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THE UNCITRAL ELECTRONIC CONTRACTS CONVENTION: WILL IT BE USED OR AVOIDED?

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Abstract: The Convention on the Use of Electronic Communications in International Contracts (CUECIC) was approved by the United Nations Commission on International Trade Law (UNCITRAL) in July 2005. It is now available for ratification by U.N. member states. CUECIC is based on the Model Law on Electronic Commerce adopted by UNCITRAL in 1996. The Model Law has served as the basis for electronic signature and electronic commerce legislation at the federal and state levels in the United States and other countries. The similarity of CUECIC to domestic electronic commerce laws should facilitate its use for international contracts. CUECIC requires, however, that its terms be interpreted by domestic courts according to its international character and the need to promote uniformity in its application. These same rules of interpretation also apply to the UNCITRAL Convention on Contracts for the International Sale of Goods (CISG), but no implementing legislation accompanied CISG ratification by the United States to locate the CISG, and to annotate decisions interpreting it, within the body of the code of federal statutes. Like the CISG, there will be no authoritative judicial body or expert commentary to resolve conflicts or ambiguities in judicial interpretations of CUECIC. Varying interpretations may also result from the different versions of CUECIC that could be created by national declarations varying its scope of applicability. Therefore, despite the common source of CUECIC and U.S. electronic commerce laws in the UNCITRAL Model Law on Electronic Commerce, the use of CUECIC for international commercial contracts might be restrained by the same procedural difficulties that have limited the use of the CISG.

I. INTRODUCTION

In July 2001, the United Nations Commission on International Trade Law (UNCITRAL) endorsed a set of recommendations by its Working Group on Electronic Commerce (Working Group) for the Working Group to prepare an international instrument dealing with selected issues of electronic contracting, and to examine possible legal barriers to electronic commerce in

existing international conventions.[1] Recommendations for legal reform to accommodate the growing use of automated information exchange in international commerce were first made to UNCITRAL in 1984.[2] UNCITRAL adopted the Model Law on Electronic Commerce (MLEC) in 1996 as a paradigm for domestic legislation of U.N. member nations.[3] Subsequently, such national legislation often diverged from MLEC principles and the electronic commerce laws of other nations, particularly regarding authentication of electronic signatures.[4] These divergences, and the limited applicability of domestic legislation to parties in foreign locations, led the United States in 1998 to recommend an international convention on electronic commerce based on preexisting MLEC principles.[5] These principles include technological neutrality, national source neutrality, and party autonomy in the choice of applicable contract law and rules.[6]

The proposed convention was also encouraged for additional reasons. In some countries, the supremacy of international treaty law, including pre-existing commercial conventions, over subsequent ordinary domestic law, such as MLEC-based commercial law, creates a potential conflict between domestic law permitting electronic contracts and pre-existing treaties requiring physical documents.[7] A convention on

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[1] U.N. Comm'n on Int'l Trade Law, *Report of the Working Group on Electronic Commerce on the Work of its Forty-Fourth Session*, ¶ 1, U.N. Doc. A/CN.9/571 (Nov. 8, 2004) [hereinafter *Final Working Group Report*].

[2] Philip M. Nichols, *Electronic Uncertainty Within the International Trade Regime,* 15 AM. U. INT'L L. REV. 1379, 1405 (2000).

[3] *Id.*

[4] John D. Gregory, *The Proposed UNCITRAL Convention on Electronic Contracts,* 59 BUS. L. 313, 317 (2003).

[5] U.N. Comm'n on Int'l Trade Law, Working Group on Electronic Commerce, Note by the Secretariat, *Proposal by the United States of America*, U.N. Doc. A/CN.9/WG.IV/WP.77 (May 25, 1998), *available at* http://www.uncitral.org (last visited Apr. 8, 2005) (The market appears unlikely to settle on one universal authentication mechanism or model of implementation in the near future. Parties appear headed toward a choice between different types of authentication regimes, depending on the nature of the transaction and upon the prior relationship, if any, among the parties to the transaction. For example, a large company may choose one authentication method for the electronic system used to procure goods from suppliers, but a different method for on-line purchases by its customers).

[6] Christopher T. Poggi, Note, *Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation*, 41 VA. J. INT'L L. 224, 272 (2000).

[7] Gregory, *supra* note 4, at 317.

electronic contracts could equalize the legal consequences of electronic and physical communications used under these pre-existing conventions.[8] In addition, as John Gregory states, "The rules of the MLEC were done as a model law at the time it was adopted because people were tentative about its solutions. Now they have proved valid and workable and deserve more legal force behind them."[9] Although the UNCITRAL Convention on Contracts for the International Sale of Goods (CISG) does not require physical writings for contracts to be governed by it (subject to party declarations otherwise), its provisions did not contemplate, and therefore do not provide for electronic communications.[10]

At its forty-fourth session in Vienna, spanning from October 11 – 22 2004, the Working Group recommended certain substantive articles for a draft Convention on the Use of Electronic Communications in International Contracts (CUECIC), and requested the UNCITRAL Secretariat to draft conforming changes to the remaining articles of the convention.[11] In addition, the Working Group requested the UNCITRAL Secretariat to circulate the draft convention to UNCITRAL member governments for their comments in anticipation of the full UNCITRAL commission's approval of the convention in July 2005.[12] On July 15, 2005, the full UNCITRAL commission approved the final version of CUECIC.[13]

The UNCITRAL Secretariat noted that "[t]he draft convention contains a few substantive rules that extend beyond merely reaffirming the principle of functional equivalence [between physical and electronic communications] where substantive rules are needed in order to ensure the effectiveness of elec-

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[8] "In favor of preparing an e-contracts convention, it was said that a convention could contribute to the legislative arsenal of means of increasing legal certainty or commercial predictability in electronic business transactions-alongside the MLEC and other instruments." *Id.*

[9] *Id.*

[10] *Id.* at 318.

[11] *Final Working Group Report, supra* note 1, ¶ 10.

[12] *Id.*

[13] U.N. Comm'n on Int'l Trade Law, *Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session,* Annex 1, U.N. Doc. A/60/17 (July 26, 2005) [hereinafter *Final UNCITRAL Report*].

tronic communications."[14] Although many CUECIC substantive legal rules are based on the MLEC,[15] the procedural framework of CUECIC closely resembles the structure of the CISG, particularly regarding scope of application, statutory interpretation principles, and declarations by ratifying countries of variations from default legal rules.[16] This procedural framework will affect the degree of acceptance and utilization of CUECIC by major trading nations like the United States.[17] Therefore, the procedural framework is addressed first below, and is followed by a comparison of the substantive rules of CUECIC with those of MLEC and other U.S. federal and state laws.

II. CISG AS CUECIC'S PROCEDURAL MODEL

UNCITRAL adopted the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 1980.[18]

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[14] U.N. Comm'n on Int'l Trade Law, Note by the Secretariat, *Draft Convention on the Use of Electronic Communications in International Contracts, Addendum: Background information,* ¶ 25, U.N. Doc. A/CN.9/577/Add.1 (Nov. 17, 2004) [hereinafter *Note by the Secretariat*].

[15] *See Final Working Group Report*, *supra* note 1, ¶ 109 (describing the effect of location of information system on rules for place of business determination).

[16] *Compare Final UNCITRAL Report, supra* note 13, Annex I, art. 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. . .(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."), *with* United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, art. 1, *available at* http://www.cisg.law.pace.edu/cisg/text/treaty.html (last visited June 1, 2005) [hereinafter CISG], ("(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. (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, 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").

[17] *See* Bruno Zeller, *International Trade Law: Problems of Language and Concepts?,* 23 J.L. & COM. 39, 40-41 (2003).

[18] CISG, *supra* note 16.

The CISG became effective in the United States on January 1, 1988, after eleven nations ratified the convention ("Contracting States").[19] As of March 2005, 65 countries have become Contracting States to the CISG by ratifying the convention, including Canada, Mexico and China, some of the United States' largest trading partners.[20] The Working Group in 2001 identified the CISG as "a readily acceptable framework for on-line contracts dealing with the sale of goods."[21] CUECIC's sphere of application rules, rules of statutory interpretation, and procedures for derogation from default rules through national declarations replicate similar rules in the CISG.[22]

A. *Sphere of Application Rules*

1. *Place of Business Scope of Application Rule*

Article 1 of CUECIC, "Scope of application," in paragraph 1, establishes the basic test for applicability of CUECIC to business transactions, stating that the "Convention applies to the use of electronic communications in connection with the formation or performance of a contract[23] between parties whose places of business are in different States."[24]

The CISG contains the same basic rule of diversity of the parties' places of business and adds a second requirement that either the location of the parties' places of business must be in Contracting States, or that the conflict-of-laws rules of private international law must be applied by a forum to choose a Contracting State's version of the CISG as applicable law.[25]

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[19] *See,* Status: 1980 – United Nations Convention on Contracts for the International Sale of Goods, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Nov. 6, 2005).

[20] *See* Pace Law School CISG Database, CISG: Table of Contracting States, http://www.cisg.law.pace.edu/cisg/countries/cntries.html (last visited Nov. 6, 2005).

[21] U.N. Comm'n on Int'l Trade Law, Working Group on Electronic Commerce, Note by the Secretariat, *Legal Aspects of Electronic Commerce, Possible Future Work in the Field of Electronic Contracting: An Analysis of the United Nations Convention on Contracts for the International Sale of Goods,* ¶ 1, U.N. Doc. A/CN.9/WG.IV/WP.91 (Feb. 9, 2001).

[22] *See infra* Part II.A-C.

[23] The Working Group proposed this sentence without the additional phrase "[or agreement]" in its recommendation of paragraph 1 of Article 1. *See Final Working Group Report*, *supra* note 1, ¶ 18.

[24] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 1, ¶ 1.

[25] *Id. See also* CISG, *supra* note 16, art. 1.

In a previous CUECIC draft, a second part of the applicability rule had required that (a) the "states" where the places of business are located be parties to the CUECIC convention; or (b) the conflict-of-laws rules of private international law be applied by a forum to choose CUECIC as applicable law; or (c) the parties to the transaction agree that CUECIC is the applicable law.[26] This formulation adopted CISG Article 1's two alternative grounds for application of the convention, and added a third basis for applicability: the transaction parties' agreement that CUECIC is the applicable law.[27] The CISG, however, also permits the parties to make a specific reservation against the effectiveness of its default conflict-of-laws applicability rule.[28] The United States has used this reservation to "opt-out" of this rule's application under the U.S. version of CUECIC.[29]

Despite the broad language of Article 1, paragraph 1, the "prevailing view" in the full UNCITRAL commission was that "the convention should only apply when the laws of a Contracting State applied to the underlying transaction."[30] This application would result not merely from the location of a forum for a dispute between foreign parties in a state that has ratified CUECIC, but also from the application of a Contracting State's law through the required conflict-of-laws analysis by the dispute forum.[31]

In Working Group discussions, concerns were expressed regarding the CUECIC's scope of application requirements, and the likelihood of dissimilar interpretations of the restrictions on applicability through Contracting State reservations and declarations.[32] As with the CISG,[33] however, the goal of maximum

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[26] U.N. Comm'n on Int'l Trade Law, Working Group IV (Electronic Commerce), Note by the Secretariat, *Legal Aspects of Electronic Commerce – Electronic Contracting: Provisions for a Draft Convention, Annex,* art. 1, ¶ 1 (a)-(c), U.N. Doc. A/CN.9/WG.IV/WP.110 (May 18, 2004) [hereinafter *Penultimate Draft CUECIC*].

[27] *See* CISG, *supra* note 16, art. 1(1); *See also* 15 U.S.C. Appendix (Supp. 1987).

[28] "Any state may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention." *See* CISG, *supra* note 16, art. 95.

[29] *Id*.

[30] *Final UNCITRAL Report, supra* note 13, ¶ 22.

[31] *Id.*

[32] *Final Working Group Report,* s*upra* note 1, ¶¶ 38-39.

[33] "Many CISG provisions are the product of compromise and thus we must ask whether these compromises have proven to be effective or have resulted in a

international acceptance of CUECIC through flexibility of terms was balanced against the goal of promotion of legal uniformity and predictability.[34] The Working Group finally agreed to "establish the broadest possible scope of application as a departure point, while allowing states for which a broad scope of application might not be desirable to make declarations aimed at reducing the reach of the draft convention."[35]

CUECIC Article 1, therefore, establishes a broad rule of applicability.[36] Unlike the CISG, CUECIC does not require that both parties to the transaction have their places of business in Contracting States.[37] Nor does it require that a national version of CUECIC be chosen as applicable law through the conflict-of-laws analysis of a court or other forum.[38] The prevailing view of the full UNCITRAL commission, however, appears to require such a choice of law in order for CUECIC to apply to a transaction, unless other applicability requirements established in a national declaration are satisfied.[39]

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chaotic jurisprudence." Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 305 (2004).

[34] "Commerce depends on confidence. For the electronic marketplace to flourish in both its customer and enterprise dimensions, buyers and sellers alike must have at least the level of confidence in the outcome of electronic commerce as they have in more traditional kinds of transactions." *Group of High-Level Private Sector Experts on Electronic Commerce, Issues and Opportunities in the Implementation of Electronic Commerce*, 42, (Organization for Economic Cooperation and Development – OECD) http://www.oecd.org/dataoecd/54/25/1893999.pdf (last visited Nov. 2, 2005).

[35] *Final Working Group Report, supra* note 1, ¶ 39.

[36] *See Final UNCITRAL Report, supra* note 13, Annex 1, art. 1.

[37] *Compare* CISG, *supra* note 16, art. 1, ¶ 1 ("This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States."), *with Final UNCITRAL Report, supra* note 13, art. 19, ¶ 1 ("Any 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.") (CUECIC gives Contracting States the option to limit the scope of applicability to only those contracts where both parties have their places of business in States that are Contracting States).

[38] "[F]or those States in which such a broader scope of application might create difficulties, draft article 18 might contemplate a reverse exclusion, namely that a State might declare that it would apply the Convention only if both parties were located in Contracting States." *Final Working Group Report, supra* note 1, ¶ 35.

[39] *Final UNCITRAL Report, supra* note 13, ¶ 22.

In the final CUECIC draft, two of the previous draft's three alternative requirements for CUECIC applicability were moved from Article 1, covering scope of applicability, to Article 19, covering national declarations.[40] Article 19 provides that a Contracting State may declare that CUECIC will govern only if (a) the places of business of the parties to the transaction are located in Contracting States; or (b) the parties agreed that CUECIC will govern their transaction.[41] As authorized declarations, they remain options to limit the national scope of application of CUECIC, rather than default requirements for CUECIC to apply to all transactions.[42] The alternative declaration that a forum conflict-of-laws analysis might require application of CUECIC to a transaction was eliminated, but the final UNCITRAL report on CUECIC indicates that this deletion was for redundancy[43] since the application of CUECIC through conflict-of-laws analysis remains an underlying assumption of the operation of the broad CUECIC scope of applicability rule in Article 1.[44]

CUECIC Article 1, paragraph 2, provides a parol evidence rule that excludes evidence of the location of places of business in different States if it is not contained in the contract itself.[45] This rule, however, is subject to two broad exceptions. First, it permits parol evidence when it appears from "dealings between the parties."[46] Second, it permits parol evidence when it appears from "information disclosed by the parties at any time before or at the conclusion of the contract."[47] The resulting balance in favor of permitting parol evidence is more like the CISG rule on parol evidence[48] than it is like the Uniform Commercial Code (UCC) rule.[49]

CUECIC Article 1, paragraph 3, prohibits a reviewing forum from considering the nationalities of the parties to the

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[40] *Compare Penultimate Draft CUECIC, supra* note 26, art. 1, *with Final UNCITRAL Report, supra* note 13, Annex 1, art. 19.

[41] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 19, ¶ 1.

[42] *Id.* Annex 1, art. 19, ¶ 2.

[43] *Id.* ¶ 127.

[44] *Id.* ¶ 22.

[45] *Id.* Annex 1, art. 1, ¶ 2.

[46] *Id.*

[47] *Id.*

[48] CISG, *supra* note 16, art. 1, ¶ 2.

[49] U.C.C. § 2-202 (2005).

transaction, or the character (civil or commercial) of the parties or the contract in determining whether the CUECIC governs a given transaction.[50]

CUECIC Article 4, "Definitions," sets forth a new definition of "place of business" as "any place where a party maintains a non-transitory [sic] establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location."[51] CUECIC Article 6, "Location of the parties," reiterates two rules from Article 10 of the CISG concerning multiple places of business and habitual residence as a place of business.[52] In addition, Article 6 creates rules on presumptions created by party indications of place of business, and the effect of the location of equipment, technology, information systems, domain names and electronic mail addresses.[53] For example, if a party has not made any indication of the location of its place of business "it would be deemed to be located at the place that meets the definition of 'place of business'" pursuant to Article 4(h).[54]

2. *Declarations on the Scope of Application*

CUECIC Article 19, "Declarations on the scope of application", provides that:

> 1. Any Contracting State may declare, in accordance with article 21, that it will apply this Convention only:
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> (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.[55]

CISG Article 92's general rules on declarations require that they be made "at the time of signature, ratification, acceptance, approval or accession," and limit declarations to the rules in

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[50] *Final UNCITRAL Report, supra* note 13, Annex 1, art.1, ¶ 3.

[51] *Id.* Annex 1, art. 4(h).

[52] *Id.* Annex 1, art. 6, ¶¶ 2-3. *See also* CISG, *supra* note 16, art. 10.

[53] *Id.* Annex 1, art. 6, ¶¶ 1, 4.

[54] *Note by the Secretariat*, *supra* note 14, ¶ 39.

[55] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 19.

Parts II and III of the CISG.[56] A separate declaration may be made under CISG Article 95 for a Contracting State to exclude the default conflict-of-laws rule for scope of CISG applicability, but it must also be made at the time of ratification, acceptance, approval or accession to the convention.[57] The effect of these provisions is to limit the flexibility of states to adjust the scope of applicability of the CISG after ratification.

CUECIC Article 21, paragraphs 1 and 4, provide that declarations under CUECIC Article 19, paragraphs 1 and 2, may be made, modified or withdrawn at any time.[58] Arguments were made that such flexibility would reduce the harmonization of law CUECIC intended to create.[59] The contrary Working Group view, however, prevailed that the rapidly changing technologies of communication justified such flexibility.[60]

CUECIC Article 20, paragraph 1, "Communications exchanged under other international conventions," lists six international conventions to which "[t]he provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract . . ."[61] This provision fulfills the CUECIC goal of removing legal obstacles to electronic commerce under existing international conventions, without the burdensome necessity of their individual amendment.[62]

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[56] CISG, *supra* note 16, art. 92(1).

[57] *Id.* art. 95.

[58] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 21, ¶¶ 1. 4.

[59] *Final Working Group Report, supra* note 1, ¶ 32.

[60] *Id.; See also* Gregory, *supra* note 4, at 328-29 (discussing the uncertain effect of variant contract terms established pursuant to an exercise of party autonomy under CUECIC Article 3 or CUECIC Article 19(1)(c)).

[61] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 20, ¶ 1. (These conventions are the 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 Apr. 1980); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 Apr. 1980); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 Apr. 1991); United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 Dec. 1995); United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 Dec. 2001)).

[62] *Final Working Group Report, supra* note 1, ¶ 48; *See also Note by the Secretariat, supra* note 14, ¶¶ 58-59. This provision would ensure that a Contracting State "directs its judicial bodies to use the provisions of the draft convention to

CUECIC Article 20, paragraphs 2, 3 and 4, sets forth, at a minimum, three different paths for national declarations to follow, stating:

> 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.[63]

A negative declaration under paragraph 2 would operate as a blanket declaration of non-applicability of the provisions of CUECIC to conventions not listed in paragraph 1, such as future conventions, treaties or agreements, (a course that might be described as the "general in, unless general opt out" path). Paragraph 4 (the "specific opt out" path) permits a State the flexibility to choose specific existing or future conventions, whether or not listed in paragraph 1, to be excluded from CUECIC governance.[64] All such declarations under paragraph 4 (and presumably paragraph 3, the "specific opt in" path)

address legal issues relating to the use of data messages in the context of those other international conventions." *Note by the Secretariat, supra* note 14, ¶¶ 58-59.

[63] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 20, ¶¶ 2-4.

[64] *Note by the Secretariat, supra* note 14, ¶ 61.

would prevent the application of CUECIC "in respect of all contracts to which another international convention applies," and should not be allowed for the exclusion of "only certain types or categories of contracts covered by another international convention."[65] Because each of these types of declarations can be made at any time,[66] the potential "path" of declarations over time could become complex.

CUECIC Article 21, "Procedure and effects of declarations," provides for declarations to be made, modified or withdrawn at any time, subject to a waiting period, before such actions take effect if they occur after the entry into force of CUECIC.[67] CUECIC Article 22 prohibits reservations to the Convention.[68]

Like the CISG, CUECIC creates what Anthony Aust calls declarations that are "disguised reservations,"[69] rather than true interpretations of convention provisions. Like a formal reservation, such a declaration "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[70] Unlike a formal reservation, however, a "disguised reservation"[71] may be made at any time, and, like an interpretative declaration, it has no formal rules concerning objection or acceptance by other ratifying States.[72] CUECIC's use of the CISG terminology of declarations promotes states' acceptance of the convention at the cost of textual uniformity.

3. *Transactions Excluded or Varied from CUECIC*

CUECIC Article 2, paragraph 1, excludes from its scope of application "electronic communications" relating to "[c]ontracts concluded for personal, family or household purposes."[73] This

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[65] *Id.*

[66] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 21, ¶ 1.

[67] *Id.* Annex 1, art. 21.

[68] *Id.* Annex 1, art. 22. "Reservations were prohibited in order to avoid the triggering of a formal system of acceptances and objections, which the Working Group agreed was inappropriate for a convention affecting private business transactions rather than State actions. *See Final Working Group Report, supra* note 1, ¶ 30.

[69] *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 104 (2000).

[70] Vienna Convention on the Law of Treaties, art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 3.

[71] AUST, *supra* note 69, at 104.

[72] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 20.

[73] *Id.* Annex 1, art. 2, ¶ 1.

language is the same as Article 2(a) of the CISG, which excludes from CISG applicability the sale of goods for personal, family or household use.[74] However, CUECIC lacks CISG's Article 2(a) exception which states that the CISG applies to goods bought for personal, family, or household use, if the seller neither knew nor ought to have known that the goods were bought for any such use.[75] The Working Group concluded that the increase in international consumer transactions, especially via the internet, between the time of adoption of the CISG and the time of CUECIC had turned merely theoretical problems of applicability of international conventions to consumer transactions into a fundamental conflict with domestic consumer law policy.[76] The inapplicability of commercial law norms, upon which CUECIC is based, to consumer transactions was used to justify an absolute exclusion of such transactions from CUECIC, without the CISG exception for lack of knowledge of the transaction purpose.[77] Further, this exclusion also applies to matrimonial property contracts.[78]

CUECIC Article 2, paragraphs 1(b) and 2, enumerate certain types of financial agreements that are excluded from the scope of CUECIC.[79] This exclusion is premised on the rationale that such agreements are already well-drafted to effectuate electronic commerce, and that relegation of this exclusion to national declarations "would be inadequate to reflect that reality."[80] In comparison, the CISG adds to the personal, family or

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[74] CISG, *supra* note 16, art. 2(a).

[75] *See Penultimate Draft CUECIC*, *supra* note 26, art. 2, ¶ 1 n.12 (describing debate by Working Group that resulted in exclusion of consumer transactions without condition of actual or presumed knowledge of a transaction party).

[76] *Note by the Secretariat, supra* note 14, ¶¶ 33-35.

[77] *Id.*

[78] *Final UNCITRAL Report, supra* note 13, ¶ 28.

[79] *Id.* Annex 1, art. 2, ¶¶ 1(b), 2.

The listed agreements are: (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; and (v) 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. *Id.*

[80] *Final Working Group Report*, *supra* note 1, ¶ 61.

household goods exclusion, exclusions of "stocks, shares, investment securities, negotiable instruments or money," specific exclusions of sales by auction, pursuant to legal order or right, sales of ships, vessels, hovercraft or aircraft, and sales of electricity.[81] CUECIC's exclusion of only personal, family or household contracts, and certain types of financial agreements, might result in a broader default scope of applicability than the CISG.[82] The possibility of future reduction in CUECIC uniformity through various Contracting State declarations of nonapplicability of CUECIC to certain transactions is justified as reflecting "territory-specific issues that should be better dealt [sic] at the State level."[83]

4. *Party Autonomy Rules*

CUECIC Article 3, "Party Autonomy," uses the same basic language as CISG Article 6 that "[t]he parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions."[84] The UNCITRAL Secretariat, however, previously construed this freedom of contract as prohibiting transactional parties from altering the CUECIC requirements for electronic "writings," "signatures" and "originals."[85] The CISG adds a limitation on transaction party autonomy that prohibits any variance by party agreement from

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[81] CISG, *supra* note 16, art. 2(b)-(f).

[82] *Compare* CISG, *supra* note 16, art. 2(b)-(f) ("This Convention does not apply to sales: (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity."), *with Final UNCITRAL Report, supra* note 13, Annex 1, art. 2, ¶ 1(b)-2 ("(1) This convention does not apply to electronic communications relating to any of the following: (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 to beneficiary to claim the delivery of goods or the payment of a sum of money.").

[83] *Final Working Group Report*, *supra* note 1, ¶ 65.

[84] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 3. *See also* CISG, *supra* note 16, arts. 6, 12.

[85] *See infra* Part III.B.5.

Contracting State declarations requiring written contracts.[86] This exception is unnecessary in CUECIC, given that its purpose is to facilitate electronic communications.[87]

Upon ratification by the U.S. Senate, CUECIC will become supreme federal law that pre-empts state law.[88] The CISG scope of application framework has been described as "opt out" coverage, because, "[u]nless the parties expressly 'opt out' of the CISG (*e.g.*, by stating that another law will govern), or derogate from its provisions (*e.g.*, by a contrary clause in the contract), the Convention will apply to any international contract that meets its jurisdictional requirements."[89] Similarly, CUECIC will also apply automatically to contracts meeting its jurisdictional requirement that are not excluded by a specific national declaration, regardless of the transaction parties' awareness of CUECIC applicability, or lack thereof. Therefore, a transaction to which CUECIC applies by its own jurisdictional rules may only be avoided through exclusion by a national declaration,[90] by the parties' exclusion of CUECIC from applicability,[91] or by a derogation from or variation of CUECIC rules by agreement of the parties.[92]

B. *Rules of Interpretation*

Article 5 of CUECIC, "Interpretation," replicates the language of Article 7 of the CISG, as follows:

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

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[86] CISG, *supra* note 16, arts. 6, 12.

[87] *See Final Working Group Report, supra* note 1 and accompanying text.

[88] U.S. CONST. art. VI, § 1, cl. 2.

[89] JEROLD A. FRIEDLAND, UNDERSTANDING INTERNATIONAL BUSINESS AND FINANCIAL TRANSACTIONS 155 (2002); *See also* CISG, *supra* note 16, arts. 1, 6.

[90] *Final UNCITRAL Report, supra note* 13, Annex 1, art. 19, ¶ 2.

[91] *Id.* Annex 1, art. 3.

[92] *Id*.

> the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[93]

In 1997, Michael Joachim Bonell and Fabio Liguori commented on CISG judicial decisions, stating that "[v]ery rarely do decisions take into account the solutions adopted on the same point by courts in other countries."[94] By 1999, ten years after its effective date in the United States, only fifteen federal court opinions and two state court opinions had cited the CISG.[95] As of June 1, 2005, seventy-one United States cases *citing* the CISG were reported.[96] Uncertainty about the rules for CISG interpretation[97] contributes to the reluctance of U.S. courts to apply and interpret the CISG, even where it is applicable. It might also encourage U.S. lawyers to advise their clients to take the "safe course" whereby the parties, through mutual agreement, exclude the application of the CISG from their international contracts.[98]

Interpretive problems inevitably occur in the use of any transnational code, due to language differences[99] and difficulties in identifying common transnational commercial contract practices.[100] Consensus must also be reached on which governing values make up the "general principles" of a convention, in addition to any stated principle of good faith.[101] These values might include the favoring of interpretations that preserve,

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[93] *Id.* art. 5.

[94] Michael Joachim Bonell & Fabio Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law*, Part 1, UNIFORM L. REV (1997), *available at* http://www.cisg.law.pace.edu/cisg/biblio/libo1.html (last visited Nov. 2, 2005).

[95] James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT'L L. J. 273, 280 (1999).

[96] *See* Pace Law School CISG Database, Case Law on Convention on Contracts for the International Sale of Goods (CISG), http://www.cisg.law.pace.edu/cisg/new-features.html (last visited Nov. 2, 2005).

[97] *See* Zeller, *supra* note 17, at 43-45.

[98] *See* Allison E. Butler, *The International Contract: Knowing When, Why and How to "Opt Out" of the United Nations Convention on Contracts for the International Sale of Goods*, 76 FLA. B. J. 24 (2002).

[99] Zeller, *supra* note 17, at 43-44.

[100] *Id.* at 46-47.

[101] *Id.* at 48.

rather than sever, contract obligations, and the recognition of human error.[102]

A consensus has been slow to develop on basic principles of statutory interpretation for the CISG, particularly concerning whether a broad or a narrow interpretative approach is appropriate.[103] Therefore, the requirement in CUECIC Article 5 for CISG-type rules of interpretation is based more upon aspirations for future harmonization of international commercial law than on successful CISG experience with such rules.

The CISG was intended to replace, within its scope of application, prior national commercial laws, such as the UCC and its judicial interpretations, with a new "stateless" type of jurisprudence.[104] Statutory rules for electronic commerce in many nations, however, do not predate the 1996 Model Law on Electronic Commerce, and they follow the MLEC rules on many issues. To the extent that national electronic commerce laws are more similar to each other than, and of more recent common origin compared to, other national commercial laws, the danger of non-uniformity in interpretations of CUECIC provisions because of over-reliance on domestic statutory parallels, should be less than for the CISG. Therefore, the problems of application of CUECIC Article 5 rules of interpretation should be fewer than under the CISG. For example, when an alternate language formulation for the CUECIC article on locating a place of business by reference to location of information systems was suggested in Working Group deliberations,[105] one reason proposed for maintaining the existing draft language was its previous use in MLEC, and that it "should be kept for the sake of uniformity between the draft convention and domestic legislation already enacted on the basis of the Model Law."[106]

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[102] *Id.*

[103] Monica Kilian, *CISG and the Problem With Common Law Jurisdictions*, 10 J. TRANSNAT'L L. & POL'Y 217, 228-29 (2001).

[104] *See* CISG, *supra* note 16, pmbl. ("BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade. . .").

[105] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 6, ¶ 4.

[106] *Final Working Group Report*, *supra* note 1, ¶ 109.

The trend of recent CISG judicial decisions has been toward recognition of the mandatory character of CISG Article 7's rules of interpretation,[107] despite institutional and practical pressures for interpretation of CISG rules according to domestic norms such as those of the Uniform Commercial Code.[108] James Bailey has argued, however, that the CISG, despite its stated intentions,[109] is an obstacle to, rather than a catalyst for, uniformity in international sales law for four reasons related to its rules of interpretation.[110] First, the CISG, like CUECIC, focuses on substantive legal rules rather than on relations between States, and it is, therefore, considered a "self-executing treaty" that does not require implementing legislation to become effective after ratification.[111] The U.S. Congress did not enact implementing legislation for the "self-executing" CISG, which makes the convention, and U.S. cases citing it, difficult to find in the codes of federal statutes.[112] This may lead judges and lawyers in the United States to ignore or avoid the CISG.[113] Second, CISG rules of interpretation "are so obscure that the treaty's own guidelines for producing consistent interpretations fail to promote uniformity."[114] Third, the CISG party autonomy rules lead to "bewildering and potentially contradictory results. . ."[115] Fourth, it is difficult to identify foreign cases citing and interpreting the CISG.[116]

Measures should be taken prior to CUECIC ratification to resist pressures to bend CUECIC norms toward familiar domestic parallels. In order to comply with CUECIC Article 5, U.S. lawyers and judges must learn international jurisprudence interpreting CUECIC. Previously proposed mechanisms to increase knowledge of the "international character"[117] of the

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107 *See* DiMatteo et al., *supra* note 33, at 328.

108 *Id.* at 303.

109 CISG, *supra* note 16, pmbl., art. 7.

110 Bailey, *supra* note 95, at 276, 281.

111 *Id.* at 281-82.

112 The CISG is in the Appendix to Title 15 of the U.S. Code.

113 Bailey, *supra* note 95, at 276-77.

114 *Id.* at 276.

115 *Id.*

116 "[C]ross-referencing to other CISG precedents is too difficult, and the Convention is simply ignored by courts as well as legal practitioners." Kilian, *supra* note 103, at 235.

117 CISG, *supra* note 16, art. 7(1).

CISG might serve the same purpose for CUECIC. These mechanisms include the establishment of both unofficial and official UNCITRAL-sponsored web-based collections of CUECIC-related judicial decisions from all signatory nations.[118] Furthermore, the direct codification of CUECIC into federal statutes would enable U.S. lawyers and judges to better analyze and compare foreign and domestic judicial decisions and scholarly commentaries. Consideration should also be given to the establishment of an official commentary by a permanent editorial board for CUECIC, similar to the official commentary on the Uniform Commercial Code. This would create an authoritative evaluation of CUECIC-related judicial and scholarly analyses and opinions that might otherwise be difficult for non-experts to understand.[119] The U.S. members of the Working Group proposed a mechanism for information sharing among nations about CUECIC judicial interpretations and national experience with the practical operation and effectiveness of the convention.[120] The proposal was eliminated from the final draft of CUECIC,[121] but a similar informal mechanism might achieve the same goal. With such implementation mechanisms, the use of CUECIC by U.S. parties to international trade transactions might avoid the types of procedural obstacles that have restricted the acceptance in practice of the CISG in the United States.[122]

C. *Proposed Amendment Rules*

The draft CUECIC Article 22, "Amendments," which was eliminated from the final version, attempted to apply the les-

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[118] *See* Case Law on Convention on Contracts for the International Sale of Goods (CISG), *supra* note 96. *See also* United Nations Commission on International Trade Law, Case Law on UNCITRAL Texts, *available at* http://www.uncitral.org/uncitral/en/case_law.html (last visited Nov. 2, 2005).

[119] *See* Michael Joachim Bonell, *A Proposal for the Establishment of a 'Permanent Editorial Board' for the Vienna Sales Convention, in* International Uniform Law In Practice, Acts And Proceedings of the 3rd Congress On Private Law Held by the International Institute for the Unification of Private Law, UNIDROIT, Rome 241, 242 (Sept. 1987). *See also* Zeller, *supra* note 17, at 40-41; Bailey, *supra* note 95, at 290-91, 300, 315.

[120] *See infra* Part II.C.

[121] *Id.*

[122] *See* Zeller, *supra* note 17, at 40-41.

sons learned from experience with previous UNCITRAL conventions.[123]

Variant A of proposed Article 22 provided for a conference of Contracting States to be convened to consider amendments upon the vote of one third of the Contracting States.[124] A two-thirds majority of the states present and voting at the conference would have been required for adoption of amendments.[125]

Variant B of proposed Article 22 would have required either the Office of Legal Affairs of the United Nations or the UNCITRAL Secretariat to prepare periodic reports on how the Convention has "operated in practice."[126] A conference of the Contracting States could thereafter have been convened, upon the vote of one quarter of the Contracting States, to consider:

(a) The practical operation of this Convention and its effectiveness in facilitating electronic commerce covered by its terms;
(b) The judicial interpretation given to, and the application made of, the terms of this Convention; and
(c) Whether any modifications to this Convention are desirable.[127]

Proposed amendments would have been approved by a vote of two-thirds of Contracting States "participating in the conference."[128] Variant B reflected a proposal made by the United States through the Working Group.[129]

The emphasis of Variant B on the practical operation and effectiveness of the Convention reflects the practical difficulties that U.S. lawyers have experienced in understanding the terms, interpretations and basic applicability of the CISG to private business transactions.[130] Variant B might, therefore, have rep-

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123 *Final UNCITRAL Report*, *supra* note 13, ¶ 145.

124 *Id.* ¶ 144.

125 *Id.*

126 *Id.*

127 *Final UNCITRAL Report*, *supra* note 13, ¶ 144.

128 *Id*.

129 U.N. Comm'n on Int'l Trade Law, Note by the Secretariat, *Draft Convention on the Use of Electronic Communications in International Contracts*, Annex I, art. 22 n.11, U.N. Doc. A/CN.9/577 (Nov. 24, 2004) [hereinafter *Final Draft CUECIC*].

130 *Id*. art. 22, Variant B ("1. The [Office of Legal Affairs of the United Nations] [secretariat of the United Nations Commission on International Trade Law] shall prepare reports [yearly or] at such [other] time as the circumstances may require for the States Parties as to the manner in which the international regimen established in this Convention has operated in practice. 2. At the request of [not less

resented a method of avoidance of similar frustrations in applying CUECIC, through the sharing of practical experience with CUECIC implementation among Contracting States. Variant B, paragraph 2(b), reinforces this analysis through its emphasis on judicial interpretations of CUECIC terms.[131]

Article 5 of CUECIC requires judges (and arbitrators) to interpret CUECIC primarily according to principles set forth in other interpretations of CUECIC, domestic or foreign, and private international trade law principles, rather than according to comparable domestic law principles.[132] (The Uniform Electronic Transactions Act, as enacted by U.S. States, is the logical source of comparable domestic jurisprudence on electronic commerce that must be resorted to only if no sources of interpretation embodying the "international character" of CUECIC are available.[133]) The practical difficulties in determining applicable international principles, however, have limited the acceptance and implementation of the CISG in the United States in ways that Variant B sought to avoid.[134]

Neither of the proposed amendments were included in the final version of CUECIC. Objections to each proposal centered on the change that each would have caused to the customary practice of UNCITRAL member agreements by consensus, rather than by formal voting.[135] Absent an amendment provi-

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than twenty-five percent of] the States Parties, review conference of Contracting States shall be convened from time to time by the [Office of Legal Affairs of the United Nations] [secretariat of the United Nations Committee on International Trade Law] to consider: (a) The practical operation of this Convention and its effectiveness in facilitating electronic commerce covered by its terms; (b) The judicial interpretation given to, and the application made of, the terms of this Convention; and (c) Whether any modifications to this Convention are desirable."). *See* Zeller, *supra* note 17, at 43-45 (Uncertainty about the rules for CISG interpretation contributes to the reluctance of U.S. courts to apply and interpret CISG, even where it is applicable.).

131 *Final Draft CUECIC, supra* note 129, art. 22, Variant B, ¶ 2(b) (Article 2 states "At the request of [not less than twenty-five per cent of] the States Parties, review conferences of Contracting States shall be convened from time to time by the [Office of Legal Affairs of the United Nations] [secretariat of the United Nations Commission on International Trade Law] to consider: . . .(b) The judicial interpretation given to, and the application made of , the terms of this convention."). *Id.*

132 *Final UNCITRAL Report, supra* note 13, Annex 1, art. 5.

133 *See infra* Part III.

134 *See Final Draft CUECIC*, *supra* note 129, art. 22, Variant B.

135 *Final UNCITRAL Report, supra* note 13, ¶¶ 146-47.

sion, changes to CUECIC may be implemented if proposed by the full commission or, pursuant to a treaty, by the Contracting States.[136]

III. Model Law On Electronic Commerce as CUECIC's Substantive Model

A. *Definitions and Effect on Information Requirements*

The Model Law on Electronic Commerce (MLEC) supplies precursors for four of the eight definitions set forth in CUECIC Article 4. These are the definitions of "data message," "originator," "addressee," and "information system."[137] Four new definitions created in CUECIC are "communication," "electronic communication," "automated message system," and "place of business."[138] Article 7 provides that CUECIC shall have no effect on laws requiring disclosure of identities, places of business or other information.[139] The Working Group did not accept a proposal to add a requirement for transaction parties to disclose the location of their places of business.[140]

B. *Legal Recognition of Electronic Communications*

1. *Legal Equivalency Rules*

CUECIC Article 8, "Legal recognition of electronic communications," paragraph 1, establishes the fundamental rule that "[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."[141] This rule of legal equivalence is derived from the MLEC,[142] and it is also stated in various forms in

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[136] *Id.*

[137] U.N. Comm'n on Int'l Trade Law, *Model Law on Electronic Commerce Adopted by the United Nations Commission on International Trade Law,* art. 2(a), (c), (d), (f), G.A. Res. 51/162, U.N. Doc. A/51/162 (Jan. 30, 1997) [hereinafter MLEC]; *Final UNCITRAL Report*, *supra* note 13, Annex 1, art. 4(c)-(f).

[138] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 4(a), (b), (g), (h).

[139] *Id.* Annex 1, art. 7.

[140] *Final Working Group Report*, *supra* note 1, ¶ 116.

[141] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 8.

[142] "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of data message." MLEC, *supra* note 137, art. 5. "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, the contract shall not

the U.S. federal Electronic Signatures in Global and National Commerce (E-SIGN) Act,[143] and the Uniform Electronic Transactions Act (UETA), the model state law.[144]

CUECIC, upon its ratification by the U.S. Senate, will preempt any conflicting E-SIGN rules for international transactions.[145] E-SIGN will thereafter remain the governing law for interstate electronic transactions only in the U.S. states that have not enacted a version of UETA that is sufficient to avoid federal preemption.[146] A state version of UETA will apply to intrastate transactions elsewhere and to interstate transactions governed by the law of a UETA state.

CUECIC Article 8, paragraph 2, provides that "[n]othing 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."[147] No mention is made of a signature requirement in this article, because "most legal systems did not impose a general signature requirement as a condition for the validity of all types of contract."[148]

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be denied validity or enforceability on the sole ground that a data message was used for that purpose." *Id.* art. 11.

143 *See* Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001(a) (2000) [hereinafter E-SIGN]. ". . .[W]ith respect to any transaction in or affecting interstate or foreign commerce - (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation." *Id.*

144 Uniform Electronic Transactions Act § 7 (1999), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm (1999) (last visited Nov. 2, 2005) [hereinafter UETA]. Section 7 provides: "(a) A record or signature may not be denied legal effect or enforcement solely because it is in electronic form. (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. (c) If a law requires a record to be in writing, an electronic record satisfies the law. (d) If a law requires a signature, an electronic signature satisfies the law." *Id.*

145 E-SIGN, *supra* note 143, §7001 (a).

146 At this time, only four states, Georgia, Illinois, New York and Washington have not yet enacted versions of UETA. *See* National Council of State Legislatures, UETA Enactments, http://www.ncsl.org/programs/lis/CIP/ueta-statutes.htm (last visited Nov. 2, 2005).

147 *Final UNCITRAL Report, supra* note 13, Annex 1, art. 8, ¶ 2. Although the use of electronic communications in contracting is voluntary, the applicability of CUECIC to such a contract will be mandatory, unless the parties successfully "opt out" of such coverage. *Id.* art. 3. *See also* Butler, *supra* note 98.

148 *Final Working Group Report*, *supra* note 1, ¶ 118.

2. *Technological Neutrality*

CUECIC Article 9, "Form requirements," sets forth specific rules confirming the functional and legal equivalency of electronic and physical communications.[149] Paragraph 1 establishes that "[n]othing in this Convention requires a contract or any other communication to be made or evidenced in any particular form."[150] Besides establishing form equivalency, paragraph 1 confirms the rule of technological neutrality among possibly competing electronic authentication systems.[151]

3. *Electronic "Writing"*

CUECIC Article 9, paragraph 2, provides that "[w]here 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."[152] The CUECIC accessibility test for an electronic "writing" is also used in the MLEC rule for satisfaction of "information in writing" legal requirements.[153] In comparison, UETA Section 7(c) provides that "[i]f the law requires a record to be in writing, an electronic record satisfies the law."[154] UETA defines an "electronic record" as "a record created, generated, sent, communicated, received, or stored by electronic means."[155] The E-SIGN Act requires that, in order for an electronic record to satisfy legal record retention requirements, it must accurately reflect the information set forth in the contract or other record and remain "accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later ref-

149 *Final UNCITRAL Report, supra* note 13, Annex 1, art. 9.

150 *Id.*

151 *Id.* ¶ 1 (paragraph 1 states that "Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form."). *Id.*

152 *Id.* ¶ 2.

153 MLEC, *supra* note 137, art. 6(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." *Id.*

154 UETA, *supra* note 144, § 7(c).

155 *Id.* § 2(8).

erence, whether by transmission, printing, or otherwise."[156] The CUECIC electronic "writing" rules improve upon the vague UETA writing rule that defers to its brief definition of electronic record.[157] It might also be preferable to the E-SIGN electronic "writing" rule, which depends in part on an individualized evaluation of the accuracy of the reproduction of record information.[158]

4. *Electronic "Signature"*

CUECIC Article 9, paragraph 3, provides for the satisfaction of the legal requirement of a signature through an electronic communication, as follows:

> 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.[159]

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156 E-SIGN, *supra* note 143, § 7001(d)(1).

157 *Compare Final UNCITRAL Report, Annex I*, *supra* note 13, art. 9, ¶ 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"), *with* UETA, *supra* note 144, § 7 ("(a) A record or signature may not be denied legal effect or enforcement solely because it is in electronic form. (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. (c) If a law requires a record to be in writing, an electronic record satisfies the law. (d) If a law requires a signature, an electronic signature satisfies the law.").

158 E-SIGN, *supra* note 143, § 7001(d)(1), (3) (E-SIGN grants an electronic "contract or other record" the status of an original if the record "accurately reflects the information set forth in the contract or other record" and "remains accessible to all persons who are entitled to access. . .in a form that is capable of being accurately reproduced for later reference. . .") *Id.*

159 *Final UNCITRAL Report, supra* note 13, Annex 1, art. 9.

The requirement that such electronic communications must have appropriately reliable methods to identify the parties to the contract is similar to Article 7(1) of MLEC for "data messages."[160] The requirement of an earlier CUECIC draft Article 9 that a valid method must also indicate a party's approval of the communication was changed in the final CUECIC draft to require only a party's "intention in respect of" the information contained in the electronic communication.[161] This change was made in response to comments by Singapore that electronic signatures are sometimes required only to indicate a party's association with information in a communication, rather than their approval of that information.[162] A notary's signature and a witness's signature are two examples of this distinction. Article 9, paragraph 3(b) was changed from an earlier version that had tracked the language of Article 7(1)(b) of the MLEC, by designating the earlier MLEC-based language as subparagraph (b)(i) and adding the new subparagraph (b)(ii). The purpose of (b)(ii) is to recognize the validity of certain "*ex ante*" or pre-dispute techniques that are "recognized as particularly reliable, irrespective of the circumstances in which they are used."[163] By borrowing this "particularly reliable" method test from the Model Law on Electronic Signatures,[164] subparagraph (b)(ii) seeks to permit determinations of signature reliability prior to a contract dispute, which cannot be overturned later by a judge or other trier of fact.[165] By modifying the MLEC-based requirement of special signature reliability, CUECIC might enhance certainty, increase cost-effectiveness, and strengthen technological neutrality by permitting electronic signatures to be authenticated by the same type of evidence used for handwritten signatures.[166]

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160 MLEC, *supra* note 137, art. 7(1).

161 *Final UNCITRAL Report, supra* note 13, Annex 1, art. 9.

162 U.N. Comm'n on Int'l Trade Law, *Draft Convention on the Use of Electronic Communications in International Contracts: Compilation of Comments by Governments and International Organizations (Singapore)*, ¶ 2, U.N. Doc. A/CN.9/578/Add.10 (May 17, 2005) [hereinafter Country Comments]. *See also Final UNCITRAL Report, supra* note 13, ¶¶ 61-64.

163 *Country Comments, supra* note 162, ¶ 10.

164 *Id.*

165 *Id.* ¶¶ 11-13.

166 *Id.* ¶¶ 17-20.

The UNCITRAL Model Law on Electronic Signatures (MLES), approved in 2001, creates a presumption of reliability for certain types of electronic signatures described therein.[167] The CUECIC choice of technological neutrality among signature methods is more consistent with MLEC than is the MLES presumption in favor of certain "public key encryption" signature technologies.[168] The MLES model is similar to that of the European Union Directive on Electronic Signatures, enacted in 1999, which favors certain types of electronic signature technologies over others on the basis of perceived reliability.[169]

The MLES model was rejected by the federal E-SIGN Act and UETA, neither of which establishes any criteria for the validity of electronic signatures other than being "attached to or logically associated with" a contract or other record[170] and executed or adopted by a person with the intent to sign the record."[171] CUECIC's rules on electronic "signatures" might be preferable to the UETA and E-SIGN rules if the latter rules require proof of subjective intent to sign. The CUECIC test of reliable identification of the signer and of their intention in respect of the electronic communication might permit proof of intent to sign through the objective record of performance of an identification method, rather than requiring proof of subjective intent.

5. *Electronic "Original"*

CUECIC Article 9, paragraphs 4 and 5, rules on electronic "originals," were prompted by the applicability of CUECIC, in article 19, "to the use of electronic communications in connection with the formation or performance of a contract or agreement" to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Conven-

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[167] Model Law on Electronic Signatures of the United Nations Commission, art. 6, ¶¶ 3, 14, G.A. Res. 56/80, U.N. Doc. A/Res/56/80 (Jan. 24, 2002) [hereinafter MLES].

[168] *Id.* ¶ 14.

[169] European Union Directive on Electronic Signatures, 1999/93, art. 2, 1999 O.J. (L13) 43 (EC).

[170] E-SIGN, *supra* note 143, §7006(5).

[171] UETA, *supra* note 144, § 2(8).

tion) applies.[172] This applicability created a need to determine the electronic equivalent of the physical "original" arbitration agreement, which (or a certified copy of which) must be proffered in order to enforce rights under the New York Convention.[173] The CUECIC rules for electronic originals are not limited, however, to arbitration agreements.

The first CUECIC requirement for an "original" electronic communication or contract is "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."[174] Reliable assurance is tested by "whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display,"[175] and is "assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances."[176] The second requirement for an electronic "original" is that "[w]here 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."[177]

CUECIC provisions on the necessary forms of electronic communications required for legal equivalence with physical "writings," "signatures," and "originals" cannot be varied by agreement pursuant to the exercise of party autonomy under CUECIC Article 3.[178] Despite objections that the CUECIC definition of an original document tested only the integrity of the document and not its uniqueness (i.e. there might be multiple "originals"), the definition was retained without a requirement

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[172] *Final UNCITRAL Report, supra* note 13, Annex 1, arts. 9, 19. *See also* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 4.

[173] *Final Working Group Report*, *supra* note 1, ¶¶ 129-135.

[174] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 9, ¶ 4(a).

[175] *Id.* Annex 1, art. 9, ¶ 5(a).

[176] *Id.* Annex 1, art. 9, ¶ 5(b).

[177] *Id.* Annex 1, art. 9, ¶ 4(b). The final draft of CUECIC article 9 would have excluded through an additional paragraph 6 the application of paragraph 4 and 5's rules on originals to original documents presented for the purpose of claiming payment under a letter of credit, a bank guarantee or a similar instrument. The need for this paragraph was eliminated by the substitution of the phrase "made available" for the word "presented" in paragraphs 4 and 5. *See Final Draft CUECIC, supra* note 129, art. 9, ¶ 6.

[178] *Final UNCITRAL Report, supra* note 13, ¶ 33.

for uniqueness, in view of the exclusion from the scope of CUECIC of documents required for negotiable instruments or documents of title.[179]

Except for the substitution of the phrase "made available" for the word "presented," and two other terminology changes, the CUECIC requirements for an electronic "original" are the same as in MLEC. The MLEC substitutes the term "information" for the CUECIC phrase "a communication or a contract," and substitutes the term "data message" for the CUECIC term "electronic communication."[180] E-SIGN section 7001(d)(1) and (3) grants an electronic "contract or other record" the status of an original if the record "(A) accurately reflects the information set forth in the contract or other record; and (B) remains accessible to all persons who are entitled to access. . .in a form that is capable of being accurately reproduced for later reference. . ."[181] Section 12(a) and (d) of UETA defines an "original" to mean an electronic record that "(1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and (2) remains accessible for later reference."[182]

The CUECIC test for an electronic "original" might be preferable to the E-SIGN and UETA tests if, as is also possible for the E-SIGN electronic "writing" rules, the E-SIGN and UETA tests require a difficult determination of the accuracy of reproduction of electronic record information. The CUECIC test of "originality"[183] might permit proof of reliability of assurance of record integrity through an objective record of performance of the method of assurance, rather than through an individualized

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[179] *Id.* ¶ 70.

[180] MLEC, *supra* note 137, art. 8(1)-(3).

[181] E-SIGN, *supra* note 143, (d)(1)(A), (B)(d)(3).

[182] UETA, *supra* note 144, § 12(a), (d).

[183] *Final UNCITRAL Report, supra* note 13, art. 9, ¶ 4 (the paragraph states "[w]here the law requires that a communication or 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.").

evaluation of the accuracy of the reproduction of record information.[184]

C. *Time and Place of Dispatch and Receipt (or the "Electronic Mailbox Rule")*

CUECIC Article 10, paragraph 1, states the rule for the time of dispatch of an electronic communication as

> 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.[185]

The stated alternative rule for communications that have not left the originator's information system is intended to apply to situations such as the posting of information on a website.[186]

CUECIC Article 10, paragraph 2, sets forth the rule for the time of receipt of an electronic communication as

> 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.[187]

The CUECIC time of receipt rules are based on addressee ability to retrieve a communication, rather than entry into an addressee "information system," defined by CUECIC Article 4(f)

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[184] *Compare* E-SIGN, *supra* note 143, (d)(1)(A), (B)(d)(3) (requiring that an original "accurately reflects the information set forth in the contract or other record."), *with* UETA, *supra* note 144, § 12(a) (requiring an electronic record that "accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and remains accessible for later reference") (Both E-SIGN and UETA require the accuracy of the electronic record to determine an original's validity. The tests for E-SIGN and UETA are more subjective than the CUECIC test).

[185] *Final UNCITRAL Report Annex I, supra* note 13, art. 10, ¶ 1.

[186] *Final Working Group Report, supra* note 1, ¶ 143.

[187] *Final UNCITRAL Report Annex I, supra* note 13, art. 10, ¶ 2.

as "a system for generating, sending, receiving, storing or otherwise processing data messages."[188] Rules based on information system entry rules were rejected by the Working Group for both the time of dispatch and the time of receipt rules.[189] Arguments prevailing against information system entry-based rules included the uncertainty of the legal relationship required between an addressee and the information system,[190] and the uncertain effect on data retrieval of "measures implemented by companies and individuals to preserve the integrity, security or usability of their information systems (for instance to block "spam" mail or prevent the spread of viruses) [that] had led in practice to repeated loss of communications."[191]

Designated information system entry is the primary criterion for time of dispatch and receipt of electronic messages in Article 15 of the MLEC,[192] and Section 15 of UETA, with the latter also requiring proper direction to the designated system and a form of electronic record capable of being processed by the designated system.[193] The information system entry test found support in the Working Group as a more objective test than capability to retrieve a message,[194] but it was ultimately rejected for determinations of either time of dispatch or time of receipt.[195] The UNCITRAL Secretariat noted, however, that "[t]he differences in wording between Article 10 of the draft convention and Article 15 of the Model Law are not intended to produce a different practical result. . ."[196] Further, the Secretariat characterizes CUECIC Article 10 "as a set of presumptions, rather than a firm rule on receipt of electronic communications."[197] Therefore, "[d]espite the different wording used. . .as is the case under article 15 of the Model Law, the draft conven-

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188 *Id.* art. 4(f).

189 *Final Working Group Report, supra* note 1, ¶¶ 142, 146.

190 *Id.* ¶ 146.

191 *Id.* ¶ 148 (brackets in original). A specific exemption to the time of receipt rule to account for the effects of technological filters was proposed, but ultimately rejected by the Working Group. *See Final Working Group Report, supra* note 1, ¶ 153.

192 MLEC, *supra* note 137, art. 15(1), (2).

193 UETA, *supra* note 144, § 15(a)-(b).

194 *Final Working Group Report, supra* note 1, ¶¶ 151-61.

195 *See Note by the Secretariat, supra* note 14, ¶¶ 50-52.

196 *Id.* ¶ 49.

197 *Id.* ¶ 51.

tion retains the objective test of entry of a communication in an information system to determine when an electronic communication is presumed to be 'capable of being retrieved' and therefore 'received.'"[198]

Unlike CUECIC, MLEC provides that data messages sent to an address other than the one designated by the addressee may be considered received only when they are actually retrieved by the intended addressee.[199] Under the MLEC, however, data messages sent to an addressee who has not designated an address are considered received when they enter any information system of the addressee.[200]

UETA Section 15 provides that an electronic record is sent when it "enters an information processing system outside the control of the sender," or enters "an information processing system that the recipient has designated or uses," if it is properly addressed and "is in a form capable of being processed by that system."[201] UETA provides that an electronic record is received when "(1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and (2) it is in a form capable of being processed by that system," regardless of the addressee's awareness of receipt of the electronic record.[202]

CUECIC Article 10, paragraph 2, requires for receipt of any message sent to any non-designated address that the message must be "capable of being retrieved" and the addressee must be "aware that the electronic communication has been sent to that address."[203] The reason for the stricter treatment of receipt of messages sent to a non-designated address (and not simply an incorrect address) under CUECIC compared with the MLEC is that, since the adoption of the MLEC the growth in security filters and firewalls has reduced the likelihood that electronic messages will reach their addressee.[204] Therefore, rules on re-

198 *Id.* ¶ 52.
199 MLEC, *supra* note 137, art. 15(2)(a)(ii).
200 *Id.* art. 15(2)(b).
201 UETA, *supra* note 144, § 15(a).
202 *Id.* § 15(b), (e).
203 *Final UNCITRAL Report, supra* note 13, art. 10, ¶ 2.
204 *Note by the Secretariat, supra* note 14, ¶ 56.

ceipt should "be linked to consent to use a particular electronic address, and should not compel persons who had not agreed to bear the risk of loss of communications that were sent to another address."[205]

The CUECIC rule for time of receipt is clearly preferable to its predecessors. For designated electronic addresses, the capability of retrieval test and presumption eliminate the ambiguous system entry test of the MLEC and UETA. For non-designated addresses of the addressee, the CUECIC capability of retrieval and awareness of the communication tests are clearer than the MLEC system entry test for receipt. The CUECIC tests are more equitable to the sender when the communication is sent to the wrong electronic address of the addressee, but the addressee is aware of the communication and capable of retrieving it. UETA does not discuss the issue of receipt of communications sent to non-designated electronic addresses of the addressee.

CUECIC Article 10, paragraph 3, establishes the rule for place of dispatch and receipt of electronic communications that "[a]n 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."[206] Paragraph 4 provides that paragraph 2's time of receipt rule applies, "notwithstanding that the place where the information system. . . is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article."[207] These are the same rules set forth in Article 15 of the MLEC[208] and in Section 15 of UETA.[209]

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[205] *Id.*

[206] *Final UNCITRAL Report Annex I, supra* note 13, art. 10, ¶ 3.

[207] *Id.* ¶ 4.

[208] MLEC, *supra* note 137, art. 15. *See also Note by the Secretariat, supra* note 14, ¶ 49 (stating that: "The differences in wording between article 10 of the draft convention and article 15 of the Model Law are not intended to produce a different practical result.").

[209] UETA, *supra* note 144, § 15; provides "[T]he federal Electronic Signatures Act ignores contract formation issues entirely, which is the strongest argument for state legislatures to enact UETA and supersede the ESA, which provides little guidance or certainty to commercial parties engaged in electronic commerce." Chris-

D. *Other Electronic Communication Rules*

1. *Invitations for Offers; Electronic Agents*

CUECIC Article 11, "Invitations to make offers" establishes the rule that a proposal to contract that is not directed at a particular party, but that is generally accessible, is only an invitation to make an offer "unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance."[210] The exception is meant to apply to cases of "offers of goods through Internet auctions and similar transactions. . ."[211]

There are no provisions dealing with invitations to make offers in MLEC, E-SIGN or UETA. Article 14(2) of the CISG, on the other hand, provides that "[a] proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal."[212] This provision was relied upon in Working Group discussions to counter the argument that CUECIC Article 11 would introduce a concept that was unrecognizable within certain legal systems.[213]

CUECIC Article 12, "Use of automated message systems for contract formation" authorizes contract formation through "the interaction of an automated message system and a natural person, or by the interaction of automated message systems. . ."[214] CUECIC Article 11 is intended, however, to prevent the mere offer of interactive applications for the placement of orders from creating a presumption of intent to be bound by all orders placed through the system.[215] E-SIGN Section 7001(h) approves contract formation through "electronic agents" whose actions are "legally attributable to the person to be bound."[216] UETA Section 14 approves contracts formed by

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topher T. Poggi, *Note: Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation,* 41 VA. J. INT'L. 224, 260 (2000).

[210] *Final UNCITRAL Report Annex I, supra* note 13, art. 11.

[211] *Final Working Group Report, supra* note 1, ¶ 171.

[212] CISG, *supra* note 16, art. 14(2).

[213] *Final Working Group Report, supra* note 1, ¶ 169.

[214] *Final UNCITRAL Report Annex I*, supra note 13, art. 12.

[215] *Note by the Secretariat, supra* note 14, ¶ 43.

[216] E-SIGN, *supra* note 143 § 7001(h).

interaction of electronic agents or of an electronic agent and an individual.[217]

2. *Availability of Contract Terms; Errors and Corrections*

CUECIC Article 13, "Availability of contract terms" defers to domestic law on requirements to make contract terms available in a particular manner.[218] CUECIC Article 14, "Error in electronic communications," applies "[w]here a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the. . .system does not provide the person with an opportunity to correct the error. . ."[219] In that case, the person has the right to withdraw the erroneous portion of the communication under certain circumstances.[220] Paragraph 2 of Article 14 defers to domestic law regarding the effect of non-input errors in contract formation and performance.[221]

UETA Section 10 establishes a separate rule for parties that "have agreed to use a security procedure to detect changes or errors."[222] In such a case, the party conforming to the procedure has the option to avoid the effect of the error.[223] In an automated transaction involving an individual, however, the individual may avoid the effect of the error if the electronic agent did not provide the opportunity for the prevention or correction of the error, and if the two conditions are met of prompt notice by the person(s) who committed the error and of their intent to not be bound by it, and the absence of use or receipt of material benefit or value by the party in error from the goods or services received from the other party. These two conditions are also

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[217] UETA, *supra* note 144, § 14.

[218] *Final UNCITRAL Report Annex I, supra* note 13, art. 13.

[219] *Id.* art. 14.

[220] *Id.*

[221] *Id.*

[222] UETA, *supra* note 144, § 10.

[223] Section 10, paragraph 1 of the UETA provides "(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record." *Id.*

required by CUECIC Article 14.[224] The third UETA requirement that the party in error must take reasonable steps to return or dispose of the goods or services received from the other party was eliminated from CUECIC Article 14 as a matter that national law should govern.[225]

Article 14 was criticized in the Working Group as a consumer policy-oriented rule that was inappropriate for commercial transactions and that presented difficult questions of proof of error.[226] The article was retained, however, on the grounds of the need for an error rule "in view of the relatively higher risk of human errors being made in communications exchanged with automated message systems," the need for a uniform rule "in view of the differing and possibly conflicting solutions that might be provided for under domestic laws," and the previous existence of evidentiary problems in resolving allegations of error in "paper-based" communications.[227]

E. *Regional Economic Integration Organizations*

A new Article 17 was added to the final version of CUECIC that permits regional economic integration organizations to ratify CUECIC and thereby have the rights and obligations of a Contracting State to the extent of the organizations' competence over matters governed by CUECIC.[228] The proper interaction of Contracting State CUECIC rules and the CUECIC

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[224] *Id.* UETA, section 10, paragraph 2 provides that "In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual: (A) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person; (B) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and (C) has not used or received any benefit or value from the consideration, if any, received from the other person.) *Id.*

[225] *Compare* UETA, *supra* note 144, § 10(2), *with Final UNCITRAL Report, supra* note 13, ¶ 101.

[226] *Final Working Group Report, supra* note 1, ¶ 185.

[227] *Id.* ¶ 186.

[228] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 17.

rules of a regional economic integration organization of which the State is a member is left to those entities to determine.[229]

IV. CONCLUSION

In the course of its future use by United States' courts and practitioners, CUECIC will have an advantage over the CISG in substantive familiarity, because it shares a common source of its legal rules with the U.N. Model Law on Electronic Commerce, as does the federal E-SIGN Act and UETA. It will therefore avoid the instinctive rejection in common law states of civil law-derived rules on long-established matters such as consideration, oral contracts and parol evidence, which has limited the use of CISG by parties in those States.[230]

From the practical viewpoint of improvement of the functioning of electronic commerce, CUECIC rules are clearly an improvement upon the MLEC and UETA rules concerning time of receipt of electronic communications, and the UETA electronic writing rule. CUECIC rules might also be preferable to the E-SIGN electronic writing rule and to the UETA and E-SIGN rules on electronic signatures and originals. CUECIC establishes an invitation for offers rule in electronic commerce that does not exist in UETA or E-SIGN, and CUECIC establishes an errors and corrections rule that does not exist in E-SIGN.

CUECIC will probably apply to future contract disputes in which the following jurisdictional facts exist: 1) the "places of business in different States" requirement of Article 1(1) is satisfied; 2) no subject matter exclusions from Article 2 apply to the contract; and 3) no exercise of party autonomy pursuant to Article 3 is used to "opt out" of CUECIC; and either (a) the parties have opted out of the CISG Article 11 "no writing or form required" rule and have chosen writing and signature requirements for enforcement of their contract, or (b) the parties have opted out of the CISG Article 11 and the applicable law chosen by them has writing and signature requirements, such as a state "Statute of Frauds" or state version of U.C.C. §2-201(1), or (c) the parties have opted out of the CISG Article 11 and the

[229] *Id.* ¶ 186.

[230] Kilian, *supra* note 103, at 230.

applicable law chosen through conflict-of-laws rules has writing and signature requirements, or (d) the CISG version that governs the contract is subject to an Article 96 national declaration that maintains writing and signature requirements for contract enforcement, or (e) the transaction is subject to other treaty requirements for a writing and signature.

The history of the CISG's adoption by U.S. lawyers and of its interpretation by U.S. judges provides a cautionary example, however, regarding the procedural pitfalls to the successful incorporation of commercial conventions into domestic U.S. law. Since CUECIC uses the CISG as a procedural model, it might suffer from these same pitfalls, including the unfamiliarity of domestic judges with the principles and techniques of jurisprudence under international commercial conventions, leading to domestically-oriented interpretations of transnational codes. Other pitfalls include the difficulty for judges and lawyers in finding international conventions within federal statutory codes, or in finding annotated domestic case law, if a "self-executing treaty" is not accompanied by implementing legislation, which makes the treaty easier to locate among federal laws. The lack of familiarity with the collections and analyses of foreign court decisions and commentaries on CISG provisions on the part of U.S. judges and lawyers has also been a problem. Finally, the absence of an official commentary on international commercial conventions, such as the Uniform Commercial Code commentary on domestic commercial statutes, limits the development of authoritative interpretations of new convention terms and concepts.

The Working Group proposed CUECIC amendment rules that included a procedure for the development of official reports at the request of the Contracting States, "as to the manner in which the international regimen established in this Convention has operated in practice."[231] The Working Group also proposed "review conferences" of the Contracting States that would "from time to time" review CUECIC "effectiveness in facilitating electronic commerce," "judicial interpretation given to, and the application made of, the terms of this Convention", and "[w]hether any modifications to this Convention [CUECIC] are

[231] *Final UNCITRAL Report, supra* note 13, Annex 1, art. 22, Variant B, ¶ 1.

desirable."[232] Adoption of these proposals by UNCITRAL might have provided a mechanism for harmonization of international electronic commerce law. Similar informal procedures might promote CUECIC ratification by a large number of states, while also promoting fulfillment of CUECIC rules of interpretation in a manner that incorporates practical experience with the implementation of previous international commercial conventions, like the CISG. Although these amendment rules were eliminated from the final CUECIC draft, their objective to promote the use and understanding of CUECIC in the United States and elsewhere might be fulfilled through other informal procedures. If such procedures develop, they might reduce CUECIC avoidance as optional law by transaction parties because of their lack of understanding of CUECIC provisions and their lack of familiarity with the record of CUECIC interpretation in practice.

[232] *Id.* ¶ 2.