed to the message rather than at the time when the signature was created.

"Intermediary"

45. The focus of the Model Law is on the relationship between the originator and the addressee, and not on the relationship between either the originator or the addressee and any intermediary. However, the Model Law does not ignore the paramount importance of intermediaries in the field of electronic communications. In addition, the notion of "intermediary" is needed in the Model Law to establish the necessary distinction between originators or addressees and third parties.

46. The definition of "intermediary" is intended to cover both professional and non-professional intermediaries, i.e., any person (other than the originator and the addressee) who performs any of the functions of an intermediary. The main functions of an intermediary are listed in subparagraph (j), namely receiving, transmitting or storing data messages on behalf of another person. Additional "value-added services" may be performed by network operators and other intermediaries, such as formatting, translating, recording, authenticating, certifying and preserving data messages and providing security services for electronic transactions. "Intermediary" under the Model Law is defined not as a generic category but with respect to each data message, thus recognizing that the same person could be the originator or addressee of one data message and an intermediary with respect to another data message. The Model Law, which is focused on the relationships between originators and addressees, does not, in general, deal with the rights and obligations of intermediaries.

"Information system"

47. The definition of "information system" is intended to cover the entire range of technical means used for transmitting, receiving and storing information, including the Internet. For example, depending on the factual situation, the notion of "information system" could be indicating a communications network, and in other instances could include an electronic mailbox or even a telecopier. For purposes of the Model Law it is irrelevant whether the information system is located on the premises of the addressee or on other premises, since location of information systems is not an operative criterion under the Model Law.

"Originator"

48. In most legal systems, the notion of "person" is used to designate the subjects of rights and obligations and should be interpreted as covering both natural persons and corporate bodies or other legal entities. Data messages that are generated automatically by computers without direct human intervention are intended to be covered by subparagraph (l). However, the Model Law should not be misinterpreted as allowing for a computer to be made the subject of rights and obligations. Data messages that are generated automatically by computers without direct human intervention should be regarded as "originating" from the legal entity on behalf of which the computer is operated. Questions relevant to agency that might arise in that context are to be settled under rules outside the Model Law.

49. The definition of "originator" should cover not only the situation where information is generated and communicated, but also the situation where such information is generated and stored without being communicated. However, the definition of

“originator” is intended to eliminate the possibility that a recipient who merely stores a data message might be regarded as an originator.

50. The focus of the Model Law is on the relationship between the originator and the addressee, and not on the relationship between either the originator or the addressee and any intermediary. The fact that the Model Law does not refer expressly to intermediaries (such as servers or web hosts) does not mean that the Model Law ignores their role in receiving, transmitting or storing data messages on behalf of other persons or performing other “value-added services”, such as when network operators and other intermediaries format, translate, record, authenticate, certify or preserve electronic communications or provide security services for electronic transactions. However, as the Model Law was not conceived as a regulatory instrument for electronic business, it does not deal with the rights and obligations of intermediaries.

51. As used in the Model Law, the notion of “party” designates the subjects of rights and obligations and should be interpreted as covering both natural persons and corporate bodies or other legal entities. Where only “natural persons” are meant, the Model Law expressly uses those words.

“Place of business”

52. The definition of “place of business” reflects the essential elements of the notions of “place of business”, as understood in international commercial practice, and “establishment”, as used in article 2, subparagraph (f), of the UNCITRAL Model Law on Cross-Border Insolvency). This definition has been included to support the operation of articles 19 of the Model Law and is not intended to affect other substantive law relating to places of business.

Article 3. Interpretation

53. Article 3 is based on article 7 of the United Nations Convention on Contracts for the International Sale of Goods as well as a number of other UNCITRAL texts. It is intended to provide guidance for interpretation of the Model Law by courts and other national or local authorities. The expected effect of article 3 is to limit the extent to which a uniform text, once incorporated in local legislation, would be interpreted only by reference to the concepts of local law.

54. The purpose of paragraph (1) is to draw the attention of courts and other national authorities to the fact that the provisions of the Model Law (or the provisions of the instrument implementing the Model Law), while enacted as part of domestic legislation and therefore domestic in character, should be interpreted with reference to its

international origin in order to ensure uniformity in the interpretation of the Model Law in various countries.

55. Paragraph gives recognition to the fact that any enactment of the Model Law should be seen against the background provided in the COMESA Guide to Enactment to the Model Law. The Guide provides the legislative history to the Model Law and should be viewed as a legitimate source of such legislation that will enhance the harmonizing effect of the Model Law in the region. It is imperative that any harmonizing instrument such as this Model Law should be interpreted and applied in a consistent manner throughout the region. The Guide provides further assistance in this regard.

56. As to the general principles on which the Model Law is based mentioned in paragraph (3), the following non-exhaustive list may be considered: (1) to facilitate electronic commerce among and within nations; (2) to validate transactions entered into by means of new information technologies; (3) to promote and encourage the implementation of new information technologies; (4) to promote the uniformity of law; and (5) to support commercial practice. While the general purpose of the Model Law is to facilitate the use of electronic means of communication, it should not be construed in any way as imposing their use.

Article 4. Variation by agreement

57. The decision to undertake the preparation of the Model Law was based on the recognition that, in practice, solutions to the legal difficulties raised by the use of modern means of communication are mostly sought within contracts. The Model Law is thus intended to support the principle of party autonomy. However, that principle is embodied only with respect to the provisions of the Model Law contained in Chapter III. The reason for such a limitation is that the provisions contained in Chapter II may, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. Such well-established rules are normally of a mandatory nature since they generally reflect decisions of public policy. An unqualified statement regarding the freedom of parties to derogate from the Model Law might thus be misinterpreted as allowing parties, through a derogation to the Model Law, to derogate from mandatory rules adopted for reasons of public policy.

58. The provisions contained in Chapter II of part one should be regarded as stating the minimum acceptable form requirement and are, for that reason, to be regarded as mandatory, unless expressly stated otherwise. The indication that such form requirements are to be regarded as the "minimum acceptable" should not, however, be

construed as inviting States to establish requirements stricter than those contained in the Model Law.

59. Article 4 is intended to apply not only in the context of relationships between originators and addressees of data messages but also in the context of relationships involving intermediaries. Thus, the provisions of Chapter III of part one could be varied either by bilateral or multilateral agreements between the parties, or by system rules agreed to by the parties. However, the text expressly limits party autonomy to rights and obligations arising as between parties so as not to suggest any implication as to the rights and obligations of third parties.

60. Nevertheless, as provided in article 6(2) the Model Law does not require the parties to accept electronic communications if they do not want to. This also means, for instance, that the parties may choose not to accept electronic signatures

Article 5. Location of the parties

Purpose of the article

61. The purpose of article 5 is to offer elements that allow the parties to ascertain the location of the places of business of their counterparts, thus facilitating a determination, among other elements, as to the international or domestic character of a transaction and the place of contract formation. This information is also important in respect to the possible jurisdiction of courts and the applicable law.

62. 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.

Nature of presumption of location

63. Article 6 creates a presumption in favour of a party's indication of its place of business, which is accompanied by conditions under which that indication can be rebutted, and by default provisions that apply if no indication has been made. The article is not intended to allow parties to invent fictional places of business that do not meet the requirements of article 2, subparagraph (m). This presumption, therefore, is not absolute and the Model Law does not uphold an indication of a place of business by a party even where such an indication is inaccurate or intentionally false.

64. The rebuttable presumption of location established by paragraph 1 of article 5 serves important practical purposes and is not meant to depart from the notion of “place of business”, as used in non-electronic transactions. For example, an Internet vendor maintaining several warehouses at different locations from which different goods might be shipped to fulfil a single purchase order effected by electronic means might see a need to indicate one of such locations as its place of business for a given contract. Article 5 recognizes that possibility, with the consequence that such an indication could only be challenged if the vendor does not have a place of business at the location it indicated. Without that possibility, the parties might need to enquire, in respect of each contract, which of the vendor’s multiple places of business has the closest connection to the relevant contract in order to determine what is the vendor’s place of business in that particular case. If a party has only one place of business and has not made any indication, it would be deemed to be located at the place that meets the definition of “place of business” under article 3, subparagraph (m).

65. The application of paragraph 2 of article 5 would be triggered by the absence of a valid indication of a place of business. The default rule provided here applies not only when a party fails to indicate its place of business, but also when such indication has been rebutted under paragraph 1 of the article.

Place of business of natural persons

66. This paragraph does not apply to legal entities, since it is generally understood that only natural persons are capable of having a “habitual residence”.

Limited value of communications technology and equipment for establishing place of business

67. The Model Law takes a cautious approach to peripheral information related to electronic messages, such as Internet Protocol addresses, domain names or the geographic location of information systems, which despite their apparent objectivity have little, if any, conclusive value for determining the physical location of the parties. Paragraph 4 of article 5 reflects that understanding by providing that the location of equipment and technology supporting an information system or the places from where the information system may be accessed by other parties do not by themselves constitute a place of business. However, nothing in the Model Law prevents a court or arbitrator from taking into account the assignment of a domain name as a possible element, among others, to determine a party’s location, where appropriate.

68. Paragraph 5 of article 5 reflects the fact that the current system for assignment of domain names was not originally conceived in geographical terms. Therefore, the apparent connection between a domain name and a country is often insufficient to conclude that there is a genuine and permanent link between the domain name user

and the country. Also, differences in national standards and procedures for the assignment of domain names make them unfit for establishing a presumption, while the insufficient transparency of the procedures for assigning domain names in some jurisdictions makes it difficult to ascertain the level of reliability of each national procedure.

Chapter II. Application of legal requirements to data messages

Article 6. Legal recognition of data messages

69. Article 6 embodies the fundamental principle that data messages should not be discriminated against, i.e., that there should be no disparity of treatment between data messages and paper documents. It is intended to apply notwithstanding any statutory requirements for a "writing" or an original. That fundamental principle is intended to find general application and its scope should not be limited to evidence or other matters covered in Chapter II. It should be noted, however, that such a principle is not intended to override any of the requirements contained in articles 7 to 12. By stating that "information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message", article 6 merely indicates that the form in which certain information is presented or retained cannot be used as the only reason for which that information would be denied legal effectiveness, validity or enforceability. However, article 6 should not be misinterpreted as establishing the legal validity of any given data message or of any information contained therein.

70. No specific rule has been included in the Model Law on the time and place of formation of contracts in cases where an offer or the acceptance of an offer is expressed by means of an electronic communications message, in order not to interfere with national law applicable to contract formation. It was considered that such a provision would exceed the aim of the Model Law, which is limited to providing that electronic communications would achieve the same degree of legal certainty as paper-based communications. The combination of existing rules on the formation of contracts with the provisions contained in article 12 of the Model Law is designed to dispel uncertainty as to the time and place of formation of contracts in cases where the offer or the acceptance are exchanged electronically.

71. Provisions similar to paragraph 4 of article 6 have been included in a number of national laws relating to electronic commerce to highlight the principle of party autonomy and make it clear that the legal recognition of electronic communications does not require a party to use or accept them.

72. However, the consent to use electronic communications does not need to be expressly indicated or be given in any particular form. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic communications, such an explicit contract should not be necessary. Indeed, such a requirement would itself be an unreasonable barrier to electronic commerce. Under the Model Law, the consent to use electronic communications is to be found from all circumstances, including the parties' conduct. Examples of circumstances from which it may be found that a party has agreed to conduct transactions electronically include the following: handing out a business card with a business e-mail address; inviting a potential client to visit a company's website or accessing someone's website to place an order; and advertising goods over the Internet or through e-mail.

Incorporation by reference

73. Article 6 paragraph 3 is intended to provide guidance as to how legislation aimed at facilitating the use of electronic commerce might deal with the situation where certain terms and conditions, although not stated in full but merely referred to in a data message, need to be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of that data message. Such recognition is acceptable under the laws of many States with respect to conventional paper communications, usually with some rules of law providing safeguards, for example rules on consumer protection. The expression "incorporation by reference" is often used as a concise means of describing situations where a document refers generically to provisions which are detailed elsewhere, rather than reproducing them in full.

74. In an electronic environment, incorporation by reference is often regarded as essential to widespread use of electronic data interchange (EDI), electronic mail, digital certificates and other forms of electronic commerce. For example, electronic communications are typically structured in such a way that large numbers of messages are exchanged, with each message containing brief information, and relying much more frequently than paper documents on reference to information accessible elsewhere. In electronic communications, practitioners should not have imposed upon them an obligation to overload their data messages with quantities of free text when they can take advantage of extrinsic sources of information, such as databases, code lists or glossaries, by making use of abbreviations, codes and other references to such information.

75. Article 6 paragraph 3 is one of the few instances where the Model Law may impact on the domestic law of Member States by creating additional requirements for incorporation by reference, or setting a different standard. It also infringes the principle of functional equivalence. However, it is deemed necessary and just under the

circumstances that a party wishing to incorporate additional terms into a contract should make those terms available at the time of contracting. Electronic means of communications provide an easy, quick and cheap method of making such terms available to the other party. The provisions contained in Article 6 paragraph 3 have been adopted from the similar provision in the South African Electronic Communications and Transactions Act 25 of 2005.

76. One aim of article 6 is to facilitate incorporation by reference in an electronic context by removing the uncertainty prevailing in many jurisdictions as to whether the provisions dealing with traditional incorporation by reference are applicable to incorporation by reference in an electronic environment.

Article 6. Writing

77. The Model Law relies on what has become known as the “functional equivalence approach” with a view to determining how the purposes or functions of paper-based documents could be fulfilled through electronic commerce techniques. For example, a paper document may serve any of the following functions: to ensure that a record would be legible by all; to ensure that a record would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts.

78. In respect of all of the above-mentioned functions of paper, electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met. However, the adoption of the functional-equivalent approach should not result in imposing on users of electronic commerce more stringent standards of security (and the costs associated with them) than in a paper-based environment.

79. The functional-equivalent approach has been taken in article 7 to 9 of the Model Law with respect to the concepts of “writing”, “signature” and “original” but not with respect to other legal concepts dealt with by domestic law.

80. Article 7 is intended to define the basic standard to be met by a data message in order to be considered as meeting a requirement (which may result from statute, regulation or judge-made law) that information be retained or presented "in writing" (or that the information be contained in a "document" or other paper-based instrument). It may be noted that article 7 is part of a set of three articles (articles 7 to 9), which share the same structure and should be read together.

81. In the preparation of the Model Law, particular attention was paid to the functions traditionally performed by various kinds of "writings" in a paper-based environment. For example, the following non-exhaustive list indicates reasons why national laws require the use of "writings": (1) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; (2) to help the parties be aware of the consequences of their entering into a contract; (3) to provide that a document would be legible by all; (4) to provide that a document would remain unaltered over time and provide a permanent record of a transaction; (5) to allow for the reproduction of a document so that each party would hold a copy of the same data; (6) to allow for the authentication of data by means of a signature; (7) to provide that a document would be in a form acceptable to public authorities and courts; (8) to finalize the intent of the author of the "writing" and provide a record of that intent; (9) to allow for the easy storage of data in a tangible form; (10) to facilitate control and sub-sequent audit for accounting, tax or regulatory purposes; and (11) to bring legal rights and obligations into existence in those cases where a "writing" was required for validity purposes.

82. However, in the preparation of the Model Law, it was found that it would be inappropriate to adopt an overly comprehensive notion of the functions performed by writing. Existing requirements that data be presented in written form often combine the requirement of a "writing" with concepts distinct from writing, such as signature and original. Thus, when adopting a functional approach, attention should be given to the fact that the requirement of a "writing" should be considered as the lowest layer in a hierarchy of form requirements, which provide distinct levels of reliability, traceability and inalterability with respect to paper documents. The requirement that data be presented in written form (which can be described as a "threshold requirement") should thus not be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act". For example, under certain national laws, a written document that is neither dated nor signed, and the author of which either is not identified in the written document or is identified by a mere letterhead, would be regarded as a "writing" although it might be of little evidential weight in the absence of other evidence (e.g., testimony) regarding the authorship of the document. In addition, the notion of inalterability should not be considered as built into the concept of writing as an absolute requirement since a "writing" in pencil might still be considered a "writing" under certain existing legal definitions. Taking into account the way in which such issues as integrity of the data and protection against fraud are dealt with in a paper-based environment, a fraudulent document would nonetheless be regarded as a "writing". In general, notions such as "evidence" and "intent of the parties to bind

themselves" are to be tied to the more general issues of reliability and authentication of the data and should not be included in the definition of a "writing".

83. The purpose of article 7 is not to establish a requirement that, in all instances, data messages should fulfil all conceivable functions of a writing. Rather than focusing upon specific functions of a "writing", for example, its evidentiary function in the context of tax law or its warning function in the context of civil law, article 7 focuses upon the basic notion of the information being reproduced and read. That notion is expressed in article 7 in terms that were found to provide an objective criterion, namely that the information in a data message must be accessible so as to be usable for subsequent reference. The use of the word "accessible" is meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained. The word "usable" is not intended to cover only human use but also computer processing. As to the notion of "subsequent reference", it was preferred to such notions as "durability" or "non-alterability", which would have established too harsh standards, and to such notions as "readability" or "intelligibility", which might constitute too subjective criteria.

84. The principle embodied in paragraph (3) of articles 7 and 8, and in paragraph (4) of article 9, is that an enacting State may exclude from the application of those articles certain situations to be specified in the legislation enacting the Model Law. An enacting State may wish to exclude specifically certain types of situations, depending in particular on the purpose of the formal requirement in question. One such type of situation may be the case of writing requirements intended to provide notice or warning of specific factual or legal risks, for example, requirements for warnings to be placed on certain types of products. Another specific exclusion might be considered, for example, in the context of formalities required pursuant to international treaty obligations of the enacting State (e.g., the requirement that a cheque be in writing pursuant to the Convention providing a Uniform Law for Cheques, Geneva, 1931) and other kinds of situations and areas of law that are beyond the power of the enacting State to change by means of a statute. The exclusions may, however, also be covered by a general exclusion in Article 1 instead.

85. Paragraph (3) was included with a view to enhancing the acceptability of the Model Law. It recognizes that the matter of specifying exclusions should be left to enacting States, an approach that would take better account of differences in national circumstances. However, it should be noted that the objectives of the Model Law would not be achieved if paragraph (3) were used to establish blanket exceptions, and the opportunity provided by paragraph (3) in that respect should be avoided. Numerous exclusions from the scope of articles 6 to 8 would raise needless obstacles to the development of modern communication techniques, since what the Model Law contains

are very fundamental principles and approaches that are expected to find general application.

86. In certain common law countries the words “the law” would normally be interpreted as referring to common law rules, as opposed to statutory requirements, while in some civil law jurisdictions the word “the law” is typically used to refer narrowly to legislation enacted by Parliament. In the context of the Model Law, however, the words “the law” refer to those various sources of law and are intended to encompass not only statutory or regulatory law, including international conventions or treaties ratified by a contracting State, but also judicially created law and other procedural law.

Article 8. Signature

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

Notion and types of electronic signatures

88. In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. The potential for fraud is considerable, due to the ease of intercepting and altering information in electronic form without detection and the speed of processing multiple transactions. The purpose of various techniques currently available on the market or still under development is to offer the technical means by which some or all of the functions identified as characteristic of handwritten signatures can be performed in an electronic environment. Such techniques may be referred to broadly as “electronic signatures”.

89. In considering uniform rules on electronic signatures, various electronic signature techniques have been examined currently being used or still under development. The common purpose of those techniques is to provide functional equivalents to (a) handwritten signatures; and (b) other kinds of authentication mechanisms used in a paper-based environment (e.g. seals or stamps). The same techniques may perform additional functions in the sphere of electronic commerce, which are derived from the functions of a signature but correspond to no strict equivalent in a paper-based environment.

90. Electronic signatures may take the form of “digital signatures” based on public-key cryptography, which are often generated within a “public-key infrastructure” where the functions of creating and verifying the digital signature are supported by certificates issued by a trusted third party. This is the option adopted in the Mauritian legislation of 2000. However, there are various other devices, also covered in the broad notion of “electronic signature”, which may currently be used, or considered for future use, with a view to fulfilling one or more of the above-mentioned functions of handwritten signatures. For example, certain techniques would rely on authentication through a biometric device based on handwritten signatures. In such a device, the signatory would sign manually, using a special pen, either on a computer screen or on a digital pad. The handwritten signature would then be analysed by the computer and stored as a set of numerical values, which could be appended to a data message and displayed by the relying party for authentication purposes. Such an authentication system would presuppose that samples of the handwritten signature had been previously analysed and stored by the biometric device. Other techniques would involve the use of personal identification numbers (PINs), digitized versions of handwritten signatures and other methods, such as clicking an “OK box” and biometric devices such as fingerprint or retina scanners

Technological neutrality

91. Article 8 is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the Model Law, the following functions of a signature were considered: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; and to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that is signed. For example, a signature might attest to the intent of a party to be bound by the content of a signed contract, to endorse authorship of a text, to associate itself with the content of a document written by someone else or to show when and at what time a person had been at a given place.

92. Alongside the traditional handwritten signature, there are several procedures (e.g. stamping and perforation), sometimes also referred to as “signatures”, that provide varying levels of certainty. For example, some countries generally require that contracts for the sale of goods above a certain amount should be “signed” in order to be enforceable. However, the concept of signature adopted in that context is such that a stamp, perforation or even a typewritten signature or a printed letterhead might be regarded as sufficient to fulfil the signature requirement. At the other end of the spectrum, there are requirements that combine the traditional handwritten signature with additional security procedures such as the confirmation of the signature by witnesses.

93. In theory, it may seem desirable to develop functional equivalents for the various types and levels of signature requirements in existence, so that users would know exactly the degree of legal recognition that could be expected from the use of the various means of authentication. However, any attempt to develop rules on standards and procedures to be used as substitutes for specific instances of “signatures” might create the risk of tying the legal framework provided by the Model Law to a given state of technical development.

94. Therefore, the Model Law does not attempt to identify specific technological equivalents to particular functions of handwritten signatures. Instead, it establishes the general conditions under which electronic communications would be regarded as authenticated with sufficient credibility and would be enforceable in the face of signature requirements. Focusing on the two basic functions of a signature article 8 establishes the principle that, in an electronic environment, the basic legal functions of a signature are performed by way of a method that identifies the originator of an electronic communication and indicates the originator’s intention in respect of the information contained in the electronic communication.

95. Given the pace of technological innovation, the Model Law provides criteria for the legal recognition of electronic signatures irrespective of the technology used, for example, digital signatures relying on asymmetric cryptography; biometric devices (enabling the identification of individuals by their physical characteristics, whether by hand or face geometry, fingerprint reading, voice recognition or retina scan, etc.); symmetric cryptography; the use of PINs; the use of “tokens” as a way of authenticating electronic communications through a smart card or other device held by the signatory; digitized versions of handwritten signatures; signature dynamics; and other methods, such as clicking an “OK box”.

Extent of legal recognition

96. The provisions of article 8 are only intended to remove obstacles to the use of electronic signatures and do not affect other requirements for the validity of the electronic communication to which the electronic signature relates. Under the Model Law, the mere signing of an electronic communication by means of a functional equivalent of a handwritten signature is not intended, in and of itself, to confer legal validity on the electronic communication. Whether an electronic communication that fulfils the requirement of a signature has legal validity is to be settled under the law applicable outside the Model Law.

97. For the purposes of article 8, it is irrelevant whether the parties are linked by prior agreement setting forth procedures for electronic communication (such as a trading partner agreement) or whether they had no prior contractual relationship regarding the

use of electronic commerce. The Model Law is thus intended to provide useful guidance both in a context where national laws would leave the question of authentication of electronic communications entirely to the discretion of the parties and in a context where requirements for signature, which are usually set by mandatory provisions of national law, should not be made subject to alteration by agreement of the parties.

98. The place of origin of an electronic signature, in and of itself, should in no way be a factor determining whether and to what extent foreign certificates or electronic signatures should be recognized as capable of being legally effective in a member State. Determination of whether, or the extent to which, an electronic signature is capable of being legally effective should not depend on the place where the electronic signature was created or where the infrastructure (legal or otherwise) that supports the electronic signature is located, but on its technical reliability.

Basic conditions for functional equivalence

99. According to article 8, an electronic signature must be capable of identifying the signatory and indicating the signatory's intention in respect of the information contained in the electronic communication.

100. The formulation of article 8 differs slightly from the wording of article 7, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, where reference is made to an indication of the signatory's "approval" of the information contained in the electronic communication. It was noted that there might be instances where the law required a signature, but that signature did not have the function of indicating the signing party's approval of the information contained in the electronic communication. For example, many countries have requirements of law for notarization of a document by a notary or attestation by a commissioner for oaths. In such cases, the signature of the notary or commissioner merely identifies the notary or commissioner and associates the notary or commissioner with the contents of the document, but does not indicate the approval by the notary or commissioner of the information contained in the document. Similarly, some laws require the execution of a document to be witnessed by witnesses, who may be required to append their signatures to that document. The signatures of the witnesses merely identify them and associate them with the contents of the document witnessed, but do not indicate their approval of the information contained in the document. The current formulation of article 8 is aimed at making it abundantly clear that the notion of "signature" in the Model Law does not necessarily and in all cases imply a party's approval of the entire content of the communication to which the signature is attached.

Reliability of signature method.

101. Article 8 establishes a flexible approach to the level of security to be achieved by the method of identification used. The method used should be as reliable as is appropriate for the purpose for which the electronic communication is generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee. Legal, technical and commercial factors that may be taken into account in determining whether the method used under paragraph 3 (a) is appropriate, include the following: (a) the sophistication of the equipment used by each of the parties; (b) the nature of their trade activity; (c) the frequency at which commercial transactions take place between the parties; (d) the kind and size of the transaction; (e) the function of signature requirements in a given statutory and regulatory environment; (f) the capability of communication systems; (g) compliance with authentication procedures set forth by intermediaries; (h) the range of authentication procedures made available by any intermediary; (i) compliance with trade customs and practice; (j) the existence of insurance coverage mechanisms against unauthorized communications; (k) the importance and the value of the information contained in the electronic communication; (l) the availability of alternative methods of identification and the cost of implementation; (m) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the electronic communication was communicated; and (n) any other relevant factor.

102. Article 8 paragraph (1)(b) establishes a “reliability test” with a view to ensuring the correct interpretation of the principle of functional equivalence in respect of electronic signatures. The “reliability test”, which appears also in article 7, paragraph 1 (b), of the UNCITRAL Model Law on Electronic Commerce, reminds courts of the need to take into account factors other than technology, such as the purpose for which the electronic communication was generated or communicated, or a relevant agreement of the parties, in ascertaining whether the electronic signature used was sufficient to identify the signatory. Without paragraph 1 (b) of article 8 of the Model Law, the courts in some States might be inclined to consider, for instance, that only signature methods that employed high-level security devices are adequate to identify a party, despite an agreement of the parties to use simpler signature methods.

103. However, it is considered that the Model Law should not allow a party to invoke the “reliability test” to repudiate its signature in cases where the actual identity of the party and its actual intention could be proved. The requirement that an electronic signature needs to be “as reliable as appropriate” should not lead a court or trier of fact to invalidate the entire contract on the ground that the electronic signature was not appropriately reliable if there is no dispute about the identity of the person signing or the

fact of signing, that is, no question as to authenticity of the electronic signature. Such a result would be particularly unfortunate, as it would allow a party to a transaction in which a signature was required to try to escape its obligations by denying that its signature (or the other party's signature) was valid—not on the ground that the purported signer did not sign, or that the document it signed had been altered, but only on the ground that the method of signature employed was not “as reliable as appropriate” in the circumstances. In order to avoid these situations, paragraph 1 (b) (ii) validates a signature method— regardless of its reliability in principle—whenever the method used is proven in fact to have identified the signatory and indicated the signatory's intention in respect of the information contained in the electronic communication.

104. The notion of an "agreement between the originator and the addressee of a data message" is to be interpreted as covering not only bilateral or multilateral agreements concluded between parties exchanging directly data messages (e.g., "trading partners agreements", "communication agreements" or " interchange agreements") but also agreements involving intermediaries such as networks (e.g., "third-party service agreements"). Agreements concluded between users of electronic commerce and networks may incorporate "system rules", i.e., administrative and technical rules and procedures to be applied when communicating data messages. However, a possible agreement between originators and addressees of data messages as to the use of a method of authentication is not conclusive evidence of whether that method is reliable or not.

105. It should be noted that, under the Model Law, the mere signing of a data message by means of a functional equivalent of a handwritten signature is not intended, in and of itself, to confer legal validity on the data message. Whether a data message that fulfilled the requirement of a signature has legal validity is to be settled under the law applicable outside the Model Law.

Article 9. Original

106 If "original" were defined as a medium on which information was fixed for the first time, it would be impossible to speak of "original" data messages, since the addressee of a data message would always receive a copy thereof. However, article 9 should be put in a different context. The notion of "original" in article 9 is useful since in practice many disputes relate to the question of originality of documents, and in electronic commerce the requirement for presentation of originals constitutes one of the main obstacles that the Model Law attempts to remove. Although in some jurisdictions the concepts of "writing", "original" and "signature" may overlap, the Model Law approaches

them as three separate and distinct concepts. Article 9 is also useful in clarifying the notions of "writing" and "original", in particular in view of their importance for purposes of evidence.

107. Article 9 is pertinent to documents of title and negotiable instruments, in which the notion of uniqueness of an original is particularly relevant. However, attention is drawn to the fact that the Model Law is not intended only to apply to documents of title and negotiable instruments, or to such areas of law where special requirements exist with respect to registration or notarization of "writings", e.g., family matters or the sale of real estate. Examples of documents that might require an "original" are trade documents such as weight certificates, agricultural certificates, quality or quantity certificates, inspection reports, insurance certificates, etc. While such documents are not negotiable or used to transfer rights or title, it is essential that they be transmitted unchanged, that is in their "original" form, so that other parties in international commerce may have confidence in their contents. In a paper-based environment, these types of document are usually only accepted if they are "original" to lessen the chance that they be altered, which would be difficult to detect in copies. Various technical means are available to certify the contents of a data message to confirm its "originality". Without this functional equivalent of originality, the sale of goods using electronic commerce would be hampered since the issuers of such documents would be required to retransmit their data message each and every time the goods are sold, or the parties would be forced to use paper documents to supplement the electronic commerce transaction.

108. Article 9 should be regarded as stating the minimum acceptable form requirement to be met by a data message for it to be regarded as the functional equivalent of an original. The provisions of Article 9 should be regarded as mandatory, to the same extent that existing provisions regarding the use of paper-based original documents would be regarded as mandatory. The indication that the form requirements stated in Article 9 are to be regarded as the "minimum acceptable" should not, however, be construed as inviting States to establish requirements stricter than those contained in the Model Law.

109. Article 9 emphasizes the importance of the integrity of the information for its originality and sets out criteria to be taken into account when assessing integrity by reference to systematic recording of the information, assurance that the information was recorded without lacunae and protection of the data against alteration. It links the concept of originality to a method of authentication and puts the focus on the method of authentication to be followed in order to meet the requirement. It is based on the following elements: a simple criterion as to "integrity" of the data; a description of the elements to be taken into account in assessing the integrity; and an element of flexibility, i.e., a reference to circumstances.

110. As regards the words "the time when it was first generated in its final form" in paragraph (1)(a), it should be noted that the provision is intended to encompass the situation where information was first composed as a paper document and subsequently transferred on to a computer. In such a situation, paragraph (1)(a) is to be interpreted as requiring assurances that the information has remained complete and unaltered from the time when it was composed as a paper document onwards, and not only as from the time when it was translated into electronic form. However, where several drafts were created and stored before the final message was composed, paragraph (1)(a) should not be misinterpreted as requiring assurance as to the integrity of the drafts.

111. Paragraph (3)(a) sets forth the criteria for assessing integrity, taking care to except necessary additions to the first (or "original") data message such as endorsements, certifications, notarizations, etc. from other alterations. As long as the contents of a data message remain complete and unaltered, necessary additions to that data message would not affect its "originality". Thus when an electronic certificate is added to the end of an "original" data message to attest to the "originality" of that data message, or when data is automatically added by computer systems at the start and the finish of a data message in order to transmit it, such additions would be considered as if they were a supplemental piece of paper with an "original" piece of paper, or the envelope and stamp used to send that "original" piece of paper.

112. As in other articles of Chapter II, the words "the law" in the opening phrase of Article 9 are to be understood as encompassing not only statutory or regulatory law but also judicially-created law and other procedural law. In certain common law countries, where the words "the law" would normally be interpreted as referring to common law rules, as opposed to statutory requirements, it should be noted that, in the context of the Model Law, the words "the law" are intended to encompass those various sources of law. However, "the law", as used in the Model Law, is not meant to include areas of law that have not become part of the law of a State and are sometimes, somewhat imprecisely, referred to by expressions such as "lex mercatoria" or "law merchant".

113. Paragraph (4), as was the case with similar provisions in articles 7 and 8, was included with a view to enhancing the acceptability of the Model Law. It recognizes that the matter of specifying exclusions should be left to enacting States, an approach that would take better account of differences in national circumstances. However, it should be noted that the objectives of the Model Law would not be achieved if paragraph (4) were used to establish blanket exceptions. Numerous exclusions from the scope of articles 7 to 9 would raise needless obstacles to the development of modern communication techniques, since what the Model Law contains are very fundamental principles and approaches that are expected to find general application. Instead of the

exclusion here, enacting States may consider using a the general exclusion under article 1.

Article 10. Admissibility and evidential weight of data messages

114. The purpose of article 10 is to establish both the admissibility of data messages as evidence in legal proceedings and their evidential value. With respect to admissibility, paragraph (1), establishing that data messages should not be denied admissibility as evidence in legal proceedings on the sole ground that they are in electronic form, puts emphasis on the general principle stated in article 4 and is needed to make it expressly applicable to admissibility of evidence, an area in which particularly complex issues might arise in certain jurisdictions. The term "best evidence" is a term understood in, and necessary for, certain common law jurisdictions. However, the notion of "best evidence" could raise a great deal of uncertainty in legal systems in which such a rule is unknown. States in which the term would be regarded as meaningless and potentially misleading may wish to enact the Model Law without the reference to the "best evidence" rule contained in paragraph (1).

115. As regards the assessment of the evidential weight of a data message, paragraph (2) provides useful guidance as to how the evidential value of data messages should be assessed (e.g., depending on whether they were generated, stored or communicated in a reliable manner).

Article 11. Retention of data messages

116. Article 11 establishes a set of alternative rules for existing requirements regarding the storage of information (e.g., for accounting or tax purposes) that may constitute obstacles to the development of modern trade.

117. Paragraph (1) is intended to set out the conditions under which the obligation to store data messages that might exist under the applicable law would be met. Subparagraph (a) reproduces the conditions established under article 7 for a data message to satisfy a rule which prescribes the presentation of a "writing". Subparagraph (b) emphasizes that the message does not need to be retained unaltered as long as the information stored accurately reflects the data message as it was sent. It would not be appropriate to require that information should be stored unaltered, since usually messages are decoded, compressed or converted in order to be stored.

118. Subparagraph (c) is intended to cover all the information that may need to be stored, which includes, apart from the message itself, certain transmittal information that

may be necessary for the identification of the message. Subparagraph (c), by imposing the retention of the transmittal information associated with the data message, is creating a standard that is higher than most standards existing under national laws as to the storage of paper-based communications. However, it should not be understood as imposing an obligation to retain transmittal information additional to the information contained in the data message when it was generated, stored or transmitted, or information contained in a separate data message, such as an acknowledgement of receipt. Moreover, while some transmittal information is important and has to be stored, other transmittal information can be exempted without the integrity of the data message being compromised. That is the reason why subparagraph (c) establishes a distinction between those elements of transmittal information that are important for the identification of the message and the very few elements of transmittal information covered in paragraph (2) (e.g., communication protocols), which are of no value with regard to the data message and which, typically, would automatically be stripped out of an incoming data message by the receiving computer before the data message actually entered the information system of the addressee.

119. In practice, storage of information, and especially storage of transmittal information, may often be carried out by someone other than the originator or the addressee, such as an intermediary. Nevertheless, it is intended that the person obligated to retain certain transmittal information cannot escape meeting that obligation simply because, for example, the communications system operated by that other person does not retain the required information. This is intended to discourage bad practice or wilful misconduct. Paragraph (3) provides that in meeting its obligations under paragraph (1), an addressee or originator may use the services of any third party, not just an intermediary.

Chapter III. Communication of data messages

Article 12. Formation and validity of contracts

120. Article 12 is not intended to interfere with the law on formation of contracts but rather to promote trade by providing increased legal certainty as to the conclusion of contracts by electronic means. It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed. In certain countries, a provision along the lines of paragraph (1) might be regarded as merely stating the obvious, namely that an offer and an acceptance, as any other expression of will, can be communicated by any means, including data messages. However, the provision is needed in view of the remaining uncertainties in a considerable number of countries as to whether contracts can validly be concluded by electronic means. Such

uncertainties may stem from the fact that, in certain cases, the data messages expressing offer and acceptance are generated by computers without immediate human intervention, thus raising doubts as to the expression of intent by the parties. Another reason for such uncertainties is inherent in the mode of communication and results from the absence of a paper document.

121. It may also be noted that paragraph (1) reinforces, in the context of contract formation, a principle already embodied in other articles of the Model Law, such as articles 6, 10 and 17, all of which establish the legal effectiveness of data messages. However, paragraph (1) is needed since the fact that electronic messages may have legal value as evidence and produce a number of effects, including those provided in articles 9 and 17, does not necessarily mean that they can be used for the purpose of concluding valid contracts.

122. Paragraph (1) covers not merely the cases in which both the offer and the acceptance are communicated by electronic means but also cases in which only the offer or only the acceptance is communicated electronically. As to the time and place of formation of contracts in cases where an offer or the acceptance of an offer is expressed by means of a data message, no specific rule has been included in the Model Law in order not to interfere with national law applicable to contract formation. It was felt that such a provision might exceed the aim of the Model Law, which should be limited to providing that electronic communications would achieve the same degree of legal certainty as paper-based communications. The combination of existing rules on the formation of contracts with the provisions contained in article 19 is designed to dispel uncertainty as to the time and place of formation of contracts in cases where the offer or the acceptance are exchanged electronically.

123. The words "unless otherwise stated by the parties", which merely restate, in the context of contract formation, the recognition of party autonomy expressed in article 4, are intended to make it clear that the purpose of the Model Law is not to impose the use of electronic means of communication on parties who rely on the use of paper-based communication to conclude contracts. Thus, article 12 should not be interpreted as restricting in any way party autonomy with respect to parties not involved in the use of electronic communication.

Article 13. Use of automated message systems for contract formation

Purpose of the article

124. Automated message systems, sometimes called "electronic agents", are being used increasingly in electronic commerce and have caused scholars in some legal

systems to revisit traditional legal theories of contract formation to assess their adequacy to contracts that come into being without human intervention.

125. Existing uniform law conventions do not seem in any way to preclude the use of automated message systems, for example for issuing purchase orders or processing purchase applications. This seems to be the case in connection with the United Nations Sales Convention, which allows the parties to create their own rules, for example in an EDI trading partner agreement regulating the use of “electronic agents”. The UNCITRAL Model Law on Electronic Commerce also lacks a specific rule on the matter. While nothing in the Model Law seems to create obstacles to the use of fully automated message systems, it does not deal specifically with those systems, except for the general rule on attribution in article 13, paragraph 2 (b).

126. Even if no modification appeared to be needed in general rules of contract law, it is considered that it would be useful for the Model Law to make provisions to facilitate the use of automatic message systems in electronic commerce. A number of jurisdictions have found it necessary or at least useful to enact similar provisions in domestic legislation on electronic commerce. Article 13 of the Model Law embodies a non-discrimination rule intended to make it clear that the absence of human review of or intervention in a particular transaction does not by itself preclude contract formation. Therefore, while a number of reasons may otherwise render a contract invalid under domestic law, the sole fact that automated message systems were used for purposes of contract formation will not deprive the contract of legal effectiveness, validity or enforceability.

Attribution of actions performed by automated message systems

127. At present, the attribution of actions of automated message systems to a person or legal entity is based on the paradigm that an automated message system is capable of performing only within the technical structures of its preset programming. However, at least in theory it is conceivable that future generations of automated information systems may be created with the ability to act autonomously and not just automatically. That is, through developments in artificial intelligence, a computer may be able to learn through experience, modify the instructions in its own programs and even devise new instructions.

128. Already during the preparation of the Model Law on Electronic Commerce, UNCITRAL had taken the view that that, while the expression “electronic agent” had been used for purposes of convenience, the analogy between an automated message system and a sales agent was not appropriate. General principles of agency law (for example, principles involving limitation of liability as a result of the faulty behaviour of the agent) could not be used in connection with the operation of such systems. It was

also considered that, as a general principle, the person (whether a natural person or a legal entity) on whose behalf a computer was programmed should ultimately be responsible for any message generated by the machine.

Means of indicating assent and extent of human intervention

129. When a contract is formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, there are several ways to indicate the contracting parties' assent. Computers may exchange messages automatically according to an agreed standard, or a person may indicate assent by touching or clicking on a designated icon or place on a computer screen. Article 13 of the Model Law does not attempt to illustrate the ways in which assent may be expressed out of a concern to respect technological neutrality and because any illustrative list would carry the risk of being incomplete or becoming dated, as other means of indicating assent not expressly mentioned might already be in use or might possibly become widely used in the future.

130. The central rule in the article is that the validity of a contract does not require human review of each of the individual actions carried out by the automated message system or the resulting contract. For the purposes of article 13 of the Model Law, it is irrelevant whether all message systems involved are fully automated or merely semi-automated (for example, where some actions are only effected following some form of human intervention), as long as at least one of them does not need human "review or intervention", to complete its task.

Article 14. Error in electronic communications

Electronic commerce and errors

131. The question of mistakes and errors is closely related to the use of automated message systems in electronic commerce. Such errors may be either the result of human actions (for example, typing errors) or the consequence of malfunctioning of the message system used.

132. Recent legislation on electronic commerce, including some domestic enactments of the UNCITRAL Model Law, contain provisions dealing with errors made by natural persons when dealing with an automated computer system of another person, typically by setting out the conditions under which a natural person is not bound by a contract in the event that the person made an error in an electronic communication. The rationale for these provisions seems to be the relatively higher risk that an error made in transactions involving a natural person, on the one hand, and an automated computer system, on the other, might not be noticed, as compared with transactions that involve only natural persons. Errors made by the natural person in such a situation may

become irreversible once acceptance is dispatched. Indeed, in a transaction between individuals there is a greater ability to correct the error before parties have acted on it. However, when an individual makes an error while dealing with the automated message system of the other party, it may not be possible to correct the error before the other party has shipped or taken other action in reliance on the erroneous communication.

133. In the drafting of the Model law it was recognised that the Model Law should avoid undue interference with well established notions of contract law and to avoid creating specific rules for electronic transactions that might vary from rules that applied to other modes of negotiation. Nevertheless, it felt that there was a need for a specific provision dealing with narrowly defined types of error in the light of the relatively higher risk of human errors being made in online transactions made through automated message systems than in more traditional modes of contract negotiation. The contract law of some legal systems further confirms the need for the article, for example in view of rules that require a party seeking to avoid the consequences of an error to show that the other party knew or ought to have known that a mistake had been made. While there are means of making such proof if there is an individual at each end of the transaction, awareness of the mistake is almost impossible to demonstrate when there is an automated process at the other end.

Scope and purpose of the article

134. Article 14 of the Model Law applies to a very specific situation. It is only concerned with errors that occur in transmissions between a natural person and an automated message system when the system does not provide the person with the possibility to correct the error. The conditions for withdrawal or avoidance of electronic communications affected by errors that occur in any other context are left for domestic law.

135. The article deals only with errors made by a natural person, as opposed to a computer or other machine. However, the right to withdraw the portion of the electronic communication is not a right of the natural person but of the party on whose behalf the person was acting.

136. Generally, errors made by any automated system should ultimately be attributable to the persons on whose behalf the system is operated. However, already during the preparation of the UNCITRAL Model Law on Electronic Commerce, it was argued that some circumstances might call for a mitigation of that principle, such as when an automated system generated erroneous messages in a manner that could not have reasonably been anticipated by the person on whose behalf the messages were sent. In practice, the extent to which the party on whose behalf an automated message system is operated is responsible for all its actions may depend on various factors such as the

extent to which the party has control over the software or other technical aspects used in programming the system. Given the complexity of those questions, in respect of which domestic law may give varying answers depending on the factual situation, it was felt that it would not be appropriate to attempt to formulate uniform rules at the current stage and that jurisprudence should be allowed to evolve.

“Opportunity to correct errors”

137. Article 14 authorizes a party who makes an error to withdraw the portion of the electronic communication where the error was made if the automated message system did not provide the person with an opportunity to correct errors. The article does oblige the party on whose behalf the automated message system operates to make available procedures for detecting and correcting errors in electronic contract negotiation.

138. It was considered desirable to introduce such a general obligation, as an alternative for dealing with the rights of the parties after an error had occurred. Such an obligation exists in some domestic systems, but the consequences for a party's failure to provide procedures for detecting and correcting errors in electronic contract negotiation vary greatly from country to country. In some jurisdictions, such failure constitutes an administrative offence and subjects the infringer to payment of a fine. In other countries, the consequence is either to entitle a customer to rescind the contract or to extend the period within which a consumer may unilaterally cancel an order. The type of consequence provided in each case depends on the type of regulatory approach taken to electronic commerce. During the preparation of the Model Law it was felt that, however desirable such an obligation might be in the interest of promoting good business practices, the Model Law would not be an appropriate place for it, since the Model Law could not provide a complete system of sanctions appropriate for all circumstances. The agreement eventually reached on this point was that, instead of requiring generally that an opportunity to correct errors should be provided, the Model Law should limit itself to providing a remedy for the person making the error.

139. Article 14 of the Model Law deals with the allocation of risks concerning errors in electronic communications in a fair and sensible manner. An electronic communication can only be withdrawn if the automated message system did not provide the originator with an opportunity to correct the error before sending the electronic communication. If no such system is in place, the party on whose behalf the automated message system operates bears the risk of errors that may occur. Thus, the article gives an incentive to parties acting through automated message systems to build in safeguards that enable their contract partners to prevent the sending of an erroneous communication, or correct the error once sent. For example, the automated message system may be programmed to provide a “confirmation screen” to the person setting forth all the information the

individual initially approved. This would provide the person with the ability to prevent the erroneous communication from ever being sent. Similarly, the automated message system might receive the communication sent by the person and then send back a confirmation which the person must again accept before the transaction is completed. This would allow for correction of an erroneous communication. In either case, the automated message system would “provide an opportunity to correct the error,” and the article would not apply. Rather, other law would govern the effect of any error.

Notion and proof of “input error”

140. Article 14 of the Model Law is only concerned with “input” errors, that is, errors relating to inputting wrong data in communications exchanged with an automated message system. These are typically unintentional keystroke errors, which are felt to be potentially more frequent in transactions made through automated information systems than in more traditional modes of contract negotiation. For example, while it would be unlikely for a person to deliver documents unintentionally to a post office, in practice there were precedents where persons had claimed not to have intended to confirm a contract by hitting “Enter” on a computer keyboard or clicking on an “I agree” icon on a computer screen.

141. The article is not intended to be media-neutral, since it deals with a specific issue affecting certain forms of electronic communications. In doing so, article 14 does not overrule existing law on error, but merely offers a meaningful addition to it by focusing on the importance of providing means of having the error corrected. Other types of error are left for the general doctrine of error under domestic law.

142. As is already the case in a paper-based environment, the factual determination as to whether or not an input error has indeed occurred is a matter that needs to be assessed by the courts in the light of the entire evidence and relevant circumstances, including the overall credibility of a party’s assertions. The right to withdraw an electronic communication is an exceptional remedy to protect a party in error and not a blank opportunity for parties to repudiate disadvantageous transactions or nullify what would otherwise be valid legal commitments freely accepted. This right is justified by the consideration that a reasonable person in the position of the originator would not have issued the electronic communication, had that person been aware of the error at that time. However, article 14 does not require a determination of the intent of the party who sent the allegedly erroneous message. If the operator of the automated message system fails to offer means for correcting errors despite the clear incentive to do so in article 14, it is reasonable to make such party bear the risk of errors being made in electronic communications exchanged through the automated message system. Limiting the right of the party in error to withdraw the messages would not further the

intended goal of the provision to encourage parties to provide for an error-correction method in automated message systems.

“Withdraw”

143. Article 14 does not invalidate an electronic communication in which an input error is made. It only gives the person in error the right to “withdraw” the portion of the electronic communication in which the error was made. The term “withdraw” was deliberately used instead of other alternatives, such as “avoiding the consequences” of the electronic communication or similar expressions that might be interpreted as referring to the validity of an act and lead to discussions as to whether the act was null and void or avoidable at the party’s request.

144. Furthermore, article 14 does not provide for a right to “correct” the error made. It is considered that the person who has made an error should only have the right to withdraw the portion of the electronic communication in which the error was made. In most legal systems, the typical consequence of an error is to make it possible for the party in error to avoid the effect of the transaction resulting from its error, but not necessarily to restore the original intent and enter into a new transaction. While withdrawal may in most cases equate to nullification of a communication, correction would require the possibility to modify the previous communication.

The “portion of the electronic communication in which the input error was made”

145. The right to withdraw relates only to the part of the electronic communication where the error was made, if the information system so allows. This has the dual scope of granting to parties the possibility to redress errors in electronic communications, when no means of correcting errors are made available, and of preserving as much as possible the effects of the contract, by correcting only the portion vitiated by the error, in line with the general principle of preservation of contracts.

146. Article 14 does not expressly establish the consequences of the withdrawal of the portion of an electronic communication in which an error was made. It is understood that, depending on the circumstances, the withdrawal of a portion of an electronic communication may invalidate the entire communication or render it ineffective for purposes of contract formation. For example, if the portion withdrawn contains the reference to the nature of the goods being ordered, the electronic communication would not be “sufficiently definite” for purposes of contract formation under article 14, paragraph 1, of the United Nations Sales Convention. The same conclusion should apply if the portion withdrawn concerns price or quantity of goods and there are no other elements left in the electronic communication according to which they could be determined. However, withdrawal of a portion of the electronic communication that concerns matters that are not, by themselves or pursuant to the intent of the parties,

essential elements of the contract, may not necessarily void the entire electronic communication of its effectiveness.

Conditions for withdrawing an electronic communication

147. Paragraphs 1 (a) and (b) of article 14 establish two conditions for a party to exercise the right to withdraw: to notify the other party as soon as possible, and not to have used or received any material benefit or value from the goods or services, if any, received from the other party.

148. It is considered that the conditions set forth in paragraphs 1 (a) and 1 (b) provided a useful remedy for cases in which the automated message system proceeded to deliver physical or virtual goods or services immediately upon conclusion of the contract, with no possibility to stop the process. It is considered that in those cases paragraphs 1 (a) and 1 (b) provided a fair basis for the exercise of the right of withdrawal and would also tend to limit abuses by parties acting in bad faith.

Notice of error and time limit for withdrawing an electronic communication

149. Paragraph 1 (a) of article 14 requires the natural person or the party on whose behalf the person was acting to take prompt action to advise the other party of the error and of the fact that the individual did not intend to approve the electronic communication. Whether the action is prompt must be determined from all the circumstances including the person's ability to contact the other party. The natural person or the party on whose behalf the person was acting should advise the other party both of the error and of the lack of intention to be bound (i.e. avoidance) by the portion of the electronic communication in which the error occurred. However, the party receiving the message should be able to rely on the message, despite the error, up to the point of receiving a notice of error.

150. In some domestic systems that require the operator of automated message systems used for contract formation to provide an opportunity to correct errors, the right to withdraw or avoid a communication must be exercised at the moment of reviewing the communication before dispatch. Under those systems, the party who makes an error cannot withdraw the communication after it has been confirmed. Article 14 does not limit the right to withdrawal in this way, since in practice, a party may only become aware that it has made an error at a later stage, for instance, when it receives goods of a type or in a quantity different from what it had originally intended to order.

151. Furthermore, article 14 does not deal with the time limit for exercising the right of withdrawal in case of input error, as time limits are a matter of public policy in many legal systems. Nevertheless, the parties are not exposed to indefinite withdrawal. The combined impact of paragraphs 1 (a) and (b) of article 14 limits the time within which an

electronic communication could be withdrawn, since withdrawal has to occur “as soon as possible”, but in any event not later than the time when the party has used or received any material benefit or value from the goods or services received from the other party.

Loss of right to withdraw an electronic communication

152. It should be noted that goods or services may have been provided on the basis of an allegedly erroneous communication before receipt of the notice required by paragraph 1 (a) of article 14. Paragraph 1 (b) avoids unjustified windfalls to the natural person or the party on whose behalf that person was acting by erecting stringent requirements before the party in error may exercise the right of withdrawal under the paragraph. Under this provision, a party loses the right to withdrawal when it has received material benefits or value from the vitiated communication.

153. It is recognized that such a limitation in the right to invoke an error in order to avoid the consequences of a legally relevant act may not exist in all legal systems under general contract law. The risk of illegitimate windfalls for a person who successfully avoids a contract is usually dealt with by legal theories such as restitution or unjust enrichment. Nevertheless, it was felt that the particular context of electronic commerce justified establishing a particular rule to avoid that risk.

154. Various transactions in electronic commerce may be concluded nearly instantaneously and generate immediate value or benefit for the party purchasing the relevant goods or services. In many cases, it may be impossible to restore the conditions as they existed prior to the transaction. For example, if the consideration received is information in electronic form, it may not be possible to avoid the benefit conferred. While the medium containing the information could be returned, mere access to the information, or the ability to redistribute the information, would constitute a benefit that could not be returned. It may also occur that the mistaken party receives consideration that changes in value between the time of receipt and the first opportunity to return. In such a case restitution cannot be made adequately. In all these cases it would not be equitable to allow that, by withdrawing the portion of the electronic communication in which an error was made, a party could avoid the entire transaction while effectively retaining the benefit gained from it. This limitation is further important in view of the large number of electronic transactions involving intermediaries that may be harmed because transactions cannot be unwound.

Relationship to general law on mistake

155. The underlying purpose of article 14 is to provide a specific remedy in respect of input errors that occur under particular circumstances and not to interfere with the general doctrine on error under domestic laws. If the conditions set forth in paragraph 1

of article 14 are not met (that is, if the error is not an “input” error made by a natural person, or if the automated message system did in fact provide the person with an opportunity to correct the error), the consequences of the error would be as provided for by other laws, including the law on error, and by any agreement between the parties

Article 15 Invitations to make offers

156. Article 15 of the Model Law is based on article 14, paragraph 1, of the United Nations Sales Model Law. Its purpose is to clarify an issue that has raised considerable debate since the advent of the Internet, namely the extent to which parties offering goods or services through open, generally accessible communication systems, such as an Internet website, are bound by advertisements made in this way.

157. In a paper-based environment, advertisements in newspapers, radio and television, catalogues, brochures, price lists or other means not addressed to one or more specific persons, but generally accessible to the public, are regarded as invitations to submit offers (according to some legal writers, even in those cases where they are directed to a specific group of customers), since in such cases the intention to be bound is considered to be lacking. By the same token, the mere display of goods in shop windows and on self-service shelves is usually regarded as an invitation to submit offers. This understanding is consistent with article 14, paragraph 2, of the United Nations Sales Convention, which provides that a proposal other than a proposal addressed to one or more specific persons is to be considered as merely an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

158. In keeping with the principle of media neutrality, it is submitted that the solution for online transactions should not be different from the solution used for equivalent situations in a paper-based environment. As a general rule, therefore, a company that advertises goods or services on the Internet or through other open networks should be considered as merely inviting those who accessed the site to make offers. Thus, an offer of goods or services through the Internet does not *prima facie* constitute a binding offer.

Rationale for the rule

159. If the general notion of “offer” is transposed to an electronic environment, a company that advertises its goods or services on the Internet or through other open networks should be considered to be merely inviting those who access the site to make offers. Thus, an offer of goods or services through the Internet would not *prima facie* constitute a binding offer.

160. The difficulty that may arise in this context is how to strike a balance between a trader's possible intention (or lack thereof) of being bound by an offer, on the one hand, and the protection of relying on parties acting in good faith, on the other. The Internet makes it possible to address specific information to a virtually unlimited number of persons and current technology permits contracts to be concluded nearly instantaneously, or at least creates the impression that a contract has been so concluded.

161. It is submitted that the potentially unlimited reach of the Internet called for caution in establishing the legal value of these "offers". It was found that attaching a presumption of binding intention to the use of interactive applications would be detrimental for sellers holding a limited stock of certain goods, if the seller were to be liable to fulfil all purchase orders received from a potentially unlimited number of buyers. In order to avert that risk, companies offering goods or services through a website that uses interactive applications enabling negotiation and immediate processing of purchase orders for goods or services frequently indicate in their websites that they are not bound by those offers. If this is already the case in practice, the Model Law should not reverse it.

Notion of interactive applications and intention to be bound in case of acceptance

162. The general principle that offers of goods or services that are accessible to an unlimited number of persons are not binding applies even when the offer is supported by an interactive application. Typically an "interactive application" is a combination of software and hardware for conveying offers of goods and services in a manner that allows for the parties to exchange information in a structured form with a view to concluding a contract automatically. The expression "interactive applications" focuses on what is apparent to the person accessing the system, namely that it is prompted to exchange information through that information system by means of immediate actions and responses having an appearance of automaticity. It is irrelevant how the system functions internally and to what extent it is really automated (e.g. whether other actions, by human intervention or through the use of other equipment, might be required in order to effectively conclude a contract or process an order)

163. It is recognized that in some situations it may be appropriate to regard a proposal to conclude a contract that was supported by interactive applications as evidencing the party's intent to be bound in case of acceptance. Some business models are indeed based on the rule that offers through interactive applications are binding offers. In those cases, possible concerns about the limited availability of the relevant product or service are often addressed by including disclaimers stating that the offers are for a limited quantity only and by the automatic placement of orders according to the time they were

received. It is also noted that some case law seemed to support the view that offers made by so-called “click-wrap” agreements and in Internet auctions may be interpreted as binding. However, the extent to which such intent indeed exists is a matter to be assessed in the light of all the circumstances (for example, disclaimers made by the vendor or the general terms and conditions of the auction platform). As a general rule, it is considered that it would be unwise to presume that persons using interactive applications to make offers always intended to make binding offers, because that presumption would not reflect the prevailing practice in the marketplace.

164. It should be noted that a proposal to conclude a contract only constitutes an offer if a number of conditions are fulfilled. For a sales contract governed by the United Nations Sales Convention, for example, the proposal must be sufficiently definite by indicating the goods and expressly or implicitly fixing or making provision for determining the quantity and the price. Article 13 of the Model Law is not intended to create special rules for contract formation in electronic commerce. Accordingly, a party’s intention to be bound would not suffice to constitute an offer in the absence of those other elements.

Article 16. Recognition by parties of data messages

165. Article 16 was added, in recognition of the fact that article 12 was limited to dealing with data messages that were geared to the conclusion of a contract, but that the draft Model Law did not contain specific provisions on data messages that related not to the conclusion of contracts but to the performance of contractual obligations (e.g., notice of defective goods, an offer to pay, notice of place where a contract would be performed, recognition of debt). Since modern means of communication are used in a context of legal uncertainty, in the absence of specific legislation in most countries, it was felt appropriate for the Model Law not only to establish the general principle that the use of electronic communication should not be discriminated against, as expressed in article 6, but also to include specific illustrations of that principle. Contract formation is but one of the areas where such an illustration is useful and the legal validity of unilateral expressions of will, as well as other notices or statements that may be issued in the form of data messages, also needs to be mentioned.

166. As is the case with article 12, article 16 is not to impose the use of electronic means of communication but to validate such use, subject to contrary agreement by the parties. Thus, article 16 should not be used as a basis to impose on the addressee the legal consequences of a message, if the use of a non-paper-based method for its transmission comes as a surprise to the addressee.

Article 17. Attribution of data messages

167. Article 17 is intended to apply where there is a question as to whether a data message was really sent by the person who is indicated as being the originator. In the case of a paper-based communication the problem would arise as the result of an alleged forged signature of the purported originator. In an electronic environment, an unauthorized person may have sent the message but the authentication by code, encryption or the like would be accurate. The purpose of article 17 is not to assign responsibility. It deals rather with attribution of data messages by establishing a presumption that under certain circumstances a data message would be considered as a message of the originator, and goes on to qualify that presumption in case the addressee knew or ought to have known that the data message was not that of the originator.

168. Paragraph (1) recalls the principle that an originator is bound by a data message if it has effectively sent that message. Paragraph (2) refers to the situation where the message was sent by a person other than the originator who had the authority to act on behalf of the originator. Paragraph (2) is not intended to displace the domestic law of agency, and the question as to whether the other person did in fact and in law have the authority to act on behalf of the originator is left to the appropriate legal rules outside the Model Law.

169. Paragraph (3) deals with two kinds of situations, in which the addressee could rely on a data message as being that of the originator: firstly, situations in which the addressee properly applied an authentication procedure previously agreed to by the originator; and secondly, situations in which the data message resulted from the actions of a person who, by virtue of its relationship with the originator, had access to the originator's authentication procedures. By stating that the addressee "is entitled to regard a data as being that of the originator", paragraph (3) read in conjunction with paragraph (4)(a) is intended to indicate that the addressee could act on the assumption that the data message is that of the originator up to the point in time it received notice from the originator that the data message was not that of the originator, or up to the point in time when it knew or should have known that the data message was not that of the originator.

170. Under paragraph (3)(a), if the addressee applies any authentication procedures previously agreed to by the originator and such application results in the proper verification of the originator as the source of the message, the message is presumed to be that of the originator. That covers not only the situation where an authentication procedure has been agreed upon by the originator and the addressee but also situations where an originator, unilaterally or as a result of an agreement with an intermediary, identified a procedure and agreed to be bound by a data message that

met the requirements corresponding to that procedure. Thus, agreements that became effective not through direct agreement between the originator and the addressee but through the participation of third-party service providers are intended to be covered by paragraph (3)(a). However, it should be noted that paragraph (3)(a) applies only when the communication between the originator and the addressee is based on a previous agreement, but that it does not apply in an open environment.

171. The effect of paragraph (3)(b), read in conjunction with paragraph (4)(b), is that the originator or the addressee, as the case may be, is responsible for any unauthorized data message that can be shown to have been sent as a result of negligence of that party.

172. Paragraph (4)(a) should not be misinterpreted as relieving the originator from the consequences of sending a data message, with retroactive effect, irrespective of whether the addressee had acted on the assumption that the data message was that of the originator. Paragraph (4) is not intended to provide that receipt of a notice under subparagraph (a) would nullify the original message retroactively. Under subparagraph (a), the originator is released from the binding effect of the message after the time notice is received and not before that time. Moreover, paragraph (4) should not be read as allowing the originator to avoid being bound by the data message by sending notice to the addressee under subparagraph (a), in a case where the message had, in fact, been sent by the originator and the addressee properly applied agreed or reasonable authentication procedures. If the addressee can prove that the message is that of the originator, paragraph (1) would apply and not paragraph (4)(a). As to the meaning of "reasonable time", the notice should be such as to give the addressee sufficient time to react. For example, in the case of just-in-time supply, the addressee should be given time to adjust its production chain.

173. With respect to paragraph (4)(b), it should be noted that the Model Law could lead to the result that the addressee would be entitled to rely on a data message under paragraph (3)(a) if it had properly applied the agreed authentication procedures, even if it knew that the data message was not that of the originator. It was generally felt when preparing the Model Law that the risk that such a situation could arise should be accepted, in view of the need for preserving the reliability of agreed authentication procedures.

174. Paragraph (5) is intended to preclude the originator from disavowing the message once it was sent, unless the addressee knew, or should have known, that the data message was not that of the originator. In addition, paragraph (5) is intended to deal with errors in the content of the message arising from errors in transmission.

175. Paragraph (6) deals with the issue of erroneous duplication of data messages, an issue of considerable practical importance. It establishes the standard of care to be applied by the addressee to distinguish an erroneous duplicate of a data message from a separate data message.

176. Early drafts of article 17 contained an additional paragraph, expressing the principle that the attribution of authorship of a data message to the originator should not interfere with the legal consequences of that message, which should be determined by other applicable rules of national law. It was later felt that it was not necessary to express that principle in the Model Law but that it should be mentioned in this Guide.

Article 18. Acknowledgement of receipt

177. The use of functional acknowledgements is a business decision to be made by users of electronic commerce; the Model Law does not intend to impose the use of any such procedure. However, taking into account the commercial value of a system of acknowledgement of receipt and the widespread use of such systems in the context of electronic commerce, it was felt that the Model Law should address a number of legal issues arising from the use of acknowledgement procedures. It should be noted that the notion of "acknowledgement" is sometimes used to cover a variety of procedures, ranging from a mere acknowledgement of receipt of an unspecified message to an expression of agreement with the content of a specific data message. In many instances, the procedure of "acknowledgement" would parallel the system known as "return receipt requested" in postal systems. Acknowledgements of receipt may be required in a variety of instruments, e.g., in the data message itself, in bilateral or multilateral communication agreements, or in "system rules". It should be borne in mind that variety among acknowledgement procedures implies variety of the related costs. The provisions of article 14 are based on the assumption that acknowledgement procedures are to be used at the discretion of the originator. Article 18 is not intended to deal with the legal consequences that may flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message. For example, where an originator sends an offer in a data message and requests acknowledgement of receipt, the acknowledgement of receipt simply evidences that the offer has been received. Whether or not sending that acknowledgement amounted to accepting the offer is not dealt with by the Model Law but by contract law outside the Model Law.

178. The purpose of paragraph (2) is to validate acknowledgement by any communication or conduct of the addressee (e.g., the shipment of the goods as an acknowledgement of receipt of a purchase order) where the originator has not agreed with the addressee that the acknowledgement should be in a particular form. The

situation where an acknowledgement has been unilaterally requested by the originator to be given in a specific form is not expressly addressed by article 18, which may entail as a possible consequence that a unilateral requirement by the originator as to the form of acknowledgements would not affect the right of the addressee to acknowledge receipt by any communication or conduct sufficient to indicate to the originator that the message had been received. Such a possible interpretation of paragraph (2) makes it particularly necessary to emphasize in the Model Law the distinction to be drawn between the effects of an acknowledgement of receipt of a data message and any communication in response to the content of that data message, a reason why paragraph (7) is needed.

179. Paragraph (3), which deals with the situation where the originator has stated that the data message is conditional on receipt of an acknowledgement, applies whether or not the originator has specified that the acknowledgement should be received by a certain time.

180. The purpose of paragraph (4) is to deal with the more common situation where an acknowledgement is requested, without any statement being made by the originator that the data message is of no effect until an acknowledgement has been received. Such a provision is needed to establish the point in time when the originator of a data message who has requested an acknowledgement of receipt is relieved from any legal implication of sending that data message if the requested acknowledgement has not been received. An example of a factual situation where a provision along the lines of paragraph (4) would be particularly useful would be that the originator of an offer to contract who has not received the requested acknowledgement from the addressee of the offer may need to know the point in time after which it is free to transfer the offer to another party. It may be noted that the provision does not create any obligation binding on the originator, but merely establishes means by which the originator, if it so wishes, can clarify its status in cases where it has not received the requested acknowledgement. It may also be noted that the provision does not create any obligation binding on the addressee of the data message, who would, in most circumstances, be free to rely or not to rely on any given data message, provided that it would bear the risk of the data message being unreliable for lack of an acknowledgement of receipt. The addressee, however, is protected since the originator who does not receive a requested acknowledgement may not automatically treat the data message as though it had never been transmitted, without giving further notice to the addressee. The procedure described under paragraph (4) is purely at the discretion of the originator. For example, where the originator sent a data message which under the agreement between the parties had to be received by a certain time, and the originator requested an acknowledgement of receipt, the addressee could not deny the

legal effectiveness of the message simply by withholding the requested acknowledgement.

181. The rebuttable presumption established in paragraph (5) is needed to create certainty and would be particularly useful in the context of electronic communication between parties that are not linked by a trading-partners agreement. The second sentence of paragraph (5) should be read in conjunction with paragraph (5) of article 17, which establishes the conditions under which, in case of an inconsistency between the text of the data message as sent and the text as received, the text as received prevails.

182. Paragraph (6) corresponds to a certain type of acknowledgement, for example, an EDIFACT message establishing that the data message received is syntactically correct, i.e., that it can be processed by the receiving computer. The reference to technical requirements, which is to be construed primarily as a reference to "data syntax" in the context of EDI communications, may be less relevant in the context of the use of other means of communication, such as telegram or telex. In addition to mere consistency with the rules of "data syntax", technical requirements set forth in applicable standards may include, for example, the use of procedures verifying the integrity of the contents of data messages.

183. Paragraph (7) is intended to dispel uncertainties that might exist as to the legal effect of an acknowledgement of receipt. For example, paragraph (7) indicates that an acknowledgement of receipt should not be confused with any communication related to the contents of the acknowledged message.

Article 19. Time and place of dispatch and receipt of data messages

Purpose of the article

184. When the parties deal through more traditional means, the effectiveness of the communications they exchange depends on various factors, including the time of their receipt or dispatch, as appropriate. Although some legal systems have general rules on the effectiveness of communications in a contractual context, in many legal systems general rules are derived from the specific rules that govern the effectiveness of offer and acceptance for purposes of contract formation.

185. Domestic rules on contract formation often distinguish between "instantaneous" and "non-instantaneous" communications of offer and acceptance or between communications exchanged between parties present at the same place at the same time (*inter praesentes*) or communications exchanged at a distance (*inter absentes*). Typically, unless the parties engage in "instantaneous" communication or are negotiating face-to-face, a contract will be formed when an "offer" to conclude the

contract has been expressly or tacitly “accepted” by the party or parties to whom it was addressed.

186. Leaving aside the possibility of contract formation through performance or other actions implying acceptance, which usually involves a finding of facts, the controlling factor for contract formation where the communications are not “instantaneous” is the time when an acceptance of an offer becomes effective. There are currently four main theories for determining when an acceptance becomes effective under general contract law, although they are rarely applied in pure form or for all situations.

187. Pursuant to the “declaration” theory, a contract is formed when the offeree produces some external manifestation of its intent to accept the offer, even though this may not yet be known to the offeror. According to the “mailbox rule”, which is traditionally applied in most common law jurisdictions, but also in some countries belonging to the civil law tradition, acceptance of an offer is effective upon dispatch by the offeree (for example, by placing a letter in a mailbox). In turn, under the “reception” theory, which has been adopted in several civil law jurisdictions, the acceptance becomes effective when it reaches the offeror. Lastly, the “information” theory requires knowledge of the acceptance for a contract to be formed. Of all these theories, the “mailbox rule” and the reception theory are the most commonly applied for business transactions.

188. In preparing article 19 of the Model Law, it was recognized that contracts other than sales contracts governed by the rules on contract formation in the United Nations Sales Convention are in most cases not subject to a uniform international regime. Different legal systems use various criteria to establish when a contract is formed and that the Model Law should not attempt to provide a rule on the time of contract formation that might be at variance with the rules on contract formation of the law applicable to any given contract. Instead, the Model Law offers guidance that allows for the application, in the context of electronic contracting, of the concepts traditionally used in international conventions and domestic law, such as “dispatch” and “receipt” of communications. To the extent that those traditional concepts are essential for the application of rules on contract formation under domestic and uniform law, UNCITRAL considered that it was very important to provide functionally equivalent concepts for an electronic environment.

189. However, article 19, paragraph 2, does not address the efficacy of the electronic communication that is sent or received. Whether a communication is unintelligible or unusable by a recipient is therefore a separate issue from whether that communication was sent or received. The effectiveness of an illegible communication, or whether it binds any party, are questions left to other law.

“Dispatch” of electronic communications

190. Paragraph 1 of article 19 of the Model Law follows in principle the rule set out in article 15 of the UNCITRAL Model Law on Electronic Commerce, although it provides that the time of dispatch is when the electronic communication leaves an information system under the control of the originator rather than the time when the electronic communication enters an information system outside the control of the originator. The definition of “dispatch” as the time when an electronic communication left an information system under the control of the originator—as distinct from the time when it entered another information system—was chosen so as to mirror more closely the notion of “dispatch” in a non-electronic environment, which is understood in most legal systems as the time when a communication leaves the originator’s sphere of control. In practice, the result should be the same as under article 15, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, since the most easily accessible evidence to prove that a communication has left an information system under the control of the originator is the indication, in the relevant transmission protocol, of the time when the communication was delivered to the destination information system or to intermediary transmission systems.

191. Article 19 also covers situations where an electronic communication has not left an information system under the control of the originator. This hypothesis, which is not covered in article 15 of the UNCITRAL Model Law on Electronic Commerce, may happen, for example, when the parties exchange communications through the same information system or network, so that the electronic communication never really enters a system under the control of another party. In such cases, dispatch and receipt of the electronic communication coincide.

“Receipt” of electronic communications

192. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. This is presumed to occur when the electronic communication reaches the addressee’s electronic address.

“Capable of being retrieved”

193. Paragraph 2 of article 19 is conceived as a set of presumptions, rather than a firm rule on receipt of electronic communications. Paragraph 2 aims at achieving an equitable allocation of the risk of loss of electronic communications. It takes into account the need to offer the originator an objective default rule to establish whether a message can be seen as having been received or not. At the same time, however, paragraph 2 recognizes that concerns over security of information and communications in the business world have led to the increased use of security measures such as filters or

firewalls which might prevent electronic communications from reaching their addressees. Using a notion common to many legal systems, and reflected in domestic enactments of the UNCITRAL Model Law on Electronic Commerce, this paragraph requires that an electronic communication be capable of being retrieved in order to be deemed to have been received by the addressee.

194. The legal effect of retrieval falls outside the scope of the Model Law and is left for the applicable law. Paragraph 2 is not concerned with national public holidays and customary working hours, elements that would have led to problems and to legal uncertainty in an instrument that applied to international transactions.

195. By the same token, the Model Law does not intend to overrule provisions of domestic law under which receipt of an electronic communication may occur at the time when the communication enters the sphere of the addressee, irrespective of whether the communication is intelligible or usable by the addressee. Nor is the Model Law intended to run counter to trade usages, under which certain encoded messages are deemed to be received even before they are usable by, or intelligible for, the addressee. It was felt that the Model Law should not create a more stringent requirement than currently existed in a paper-based environment, where a message can be considered to be received even if it is not intelligible for the addressee or not intended to be intelligible to the addressee (for example, where encrypted data is transmitted to a depository for the sole purpose of retention in the context of protection of intellectual property rights).

196. Despite the different wording used, the effect of the rules on receipt of electronic communications in the Model Law is consistent with article 15 of the UNCITRAL Model Law on Electronic Commerce. As is the case under article 15 of the UNCITRAL Model Law, the COMESA Model Law retains the objective test of entry of a communication into an information system to determine when an electronic communication is presumed to be “capable of being retrieved” and therefore “received”. The requirement that an electronic communication should be capable of being retrieved, which is presumed to occur when the communication reaches the addressee’s electronic address, should not be seen as adding an extraneous subjective element to the rule contained in article 15 of the UNCITRAL Model Law. In fact “entry” in an information system is understood under article 15 of the UNCITRAL Model Law as the time when an electronic communication “becomes available for processing within that information system”, which is arguably also the time when the communication becomes “capable of being retrieved” by the addressee.

197. Whether or not an electronic communication is indeed “capable of being retrieved” is a factual matter outside the Model Law. One must take note of the increasing use of security filters (such as “spam” filters) and other technologies restricting the receipt of

unwanted or potentially harmful communications (such as communications suspected of containing computer viruses). The presumption that an electronic communication becomes capable of being retrieved by the addressee when it reaches the addressee's electronic address may be rebutted by evidence showing that the addressee had in fact no means of retrieving the communication.

“Electronic address”

198. Similar to a number of domestic laws, the Model Law uses the term “electronic address”, instead of “information system”, which was the expression originally used in the UNCITRAL Model Law. In practice, the new terminology, which appears in other international instruments such as the Uniform Customs and Practices for Documentary Credits (“UCP 500”) Supplement for Electronic Presentation (“eUCP”),⁵⁰ should not lead to any substantive difference. Indeed, the term “electronic address” may, depending on the technology used, refer to a communications network, and in other instances could include an electronic mailbox, a telecopy device or another specific “portion or location in an information system that a person uses for receiving electronic messages”.

199. The notion of “electronic address”, like the notion of “information system”, should not be confused with information service providers or telecommunications carriers that might offer intermediary services or technical support infrastructure for the exchange of electronic communications.

“Designated” and “non-designated” electronic addresses

200. The Model Law retains the distinction made in article 15 of the UNCITRAL Model Law between delivery of messages to specifically designated electronic addresses and delivery of messages to an address not specifically designated. In the first case, the rule of receipt is essentially the same as under article 15, paragraph (2) (a)(i), of the UNCITRAL Model Law, that is, a message is received when it reaches the addressee's electronic address (or “enters” the addressee's “information system” in the terminology of the UNCITRAL Model Law). The COMESA Model Law does not contain specific provisions as to how the designation of an information system should be made, or whether the addressee could make a change after such a designation.

201. In distinguishing between designated and non-designated electronic addresses, paragraph 2 aims at establishing a fair allocation of risks and responsibilities between originator and addressee. In normal business dealings, parties who own more than one electronic address could be expected to take the care of designating a particular one for the receipt of messages of a certain nature and to refrain from disseminating electronic addresses they rarely use for business purposes. By the same token, however, parties should be expected not to address electronic communications containing information of

a particular business nature (e.g. acceptance of a contract offer) to an electronic address they know or ought to know would not be used to process communications of such a nature (e.g. an e-mail address used to handle consumer complaints). It would not be reasonable to expect that the addressee, in particular large business entities, should pay the same level of attention to all the electronic addresses it owns.

202. One noticeable difference between the Model Law and the UNCITRAL Model Law on Electronic Commerce, however, concerns the rules for receipt of electronic communications sent to a non-designated address. The Model Law distinguishes between communications sent to an information system other than the designated one and communications sent to any information system of the addressee in the absence of any particular designation. In the first case, the Model Law does not regard the message as being received until the addressee actually retrieves it. The rationale behind this rule is that if the originator chooses to ignore the addressee's instructions and sends the electronic communication to an information system other than the designated system, it would not be reasonable to consider the communication as having been delivered to the addressee until the addressee has actually retrieved it. In the second situation, however, the underlying assumption of the Model Law was that for the addressee it was irrelevant to which information system the electronic communication would be sent, in which case it would be reasonable to presume that it would accept electronic communications through any of its information systems.

203. In this particular situation, the Model Law follows the approach taken in a number of domestic enactments of the Model Law and treats both situations in the same manner. Thus for all cases where the message is not delivered to a designated electronic address, receipt under the Model Law only occurs when (a) the electronic communication becomes capable of being retrieved by the addressee (by reaching an electronic address of the addressee) and (b) the addressee actually becomes aware that the communication was sent to that particular address.

204. In cases where the addressee has designated an electronic address, but the communication was sent elsewhere, the rule in the Model Law is not different in result from article 15, paragraph (2) (a)(ii), of the UNCITRAL Model Law, which itself requires, in those cases, that the addressee retrieves the message (which in most cases would be the immediate evidence that the addressee has become aware that the electronic communication has been sent to that address).

205. The only substantive difference between the COMESA Model Law and the UNCITRAL Model Law, therefore, concerns the receipt of communications in the absence of any designation. In this particular case, UNCITRAL agreed that practical developments since the adoption of the Model Law justified a departure from the

original rule. It also considered, for instance, that many persons have more than one electronic address and could not be reasonably expected to anticipate receiving legally binding communications at all addresses they maintain.

Awareness of delivery

206. The addressee's awareness that the electronic communication has been sent to a particular non-designated address is a factual matter that could be proven by objective evidence, such as a record of notice given otherwise to the addressee, or a transmission protocol or other automatic delivery message stating that the electronic communication had been retrieved or displayed at the addressee's computer.

Place of dispatch and receipt

207. The purpose of paragraphs 3 and 4 of article 19 is to deal with the place of receipt of electronic communications. The principal reason for including these rules is to address a characteristic of electronic commerce that may not be treated adequately under existing law, namely, that very often the information system of the addressee where the electronic communication is received, or from which the electronic communication is retrieved, is located in a jurisdiction other than that in which the addressee itself is located. Thus, the rationale behind the provision is to ensure that the location of an information system is not the determinant element, and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt and that this place can be readily ascertained by the originator.

208. Paragraph 3 contains a firm rule and not merely a presumption. Consistent with its objective of avoiding a duality of regimes for online and offline transactions and taking the United Nations Sales Convention as a precedent, where the focus was on the actual place of business of the party, the phrase "deemed to be" has been chosen deliberately to avoid attaching legal significance to the use of a server in a particular jurisdiction other than the jurisdiction where the place of business is located simply because that was the place where an electronic communication had reached the information system where the addressee's electronic address is located.

209. The effect of paragraph 3 therefore is to introduce a distinction between the deemed place of receipt and the place actually reached by an electronic communication at the time of its receipt under paragraph 2. This distinction is not to be interpreted as apportioning risks between the originator and the addressee in case of damage or loss of an electronic communication between the time of its receipt under paragraph 2 and the time when it reached its place of receipt under paragraph 3. Paragraph 3 establishes a rule on location to be used where another body of law (e.g. on formation of contracts or conflict of laws) requires determination of the place of receipt of an electronic communication.

Article 20: Notarisation, acknowledgement and certification

210. There are a number of processes whereby paper documents may be authenticated by an independent third party such as a notary public, commissioner of oaths, magistrate, judge or persons holding a similar high and respected office. Article 20 paragraph 1 makes provision for such authentication to be done by the person authorised to do so by appending his or her electronic signature.

211. The Model Law does not make provision for different types of electronic signatures as is found in some domestic legal systems and in the UNCITRAL Model Law on Electronic Signatures (2001) because of the practical difficulties encountered with such so-called advanced electronic signatures. However, it is recognised that the authentication by such independent third parties need to be done in a manner which provides at least the same level of security or legal certainty that such certification on paper documents by conventional methods provide. It is therefore envisaged that an electronic signature that has a higher inherent level of security should be used in these instances. The Model Law therefore provides that the relevant Minister or official charged with the administration of the Model Law or of such other relevant legislation may prescribe what kind of electronic signature will be acceptable in terms of Article 30. In the absence of such regulations, such electronic authentication will not be possible.

212. Paragraph two makes provision for the certification of printouts as certified copies of the electronic information. This provision must be read in conjunction with the provisions of Article 9 which deals with originals.

Article 21: Other requirements

213. Article 21 paragraph (1) deals with a number of requirements that are required by law in certain instances to authenticate the signature or authenticity of a document by an independent and trusted third party. Article 21 paragraph (1) does not prescribe which kind of electronic signature should be acceptable for such third party authentication. Because of the ease with which some electronic signatures may be copied or falsified, it may well be necessary for Member States to require a more secure form of signature in these circumstances. In such instances the type of electronic signature that will be regarded as valid should be prescribed in the relevant other Act, either by legislation or preferably by ministerial regulation. Ministerial regulation has the advantage of being more flexible and can therefore be changed as technological standards or the need requires.

214. Article 21 paragraph (2) deals with situation where a document or information exists only in electronic form. It provides that the person required to provide a certified

copy of the document or information may do so by providing a printout that has been certified as a true copy by an independent and trusted third party. The Article does not prescribe the exact method in which this should be done. Again this is an area where the requirements can be prescribed by ministerial regulation, either generally in accordance with the Model Law Article 31 or in terms of another relevant act.

215. Article 21 paragraph (3) deals with the exact opposite practical situation to that found in Article 21 paragraph (2). It makes provision for the electronic certification of an electronic copy of a document that exists only in paper form by an appropriate electronic signature of a trusted third party. The Article does not prescribe the exact method in which this should be done. Again this is an area where the requirements can be prescribed by ministerial regulation, either generally in accordance with the Model Law Article 31 or in terms of another relevant act.

Chapter IV. Consumer Protection

216. Online trading by consumers provides fertile ground for unscrupulous suppliers to take advantage of consumers. The actions of some rogue suppliers are undermining the trust of consumers and therefore inhibiting the growth of this sector of the economy. The type of problems encountered are similar to the problems experienced in old fashioned distance selling agreement. The European Union has long recognised the need to provide consumer with protection against the negative practices and consequences of some long distance selling agreements. In response it has issued a directive on distance selling which has been implemented in member states. The provisions of this Chapter have been modelled in part on the Distance Selling Directive of the European Union as well as on the current practices of responsible internet traders such as Amazon.com and major airline booking sites.

Article 22 Scope of application

217. This Chapter deliberately deviates from the principle of functional equivalence as it makes special provision for online consumer transactions which may be different from provisions to similar types of transactions that are not concluded electronically such as distance selling contracts making use of other forms of communication such as telephone. Member Countries may consider introducing these provisions with the necessary changes to all distance selling transactions to ensure functional equivalence. This can be achieved by enacting similar legislation or by amending paragraph 1 of Article 22 to read “electronic transactions and other distance selling transactions” In that case a definition of “distance selling transactions” should also be included as part of

paragraph one. The inclusion will also necessitate corresponding changes in the other articles of Chapter IV.

218. Chapter IV only applies to consumer transactions. “Consumer” is defined in Article 2 as any “natural person”. These provisions will therefore not apply to transactions where an artificial person is the end user of the goods or services. A consumer transaction is any transaction with a consumer provided that the consumer contracts for the goods or services as end-user. Whether a person will be the end-user of the goods or services obtained, is a factual question depending on the individual circumstances. While it is recognised that it may be difficult for internet traders to establish whether they are dealing with a consumer or a business person in some instances, practically speaking the circumstances will be quite clear-cut in the majority of cases. Limiting the definition of “consumer” to natural persons further cuts down on the uncertainty. The definitions of “consumer” and “consumer transactions” are notoriously difficult to pin down and have been hotly debated by consumer law commentators. In the end it is a policy question whether “consumer” should also include small artificial persons, but such an inclusion makes it difficult for businesses to distinguish between business and consumer transactions. It was therefore decided to opt for a more rigid approach providing more legal certainty in the market place.

219. There are certain types of agreement that by their nature requires finality at the time of their conclusion. It is therefore imperative that these transactions should not be subject to the cooling-off period provided for in Article 24. Article 22 paragraph (2) provides a list of transactions where the cooling-off period will not apply.

Article 23. Information to be provided

220. One of the biggest problems with online transactions is the anonymity that exists between the parties because their only contact is by electronic means. It is therefore often difficult for consumers to know with whom they are dealing, where to contact companies they are dealing with or where to instigate legal proceedings against such companies. Article 23 endeavours to alleviate this problem by prescribing certain essential information that must be provided by the online trader. This includes the name and legal status of the trader; its physical address and contact numbers; codes of conduct to which they are subject; a proper description of the goods or services to be obtained; a transparent exposition of the full price to be paid, including any additional costs such as insurance and transport; the terms of guarantees or warranties and standard terms; the audit trail of the transaction; the return or refund policy; alternative dispute resolution provisions; details about the secure handling of payment details; the

duration of the transaction and the fact that the consumer has a right to resile from the contract in terms of Article 24 within 7 days of the receipt of the goods or services.

221. Article 23 paragraph (2) makes specific provision for an opportunity for the consumer to review the entire transaction before it is concluded. There is an obligation on the supplier to provide the consumer with an opportunity to check the whole transaction before finally accepting it, to correct any mistakes and to withdraw from the transaction. It prevents a consumer from being taken by surprise by the addition of additional costs such as transport, insurance or taxes that are added to the prices displayed. Most responsible consumer trading websites now have all of these features. The most common technique used is providing the consumer with a shopping basket in which goods or services are placed. When the consumer has finished shopping, the entire shopping basket is displayed together with all of the costs and the overall price to be paid. At this stage the consumer can still remove items from the shopping basket and the resultant new transaction will be displayed. Only when the consumer acknowledges that it is satisfied with the transaction and that there are no mistakes, will the consumer be required to provide payment details on a secure page. Secure payment is dealt with in paragraph (5).

222. Article 23 (2) also provides a practical implementation of the provisions of Articles 14 which deals with errors in electronic communications. It puts an obligation on the supplier to provide the consumer with an opportunity to review the transaction before finalising it as required by Article 14 paragraph (1).

223. Non-compliance with these provisions is first and foremost dealt with by the provision of a self-help remedy to consumers; a consumer is entitled to cancel the agreement in terms of Article 23 paragraph (3) if the supplier fails to comply with its obligations under Article 23 paragraph (1) and (2). Whether this remedy is effective may depend on the policy of payment providers such as credit card companies and Paypal. Generally speaking credit card companies will reverse charges where there is a dispute between consumers and traders. The Model Law makes further provision for complaints to be made to either a government department that may be able to take action or consumer bodies. Generally such remedies are not very effective unless such bodies have effective means to ensure compliance.

224. Article 23 paragraph (5) places a positive duty on suppliers to use payment systems that are sufficiently secure. The term sufficiently secure is qualified by the requirement that it must adhere to technological standards that are accepted generally. This means that suppliers will have to constantly review the security measures taken to ensure that they comply with this obligation. Article 23 paragraph (6) makes suppliers liable for damages should they fail to comply with this obligation. Once again the

remedy here is a civil rather than a punitive remedy which provides consumers with better protection than criminal sanctions.

Article 24. Cooling-off period

225. One of the problems with distance selling is that consumers do not have the opportunity to inspect the goods that are being purchased at the time of the transaction. They only receive the goods after the transaction has been concluded and payment made. If the goods are defective or do not meet with their requirements because of a mistaken description or misapprehension, it leaves consumers with no effective remedy. Article 24 is aimed at redressing this situation by providing consumers with a cooling-off period during which they can lawfully terminate the agreement and return the goods against repayment of the purchase price. The only negative consequence for consumers is that they have to pay the cost of returning the goods. The provision aims at achieving a fair balance between the interests of the supplier and the consumer.

Article 25. Unsolicited goods, services or communications

226. Article 25 deals with the problem of spam. It places an obligation on the sender of spam to provide consumers with an option to opt out of the spam. It also provides consumers with a right to obtain information on where the person obtained their personal particulars. Non-compliance with this provision is liable to the payment of a fine on conviction. Unlike the other provisions where civil remedies were regarded as sufficient to protect the interests of consumers, civil remedies in this instance were regarded as ineffective in themselves to counter the problem of spam.

227. Article 25 paragraph (2) is aimed at providing legal certainty and protection to consumers against another unconscionable selling technique, namely sending communications purporting to be an offer which will be regarded as being accepted if a consumer should fail to respond to it. This is similar to the technique where unsolicited goods are sent followed by an invoice if the consumer does not return the goods within a specific period of time. This provision simply states that consumers will incur no obligations by failing to respond to unsolicited electronic communications by suppliers. Their silence is treated as a rejection in law rather than as an acceptance.

Article 26. Performance

228. This provision is aimed at ensuring that suppliers comply with their obligations in a timely and reasonable manner. It prescribes specific time periods within which a

supplier must carry out its obligations. This prevents the supplier from obtaining payment and then not performing its own obligations in a timely manner. The provision gives the consumer the right to cancel the contract and obtain a refund in such circumstances.

Article 27. Applicability of foreign law

229. Increasingly online consumer transactions are being concluded without regard for international borders. It is usual for suppliers to make their own legal system applicable to such transactions. Very often the applicable legal system will not have consumer protection that is similar to the protection provided here. Although this provision may not be effective in all situations, it at least ensures that where legal proceedings are brought against consumers in their own jurisdictions, they will be able to rely on the protection of this part.

Article 28. Non-exclusion

230. This article ensures that suppliers do not contract out of their obligations as provided for in this Chapter. Any provision limiting or excluding the rights of the consumer will be void. Again this provision may not be effective in all situations, for instance where the consumer has to proceed against the supplier in a foreign country, but at least it provides protection to consumers against local suppliers or in the event that proceedings are brought against them in their own jurisdictions.

Article 29. Consumer Complaints

231. The effectiveness of the remedy provided for in this article will depend on the powers or influence to which such complaints will be directed. It is not the only remedy but provides a further remedy to strengthen consumer rights. It also raises consumer awareness about other possible avenues to address their grievances.

Chapter V. Online Dispute Resolution

Article 30. Conciliation before the Court of Justice of the Common Market

232. COMESA has expressed its wish to extend the jurisdiction of the COMESA Court of Justice to empower it to facilitate online mediation or conciliation to resolve disputes that may arise from electronic transactions. The Council of Ministers at their meeting

held in Vitoria Falls, Zimbabwe in June 2009 made a specific reference to empowerment of the COMESA Court of Justice to facilitate online mediation to resolve disputes that may arise from electronic transactions.

233. The provisions of this Chapter, read with the Draft Rules to amend the Rules of the Court, is partly based on the UNCITRAL Model Law on International Commercial Conciliation of 2002 and on the very successful online conciliation procedures found on some commercial internet sites such as that of eBay. The provisions have been tailored to take into account the unique situation of the Court. It also takes into account that the conciliation procedures should be available to commercial parties in business-to-business transactions as well as consumer transactions. The empowerment of the Court also gives recognition to the fact that more and more electronic transactions are being concluded irrespective of international borders. Such international transactions are not limited to commercial transactions, but also very often involve consumer transactions.

234. The provisions are divided between those higher level aspects establishing the Court's jurisdiction to perform conciliation that are dealt with in the Treaty and the Model Law and those more practical aspects that belong more properly in the Rules of the Court. The various provisions must however be read as a whole to obtain a full understanding of the process.

235. The term "conciliation" is used in the Model Law as a broad notion referring to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute. There are critical differences among the dispute resolution processes of negotiation, conciliation and arbitration. Once a dispute arises, the parties typically seek to resolve their dispute by negotiating without involving anyone outside the dispute. If the negotiations fail to resolve the dispute, a range of dispute settlement mechanisms is available, including arbitration and conciliation. An essential feature of conciliation is that it is based on a request addressed by the parties in dispute to a third party. In arbitration, the parties entrust the dispute resolution process and the outcome of the dispute to the arbitral tribunal that imposes a binding decision on the parties. Conciliation differs from party negotiations in that conciliation involves third-person assistance in an independent and impartial manner to settle the dispute. It differs from arbitration because in conciliation the parties retain full control over the process and the outcome, and the process is non-adjudicatory.

236. In conciliation, the conciliator assists the parties in negotiating a settlement that is designed to meet the needs and interests of the parties in dispute. The conciliation process is an entirely consensual one in which parties that are in dispute determine how

to resolve the dispute, with the assistance of a neutral third party. The neutral third party has no authority to impose on the parties a solution to the dispute.

237. In practice, proceedings in which the parties are assisted by a third person to settle a dispute are referred to by expressions such as conciliation, mediation, neutral evaluation, mini-trial or similar terms. Various techniques and adaptations of procedures are used for solving disputes by conciliatory methods that can be regarded as alternatives to more traditional judicial dispute resolution. The Model Law uses the term “conciliation” to encompass all such procedures. Practitioners draw distinctions between these expressions in terms of the methods used by the third person or the degree to which the third person is involved in the process. However, from the viewpoint of the legislator, no differentiation needs to be made between the various procedural methods used by the third person. In some cases, the different expressions seem to be more a matter of linguistic usage than the reflection of a singularity in each of the procedural method that may be used. In any event, all these processes share the common characteristic that the role of the third person is limited to assisting the parties to settle the dispute and does not include the power to impose a binding decision on the parties.

238. Conciliation is being increasingly used in dispute settlement practice in various parts of the world, including regions where until a decade or two ago it was not commonly used. In addition, the use of conciliation is becoming a dispute resolution option preferred and promoted by courts and government agencies, as well as in community and commercial spheres. This trend is reflected, for example, in the establishment of a number of private and public bodies offering services to interested parties designed to foster the amicable settlement of disputes. Alongside this trend, various regions of the world have actively promoted conciliation as a method of dispute settlement, and the development of national legislation on conciliation in various countries has given rise to discussions calling for internationally harmonized legal solutions designed to facilitate conciliation. The greater focus on these methods of dispute settlement is justified particularly because the success rate of these methods has been high; in fact, in some countries and industrial sectors, it has been surprisingly high.

239. Since the role of the conciliator is only to facilitate a dialogue between the parties and not to make a decision, there is no need for procedural guarantees of the type that exist in arbitration, such as the prohibition of meetings by the conciliator with one party only or an unconditional duty on the conciliator to disclose to a party all information received from the other party. The flexibility of conciliation procedures and the ability to adapt the process to the circumstances of each case and to the wishes of the parties are thus considered to be of crucial importance.

240. This flexibility has led to a widespread view that it is not necessary to deal legislatively with a process that is so dependent upon the will of the parties. Indeed, it was believed that legislative rules would unduly restrict and harm the conciliation process. Contractual rules were widely considered to be the suitable way to provide certainty and predictability.

241. Nevertheless, States have been adopting laws on conciliation. They are doing so in order to respond to concerns by practitioners that contractual solutions alone do not completely meet the needs of the parties, while remaining conscious of the need to preserve the flexibility of conciliation. The single most important concern of parties in conciliation is to ensure that certain statements or admissions made by a party in conciliation proceedings will not be used as evidence against that party in other proceedings, and it was considered that a contractual solution was inadequate to accomplish this goal.

242. It is noted that while certain issues, such as the admissibility of certain evidence in subsequent judicial or arbitral proceedings or the role of the conciliator in subsequent proceedings, could typically be solved by reference to sets of rules such as the UNCITRAL Conciliation Rules, there are many cases where no such rules are agreed upon. The conciliation process will therefore benefit from the establishment of non-mandatory legislative provisions that would apply when the parties mutually desired to conciliate but had not agreed on a set of conciliation rules. Moreover, in countries where agreements as to the admissibility of certain kinds of evidence were of uncertain effect, uniform legislation might provide useful clarification. In addition, it is pointed out with respect to certain issues, such as facilitating enforcement of settlement agreements resulting from conciliation, that the level of predictability and certainty required to foster conciliation can only be achieved through legislation.

243. Conciliation proceedings may differ in procedural details depending on what is considered the best method to foster a settlement between the parties. The provisions in the Model Law governing such proceedings are designed to accommodate those differences and leave the parties and conciliators free to carry out the conciliatory process as they consider appropriate. Essentially, the provisions seek to strike a balance between protecting the integrity of the conciliation process, for example, by ensuring that the parties' expectations regarding the confidentiality of the conciliation are met while also providing maximum flexibility by preserving party autonomy.

244. The Model Law makes provision for the empowerment of the COMESA Court of Justice to act as a conciliator. The provisions of the Model Law are premised on the basis that the COMESA Treaty will be amended to extend the scope of the Court. An amending clause is suggested in the next section. The provisions of the Model Law on

online conciliation will be augmented by appropriate changes to the Rules of the Court. Draft Rules to amend the current Rules of the Court are also set out in the next section.

Article by article comment

245. Article 30 paragraph (1) defines the jurisdiction of the COMESA Court of Justice. The provision is widely framed in order that the Court can exercise its jurisdiction to conciliate as widely as possible. This article applies only to domestic electronic transactions and consumer electronic transactions. However, the amendments to the COMESA Treaty and the Court Rules ensure that the conciliation provisions will also be applicable where the UNECIC applies to a transaction.

246. In the normal course of events conciliation is initiated by a request from one party to the other to refer the dispute between them to conciliation. The provision here entitles a party to unilaterally refer the matter to the Court for conciliation, but reserves the right of the other party to reject such a referral (see paragraph (6) and Rule 103(3)(b)). It is regarded that this will be a more effective way of dealing with the initiation of the conciliation without causing any negative consequences.

247. Paragraph (2) stresses the consensual nature of this process by providing that any party “*may*” refer a dispute. There is therefore no obligation on any party to refer the dispute before turning to other legal remedies, but it provides encouragement to do so.

248. Paragraph (3) emphasises the fact that the conciliation will take place according to the Rules of the Court. This link is important because the provisions of this Chapter must be read in unison with the provisions of the Court Rules.

249. Paragraph (4) makes it clear that the entire process will be conducted online and that there will therefore be no opportunity for other methods of communication. It is important for the effectiveness of these proceedings as well as the orderly functioning of the Court, that the process be managed as a method of online dispute resolution. Of course, if the situation requires another method of communication, a Conciliator will be able to pursue that due to the consensual nature of the proceedings. The process and any exceptions to it will, however, be controlled by the Conciliator.

250. Article 30 paragraph (5) preserves the consensual nature of the conciliation proceedings by providing both parties to withdraw from or terminate the proceedings at any time. This must also be read in conjunction with Rule 103(3) which provides that a party receiving notice of a referral shall be entitled to accept or reject the invitation to conciliate. Where a party fails to respond to the notice, the other party is entitled to assume that the invitation to conciliate has been rejected and that the conciliation is terminated.

251. Paragraph (6) is required to aid the climate of conciliation and settlement rather than adversity. If legal proceedings have been instigated and the parties agree to conciliation, it is necessary that all other proceedings should be stayed for the duration of the conciliation. The only exception is where prescription, a limitation period or some other legal bar may impact on the rights of a party if it is not timeously exercised. It was considered whether this provision should not make provision for the interruption of prescription, limitation and similar remedies. The issue of introducing a limitation period raises complex technical issues and would be difficult to incorporate into national procedural regimes that take different approaches to the issue. Furthermore establishing when the commencement of conciliation proceedings should result in suspension of the limitation period would require a high degree of precision as to what constituted such commencement. Requiring such a degree of precision might disregard the fundamentally informal and flexible nature of conciliation. The acceptability of the Model Law might be jeopardized if it were to interfere with existing procedural rules regarding the suspension or interruption of limitation periods. It is noted that the initiation of arbitral or judicial proceedings by the parties while conciliation was pending was likely to have a negative impact on the chances of reaching a settlement. It is considered that limiting the parties' right to initiate arbitral or court proceedings might, in certain situations, discourage parties from entering into conciliation agreements. Moreover, preventing access to courts might raise constitutional law issues in that access to courts is in some jurisdictions regarded as an inalienable right.

252. Paragraph (7) provides legal support for the binding nature of settlement agreements that are made in the course of the conciliation. In some legal systems there are certain procedural advantages to have a settlement agreement made and order of court. Enacting Member States must consider whether they want to retain this part of the provision.

253. Article 30 paragraph (8) provides for the confidentiality of the proceedings. A provision on confidentiality is important, as the conciliation will be more appealing if parties can have confidence, supported by a statutory duty, that conciliation-related information will be kept confidential. The provision is drafted broadly referring to "all information relating to the conciliation proceedings" to cover not only information disclosed during the conciliation proceedings, but also the substance and the result of those proceedings, as well as matters relating to a conciliation that occurred before the agreement to conciliate was reached, including, for example, discussions concerning the desirability of conciliation, the terms of an agreement to conciliate, the choice of conciliators, an invitation to conciliate and the acceptance or rejection of such an invitation.

254. Article 30 paragraph (9) and (10) stresses the importance of the impartiality and independence of the Conciliator as a basis for the success of conciliation. The Conciliator must not be seen as partial to the one or the other of the parties, despite the fact that the Conciliator is entitled to have individual communications with a party and receive confidential information from a party. The aim of the Conciliator should be to facilitate the parties in finding their own solution by providing independent views and suggestions.

255. Article 30 paragraph (10) ensures that the conciliator is not compromised by his involvement in later proceedings to the detriment of one of the parties. This provision is necessary to preserve the independence of the Conciliator and the confidentiality of the proceedings.

256. Article 30 paragraph (11) and (12) stresses the “without prejudice nature of the conciliation proceedings”. In conciliation proceedings, the parties may typically express suggestions and views regarding proposals for a possible settlement, make admissions or indicate their willingness to settle. If, despite such efforts, the conciliation does not result in a settlement and a party initiates judicial or arbitral proceedings, those views, suggestions, admissions or indications of willingness to settle might be used to the detriment of the party who made them. The possibility of such a “spill over” of information may discourage parties from actively trying to reach a settlement during conciliation proceedings, which would reduce the usefulness of conciliation. Thus, paragraph (11) is designed to encourage frank and candid discussions in conciliation by prohibiting the use of information listed in paragraph (11) in any later proceedings.

257. Article 30 paragraph (12) provides for two results with respect to the admissibility of evidence in other proceedings: an obligation incumbent upon the parties not to rely on the types of evidence specified in article 10 and an obligation of courts to treat such evidence as inadmissible. The Model Law aims at preventing the use of certain information in subsequent judicial or arbitral proceedings, regardless of whether the parties have agreed to a rule such as that contained in article 20 of the UNCITRAL Conciliation Rules. Where the parties have not agreed otherwise, the Model Law provides that the parties shall not rely in any subsequent arbitral or judicial proceedings on evidence of the types specified in the model provisions. The specified evidence would then be inadmissible in evidence and the arbitral tribunal or the court could not order disclosure.

258. In order to promote candour between the parties engaged in a conciliation, they must be able to enter into the conciliation knowing the scope of the rule and that it will be applied. Paragraph (11) achieves that by prohibiting any of the parties involved in the conciliation process, including the conciliator and any third party, from using

conciliation-related material in the context of other proceedings. With a view to clarifying and strengthening the rule expressed in paragraph (11), paragraph (12) restricts the rights of courts, arbitral tribunal or government entities from ordering disclosure of information referred to in paragraph (11), unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings, and requires such bodies to treat any such information offered as evidence as being inadmissible.

259. In the preparation of the Model Law, it was recognized that, in certain systems, the term “law” includes not only the texts of statutes, but also court decisions. In the Model Law the term “law” should be given a narrow interpretation so as to be interpreted to refer to legislation rather than orders by arbitral or judicial tribunals ordering a party to a conciliation, at the request of another party, to disclose the information mentioned in paragraph (11). Thus, if disclosure of evidence is requested by a party so as to support its position in litigation or similar proceedings the court would be barred from issuing a disclosure order. However, orders by a court (such as disclosure orders combined with a threat of sanctions, including criminal sanctions, directed to a party or another person who could give evidence referred to in paragraph (11), are normally based on legislation, and certain types of such orders (in particular, if based on the law of criminal procedure or laws protecting public safety or professional integrity) may be regarded as exceptions to the rule of paragraph (11).

260. There may be situations where evidence of certain facts would be inadmissible under article 30, but the inadmissibility would have to be overridden by an overwhelming need to accommodate compelling reasons of public policy, for example: the need to disclose threats made by a participant to inflict bodily harm or unlawful loss or damage; where a participant attempts to use the conciliation to plan or commit a crime; where evidence is needed to establish or disprove an allegation of professional misconduct based on the conduct occurring during a conciliation; where evidence is needed in a proceeding in which fraud or duress is in issue regarding the validity or enforceability of an agreement reached by the parties or where statements made during a conciliation show a significant threat to public health or safety. The final sentence in paragraph 3 expresses such exceptions in a general manner and is in terms similar to the exception expressed with respect to the duty of confidentiality in paragraph (8).

261. Paragraph (13) extends the scope of application of paragraphs (11)-(12) to apply not only to subsequent proceedings related to the conciliation, but also to unrelated subsequent proceedings. This provision eliminates the possibility of avoiding the application of article 30 by introducing evidence in proceedings where the main issue is a different one from the issue considered in conciliation.

262. In making sure that certain information is not used in subsequent proceedings, it must be borne in mind that parties in practice often present in conciliation proceedings information or evidence that has existed or has been created for purposes other than the conciliation and that, by presenting it in the conciliation proceedings, the party has not forfeited its use in subsequent proceedings or otherwise made it inadmissible. In order to put this beyond doubt, paragraph (14) makes it clear that all information that otherwise would be admissible as evidence in a subsequent court or arbitral proceeding does not become inadmissible solely by reason of it having been raised in an earlier conciliation proceeding (for example, in a dispute concerning a contract of carriage of goods by sea, a bill of lading would be admissible to prove the name of the shipper, notwithstanding its prior use in a conciliation). Only statements (or views, proposals etc.) made in conciliation proceedings, as listed in paragraph (11), are inadmissible, but the inadmissibility does not extend to any underlying evidence that may have given rise to those statements.

263. In many legal systems, a party may not be compelled to produce in court proceedings a document that enjoys a “privilege”—for example, a written communication between a client and its attorney. However, in some legal systems, the privilege may be lost if a party has relied on the privileged document in a proceeding. Privileged documents may be presented in conciliation proceedings with a view to facilitating settlement. In order not to discourage the use of privileged documents in conciliation, an enacting State may wish to consider including a provision stating that the use of a privileged document in conciliation proceedings does not constitute a waiver of the privilege.

Chapter VI. Final Provisions. Article 31. Regulations

264. Article 20 makes provision for certain requirements to be prescribed. This article empowers the Minister to provide such prescription by Regulation. It may also be necessary due to domestic law that certain regulations may be needed for the proper implementation of the Model Law.

Article 32. Short title and commencement

265. It is recommended that the Model Law be called the Electronic Transactions Act, rather than the Electronic Commerce Act as the former provides a wider description than the latter which is more in keeping with the nature and scope of the Model Law.

Amendment to the COMESA Treaty

266. The current jurisdiction of the COMESA Court of Justice is limited to the following areas: (a) disputes between a COMESA Member and another Member or the Council about their obligations under the COMESA Treaty (Article 24); (b) matters referred to the Court by the Secretary-General on the failure of a Member to fulfill its obligations under the Treaty (Article 25); (c) matters referred by any resident of a COMESA Member on the failure of a Member or the Council to fulfill its obligations under the Treaty or its infringement of the Treaty (Article 26); (d) disputes between the Common Market and its employees (Article 27(1)); and (e) claims by any person against the Common Market or its institutions for acts of their servants or employees in the performance of their duties (Article 27(2)).

267. The jurisdiction of the Court will have to be extended by an appropriate amendment to the COMESA treaty to enable the Court to deal with online dispute resolution by way of mediation or conciliation. Internationally the most successful deployment of online dispute resolution has been by way of mediation or conciliation. The suggested text of the amendment necessary is set out in Chapter 4 A as Article 28A.

268. The Court's jurisdiction is extended in order that the Judges appointed to the Court may act as Conciliators in any dispute that arises from a transaction subject to either the United Nations Convention on the Use of Electronic Communications in International Contracts or an enactment by a Member State of the COMESA Model Law on Electronic Transactions.

Amendment of the Rules of the COMESA Court of Justice

269. The extension of the Court's jurisdiction in Article 28A of the COMESA Treaty and in Article 30 of the Model Law must be complimented by an amendment of the Rules of the Court to provide for proper processes and procedures to deal with online conciliation and to give guidance to parties wishing to participate in conciliation. The Rules of the Court set out the practical steps that parties must take to ensure the orderly conduct of cases.

270. The addition of Part 24 to the Rules aims to achieve that objective. Rule 101 describes the situations in which these Rules will apply, namely in the case of any referral to the Court of a request for conciliation.

271. Rule 102 confirms the provisions of Article 30 of the Model Law that the conciliation proceedings shall be conducted as an online dispute resolution process

where there is no provision for any face to face meetings or the provision of oral evidence or submissions.

272. Rule 102 paragraph (2) empowers the President of the Court to prescribe any format in which the referral and the responses to the referral must be couched. This provides an opportunity to give guidance to the referring party on all the information that must be contained in the referral notice mentioned in Rule 103 paragraph (2). It is important that the notice should provide information on the consensual nature of the proceedings as well as the fact that the proceedings will be confidential and will not prejudice a party by that party's participation.

273. Rule 103 sets out the procedures for the commencement of the conciliation proceedings. It sets out the information that the referring party must include in the referral notice. It also provides the responses that the other party may give to the referral notice. In the event that the other party rejects the invitation to take part in the conciliation, the process is terminated without any further consequences.

274. Ordinarily parties will choose the Conciliator(s) that will be conducting the conciliation. However, where the parties elect to refer the conciliation to the Court, the President will determine who the Conciliator(s) will be. In particularly complex situations, the President may elect to appoint more than one Conciliator, but that will be the exception rather than the rule. Paragraph (2) stresses the fact that the Judge appointed will act as conciliator and not in his or her capacity as Judge or even as an arbitrator. It is important to stress that these proceedings do not constitute arbitration, because of the important differences between the two procedures as set out above.

275. Rule 105 deals with the Conciliation process. It starts with the Conciliator requesting the parties to submit statements describing the issues in order that the points in dispute may be properly determined. Very often the dispute can be narrowed down to a few issues on which the parties can then focus. Because of the non-adversarial nature of the proceedings parties are less likely to raise unnecessary and purely obstructive defences. Paragraph (2) envisages that these initial statements are interchanged between the parties in order that each party can properly understand the nature and scope of the dispute.

276. The Conciliator controls the process from this point forward in order to facilitate a settlement between the parties. For this reason the Conciliator is empowered to act in a more inquisitorial fashion and may even communicate with parties individually. Generally the Conciliator must provide the other party with an account of any information provided to him or her, but in order to promote full frankness by all parties, parties may also provide certain information under condition of confidentiality. This aids the Conciliator in fully understanding the dispute between the parties in order to find a

solution acceptable to both parties. The process is fully informal and controlled by the Conciliator.

277. Rule 106 describes the pivotal role that the Conciliator plays in the proceedings. In order for the process to have a chance of success the Conciliator must display the qualities set out in this Rule and conduct the process in the manner described. If either party has the impression that the Conciliator may be biased, it will kill the process.

278. Rule 107 refers to the fact that parties must co-operate in good faith. Due to the consensual nature of the process there are no sanctions available to the parties or the Conciliator other than terminating the conciliation process. Experience with conciliation worldwide, however, shows that generally speaking parties will take part in conciliation with the honest and earnest desire to find a suitable and just settlement. The participation of an independent trusted third party is very effective in resolving disputes.

279. Rules 108 and 109 gives guidance to the parties as well as the Conciliator on how to proceed to obtain a possible settlement. Article 109 (4) and (5) gives practical effect to the conclusion of a binding settlement agreement and determines when the settlement agreement will be effective.

280. The need for confidentiality of the proceedings has been fully dealt with above in the discussion of the conciliation provisions contained in the Model Law.

281. Rule 111 makes it clear that no cost orders can or will be made and that each party will bear his or her own costs.