

# The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law

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*Although no non-European Union convention focusing on international electronic commercial contracts is currently in effect, such contracts are growing in number and importance and do not exist in a legal vacuum. The Convention on Contracts for the International Sale of Goods (CISG) has been interpreted by its Advisory Council to apply to such electronic contracts. International law, based on general principles of good faith and equity and on customary international law, is an existing and future source of international commercial electronic contract law. Customary international electronic commerce law is derived from the general practices of businesses contracting through electronic communications that are accepted as law, and from international treaties and model laws, and their interpretations, which have been accepted as authoritative descriptions of such practices. The United States will decide whether or not and how to ratify the Convention on the Use of Electronic Communications in International Contracts (CUECIC) that was proposed by it to the United Nations Commission on International Trade Law (UNCITRAL) and was drafted and approved by UNCITRAL. CUECIC advances further than existing law the legitimacy and functionality of international electronic commercial contracts. U.S. ratification decision makers should recognize this advancement, reinforce the freedom of contract norms promoted by CUECIC, and preserve the legitimacy of customary international law as a supplement to the limited contract formation rules of CUECIC.*

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## I. INTRODUCTION

As of March 1, 2008, no currently-in-force international conventions focus on international commercial contracts formed or performed through electronic communications.<sup>1</sup> U.S. government statistics do not separate international from national electronic commerce.<sup>2</sup> Private sources, however, predict that international “e-commerce,” which presently accounts for a small percentage of electronic contracts, will grow rapidly.<sup>3</sup>

Since U.S. ratification in 1988, the Convention on Contracts for the International Sale of Goods (CISG), sponsored by the United Nations Commission on International Trade Law (UNCITRAL), its mandatory rules and, absent an effective choice of other applicable law, its “default rules”<sup>4</sup> on contract formation and performance have governed contracts for international sale of goods.<sup>5</sup>

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1. United Nations Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, U.N. Doc. A/RES/60/21 (Dec. 9, 2005) [hereinafter CUECIC], has been signed by eighteen nations as of January 16, 2008, according to the United Nations Commission on International Trade Law (UNCITRAL). See Status 2005—United Nations Convention on the Use of Electronic Communications in International Contracts, UNCITRAL, 2007, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005\\_Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005_Convention_status.html) [hereinafter Status 2005]. CUECIC will not become effective, however, until at least three nations ratify it. See CUECIC, *supra*, art. 23.1.

2. See U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL ELECTRONIC COMMERCE, DEFINITIONS AND POLICY IMPLICATIONS 14 (2002). The U.S. Census Bureau of the Department of Commerce estimates U.S. retail e-commerce sales for the second quarter of 2007 at \$33.6 billion, accounting for 3.3% of total retail sales. Sales made to a customer in a foreign country through a U.S. Web site are included in the estimates. See Quarterly Retail E-Commerce Sales 2nd Quarter 2007, Aug. 16, 2007, <http://www.census.gov/mrts/www/data/html/07Q2.html>. The U.S. Census Bureau estimated that business-to-business transactions accounted for 92% of the \$2.4 trillion total of all U.S. electronic commerce in 2005. Manufacturers accounted for \$1,266 billion, or 52.8% of all U.S. e-commerce, with wholesalers next at \$945 billion or 39.4% of all U.S. e-commerce. See U.S. Census Bureau E-Stats, U.S. CENSUS BUREAU, May 25, 2007, <http://www.census.gov/eos/www/2005/2005reportfinal.pdf>.

3. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 2; Riva Richmond, *More Small Firms Expand Abroad*, WALL ST. J., July 3, 2007, at A12 (noting that the Internet, trade agreements, and improved transportation facilitate increased international business by U.S. companies).

4. Some of the “mandatory” CISG rules include the scope rules of articles 3, 4, and 5 on the types of contracts to which the CISG applies and CISG article 12 allowing Contracting State declarations requiring contracts to be concluded in or evidenced by writing. Cf. UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT (1996) [hereinafter MLEC GUIDE TO ENACTMENT] (noting that default rules may be used by parties as a basis for their contracts, to supplement contract terms, or as basic standards for communications entered into without previous agreement on applicable standards, while mandatory rules set minimum acceptable form requirements).

5. See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1989 U.N.T.S. 3, 19, art. 1 [hereinafter CISG].

In 1998, the United States recommended that UNCITRAL develop an international convention on electronic contracts based on the preexisting principles of the Model Law on Electronic Commerce (MLEC) adopted by UNCITRAL in 1996. These principles include technological neutrality, national source neutrality, and party autonomy in the choice of applicable contract law and rules.<sup>6</sup> In July 2005, the Convention on the Use of Electronic Communications in International Contracts (CUECIC) was adopted by UNCITRAL at its thirty-eighth session.<sup>7</sup> The General Assembly of the United Nations later adopted CUECIC on November 23, 2005.<sup>8</sup> The CUECIC remained open for signature by all nations until January 16, 2008.<sup>9</sup> Signing the convention only indicates an intention to consider its ratification rather than consent to be bound by it.<sup>10</sup> As of January 16, 2008, eighteen nations including China, Russia, Singapore, and the Republic of Korea had signed CUECIC.<sup>11</sup>

Unlike the CISG, which applies to “contracts of sale of goods,”<sup>12</sup> CUECIC applies to “electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States.”<sup>13</sup> Therefore, CUECIC potentially applies to contracts for services, licenses of software, auctions, barter, and other types of transactions, as well as sales of goods.<sup>14</sup>

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6. U.N. Comm'n on Int'l. Trade Law [UNCITRAL], 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* [www.uncitral.org/pdf/english/workinggroups/wg\\_ec/wp-77.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_ec/wp-77.pdf); *see also* Electronic Signatures in Global and National Commerce Act (E-SIGN), 15 U.S.C.A. § 7031 (West Supp. 2007) (noting that the Secretary of Commerce shall promote international acceptance and use of electronic signatures based on Model Law on Electronic Commerce principles, including technological and national neutrality).

7. *See* Press Release, General Assembly, General Assembly Adopts New Convention on Use of Electronic Communications in International Contracting, U.N. Doc. GA/10424 (Nov. 23, 2005), *available at* <http://www.un.org/News/Press/docs/2005/ga10424.doc.htm>.

8. *Id.*

9. *See* CUECIC, *supra* note 1, art. 16.1.

10. *See* Resolution 303 of the American Bar Association House of Delegates 2006 A.B.A. SEC SCI. & TECH. L., SEC. INT'L. L. RESOL. 303, at n.2 (2006), *available at* <http://www.abanet.org/intlaw/policy/investment/unelectroniccomm0806.pdf> [hereinafter Resolution 303].

11. *See* Status 2005, *supra* note 1. According to Harold S. Burman, Attorney-Advisor, Private International Law, U.S. Department of State, the United States will consider ratification of CUECIC without the intermediate step of signature (e-mail on file with author).

12. CISG, *supra* note 5, art. 1(1).

13. CUECIC, *supra* note 1, art. 1.1.

14. *But see* CUECIC, *supra* note 1, art. 2 (noting exclusions of consumer contracts, certain financial contracts, and certain financial instruments from scope of treaty), and *id.* art. 19.2 (“Contracting State[s] may exclude from scope of application . . . matters specific[d] in a declaration [pursuant to] article 21.”).

Like the MLEC, the purpose of the CUECIC is to “remove [existing legal] obstacles to the use of electronic communications in international contract[]” formation and performance.<sup>15</sup> The MLEC, which has been implemented with varying degrees of uniformity, is a model for national and sub-national legislation.<sup>16</sup> CUECIC establishes a treaty-based framework of rules to legitimize contract formation and performance through electronic communications by commercial parties whose contract places of business are in different nations, unless the parties effectively choose an alternative applicable law.<sup>17</sup> In addition, CUECIC validates the use of electronic communications for notice, filing, and other procedures prescribed by international treaties that were drafted prior to the advent of modern electronic communications.<sup>18</sup>

International electronic contract law will proceed to develop from the same sources from which international law generally develops. Treaties are only one of several sources of international law, and commercial law treaties, such as CUECIC and CISG, are only one of several sources of international electronic commerce and contract law. Judicial decisions, customary law, scholarly writings, and general principles of law, such as equity and good faith, are other sources of international law<sup>19</sup> that might serve to supplement treaty texts, to fill gaps in subject matter addressed by treaties, to contradict and supersede treaty rules, or to provide an enforcement structure for treaty law.<sup>20</sup>

This Article surveys the current sources of international electronic contract rules, including the rules of the CISG as interpreted by its Advisory Council. It then compares these rules to CUECIC in order to identify any significant differences and ratification options that might influence national decisions as to whether or not to sign or ratify

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15. See CUECIC, *supra* note 1, pmb1.

16. John D. Gregory, *The Proposed UNCITRAL Convention on Electronic Contracts*, 59 BUS. LAW 313, 317 (2003).

17. See CUECIC, *supra* note 1, art. 1 (scope of application) and art. 3 (party autonomy).

18. *Id.* art. 20.

19. See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, T.S. No. 993. *Jus cogens*, or natural law, is another source of international law based on universally accepted, unwritten standards for fundamental human behavior. See MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 138-54 (3d ed. 2006).

20. See PRZEMYSŁAW P. POLAŃSKI, CUSTOMARY LAW OF THE INTERNET 354 (2007); Fabrizio Marrella & Christopher S. Yoo, *Is Open Source Software the New Lex Mercatoria?*, 47 VA. J. INT'L L. 807, 816 (2007), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=75&content=75&context=va\\_jil](http://lsr.nellco.org/cgi/viewcontent.cgi?article=75&content=75&context=va_jil); *cf.* Statute of the International Court of Justice, art. 38; see also George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 569 (2005).

CUECIC, such as declarations by ratifying States that might address such differences.<sup>21</sup>

## II. HOW AND WHEN CAN INTERNATIONAL ELECTRONIC CONTRACTS BE FORMED?

### A. *Electronic Equivalency Rules*

Commercial parties have the freedom to contract across national borders, absent legislative prohibitions. No specific authorizations are required for their contracting to take electronic form. Parties may agree to document their transactions solely through the exchange of computer-generated messages. However, unless parties had the foresight and capability to address every legal rule that might apply to their contract, treaty-based rules of law might be applied by an adjudicator in the event of a contract dispute between the parties.<sup>22</sup> Federal and state legislation, based on the MLEC, has been enacted in the United States to supply both mandatory and default rules for commercial and consumer electronic contracts.<sup>23</sup> However, until CUECIC is ratified by at least three nations, no international treaty will establish rules similar to those of the federal Electronic Signatures in Global and National Commerce Act (E-SIGN) or the state model law, the Uniform Electronic Transactions Act (UETA).<sup>24</sup> Nevertheless, international commercial sales, licenses, barter, swaps, and auctions of goods, services, software, and other information will continue to increase in volume. E-commerce law that might apply to such contracts in the absence of, or in addition to, CUECIC is described further in this Part and in the remainder of the Article.

The MLEC, and E-SIGN and UETA, which are based on the MLEC, explicitly recognize the legal effect, validity, and enforceability of electronic signatures, contracts, and other related records.<sup>25</sup> State laws based on UETA apply to purely intrastate contracts and contracts for which such laws are chosen by the contracting parties. E-SIGN applies

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21. See Resolution 303, *supra* note 10 (stating ABA recommendation of the signing only of the CUECIC by the United States, while the manner of ratification recommendation was postponed for analysis of impact on existing treaties).

22. See *supra* text accompanying note 4.

23. See Electronic Signatures in Global and National Commerce Act (E-SIGN), 15 U.S.C. § 7001(a) (2000); Uniform Electronic Transactions Act (UETA) (1999), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>.

24. See CUECIC, *supra* note 1, art. 23.

25. See Model Law on Electronic Commerce Adopted by the United Nations Commission on International Trade Law, art. 5, G.A. Res. 51/162, U.N. Doc. A/RES/51/162 (Jan. 30, 1997) [hereinafter MLEC]; E-SIGN, 15 U.S.C. § 7001(a); UETA § 7(a)-(b).

to all contracts affecting interstate commerce and contracts where the chosen or otherwise applicable state law failed to adopt minimum standards recognizing the validity of electronic contracts as set forth in E-SIGN.<sup>26</sup> E-SIGN also applies “with respect to any transaction in or affecting . . . foreign commerce.”<sup>27</sup> Ratification of CUECIC by the United States would replace conflicting E-SIGN rules for international contracts subject to CUECIC.<sup>28</sup>

### 1. CISG Rules on “Writings,” “Signatures,” and “Originals”

The CISG was adopted by UNCITRAL in 1980, before the development of the Internet and other advanced means of electronic communication. The CISG only mentions a “writing” in article 11’s elimination of any contract form requirement,<sup>29</sup> in article 21(2) when a “letter or other writing containing a late acceptance” is nevertheless effective as an acceptance,<sup>30</sup> and in article 29(2) wherein “contracts in writing” requiring their modification or termination “in writing” may not be otherwise modified or terminated.<sup>31</sup> Only CISG article 13 addresses electronic equivalents of traditional paper “writings” by stating: “For the purpose of this Convention ‘writing’ includes telegram and telex.”<sup>32</sup>

CISG article 7(2) provides:

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.<sup>33</sup>

A general principle of freedom of contract form is stated in CISG article 11: “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.”<sup>34</sup> Therefore, commentators have suggested that article 13 “must be read to include all

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26. 15 U.S.C. § 7002.

27. *Id.* § 7001(a).

28. See Charles H. Martin, *The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided?*, 17 PACE INT’L L. REV. 261, 284 (2005).

29. CISG, *supra* note 5, art. 11 (“A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”).

30. *Id.* art. 21(2).

31. *Id.* art. 29(2).

32. *Id.* art. 13.

33. *Id.* art. 7(2).

34. *Id.* art. 11.

electronic forms of communication as well.”<sup>35</sup> Article 13’s use of the nonexclusive term “includes” supports this interpretation. Furthermore, if the underlying reasons for the requirement of a “writing” are the future accessibility and readability of the communication, if an electronic communication may be stored and later reproduced in electronic or paper form, it should satisfy these functional reasons for a “writing” requirement and should be considered the equivalent of a paper “writing.”<sup>36</sup>

CISG article 12, however, permits ratifying nations whose municipal laws require offers, acceptances, any other indications of intention, and/or contracts, modifications or terminations to be in writing, to “declare” pursuant to article 96 that the freedom of form rule of article 11 “does not apply where any party has his place of business in that State.”<sup>37</sup> Therefore, whether a traditional paper “writing” is required in a CISG-governed sale of goods contract depends on the treaty version ratified by the particular Contracting States in which the parties have their places of business.<sup>38</sup>

No requirement of a signature or an original writing is stated in the CISG. The second sentence of article 11’s freedom of form rule states: “[A contract of sale] may be proved by any means, including witnesses.”<sup>39</sup> Therefore, a contract may be proved to be the legal commitment of a party without proof of the party’s signature to the contract and without proof of the “original” character of the contract document, unless the parties require a signature or an original through the exercise of their freedom to derogate by contract from particular CISG provisions pursuant to CISG article 6.<sup>40</sup>

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35. Siegfried Eiselen, *Electronic Commerce and the U.N. Convention on Contracts for the Sale of Goods (CISG)*, 6 EDIL REV. 21, 35 (1999).

36. Jennifer E. Hill, *The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies Under the United Nations Convention on Contracts for the International Sales of Goods*, 2 NW. J. TECH. & INTELL. PROP. 1, 21 (2003).

37. CISG, *supra* note 5, art. 96.

38. *See id.* art. 1. CISG “applies to contracts [for the] sale of goods between parties whose places of business are in different States when . . . the States are Contracting States,” i.e., nations that have ratified the CISG. *Id.* art. 1(1)(a). Ten nations ratified the CISG with writing requirement declarations pursuant to CISG articles 12 and 96, including Russia, China, Chile, and Argentina. *See* UNCITRAL, Status 1980 United Nations Convention on Contracts for the International Sale of Goods (2007), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

39. CISG, *supra* note 5, art. 11.

40. *Id.* art 6.



In 2003, the first opinion of the CISG Advisory Council addressed “electronic communications.”<sup>41</sup> In interpreting CISG article 11, the Advisory Council concluded: “[The] CISG enables parties to conclude contracts electronically.”<sup>42</sup> Furthermore, CISG article 13 was interpreted so that “[t]he term ‘writing’ in CISG also includes any electronic communication retrievable in perceivable form.”<sup>43</sup> Applying a functional test, the Advisory Council determined: “The prerequisite of ‘writing’ is fulfilled as long as the electronic communication is able to fulfil the same functions as a paper message. These functions are the possibility to save (retrieve) the message and to understand (perceive) it.”<sup>44</sup> Furthermore, the Advisory Council opined, “Unless the parties have limited the notion of writing, there should be a presumption that electronic communications are included in the term ‘writing.’ This presumption could be strengthened or weakened in accordance to the parties’ prior conduct or common usages (CISG Article 9(1) and (2)).”<sup>45</sup>

## 2. CUECIC Rules on “Writings,” “Signatures,” and “Originals”

CUECIC article 8, paragraph 1, states a rule of equivalency between electronic contracts and traditional paper contracts by stating: “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.”<sup>46</sup> Article 9 then establishes certain form requirements in order for electronic communications to meet contract or statutory requirements of a “writing,” a “signature,” or an “original” document.

CUECIC article 9, paragraph 2 provides: “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.”<sup>47</sup> This rule conforms to the CISG Advisory Council’s Opinion that future retrievability and readability of an electronic communication are the two functional requirements for a “writing,” whether electronic or otherwise.

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41. CISG-Advisory Council Opinion No. 1, Electronic Communications Under CISG (Aug. 15, 2003), *available at* <http://cisgw3.law.pace.edu/cisg/CISG-AC-op1.html> [hereinafter Electronic Communications Under CISG].

42. *Id.*

43. *Id.*

44. *Id.* ¶ 13.1.

45. *Id.* ¶ 13.1-.2.

46. CUECIC, *supra* note 1, art. 8.1.

47. *Id.* art. 9.2.

CUECIC article 9, paragraph 3 provides for satisfaction of contract or statutory requirements 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.<sup>48</sup>

CUECIC article 9, paragraphs 4 and 5 provide for satisfaction of the requirement of an “original” document as follows:

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

- (a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and
- (b) Where it is required that the information it contains be made available, that information is capable of being displayed to the person to whom it is to be made available.

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

- (a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display; and
- (b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.<sup>49</sup>

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48. *Id.* art. 9.3

49. *Id.* art. 9.4-5.

### 3. Customary Law of the Internet

The Statute of the International Court of Justice states that “international custom, as evidence of general acceptance of a practice as law”<sup>50</sup> may be a source of international law.<sup>51</sup> A nontreaty source of international electronic contract law might be referred to in a treaty as a general source of treaty interpretation, as in CISG article 7,<sup>52</sup> or to supplement a treaty rule, such as the contract interpretation rule of CISG article 9(2),<sup>53</sup> or the CUECIC article 9 test of appropriate reliability of the method of identification used for an electronic signature.<sup>54</sup>

CISG article 4(a) states that, except as otherwise expressly provided, the CISG “is not concerned with . . . the validity of . . . any [trade] usage.”<sup>55</sup> CISG article 8(3), however, provides: “In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to . . . [trade] usages.”<sup>56</sup> Furthermore, CISG article 9(2) provides:

The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.<sup>57</sup>

Supplementation of CISG article 18(3) by trade usage is explicitly permitted regarding offeree assent by an act without notice of the act to an offeror.<sup>58</sup> Therefore, the CISG clearly permits its supplementation by

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50. See Statute of the International Court of Justice, art. 38, ¶ 1(b), June 26, 1945, 59 Stat. 1031, T.S. No. 993.

51. *Id.*

52. See, e.g., CISG, *supra* note 5, art. 7(2).

53. *Id.* art. 9(2) (“The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.”).

54. See Secretariat, *Explanatory note on United Nations Convention on the Use of Electronic Communications in International Contracts* ¶ 162 (2007), available at [http://www.uncitral.org/pdf/english/texts/electcom/06-57452\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf). The note states that “[l]egal, technical, and commercial factors . . . may be taken into account in determining whether the method” of signature identification used under article 9, paragraph 3(a), is as reliable as appropriate for its purpose. *Id.*

55. CISG, *supra* note 5, art. 4-4(a).

56. *Id.* art. 8(3).

57. *Id.* art. 9(2).

58. *Id.* art. 18(3) (“However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed,

customary international commercial law in the form of trade usage, both generally and specifically, to provide evidence of party intent.

Proof of international custom requires both general acceptance of a practice and the subjective belief that the practice carries legal authority.<sup>59</sup> It has been proposed, however, that customary law of the Internet should be given legal effect without a requirement of subjective belief in necessary compliance because of the difficulty of proving such subjective belief and its questionable significance.<sup>60</sup> Przemyslaw Polański has suggested that the subjective belief in legality requirement could be replaced with a requirement of regularity of Internet commercial practice. This practice would raise an objective expectation of conformity and give a relaxed standard for the length of the time period of practice acceptance in order to accommodate the accelerated pace of "Internet time."<sup>61</sup> Further requirements of practical utility and moral acceptability could be added to limit the range of potentially binding custom.<sup>62</sup>

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provided that the act is performed within the period of time laid down in the preceding paragraph.").

59. *Cf.* Statute of the International Court of Justice art. 38, ¶ 1, 1(b), June 26, 1945, 59 Stat. 1031, T.S. No. 993 ("The Court . . . shall apply . . . international custom, as evidence of a general practice *accepted as law*." (emphasis added)).

60. *See* PRZEMYSŁAW P. POLAŃSKI, CUSTOMARY LAW OF THE INTERNET 223 (2007). *See generally* Joel R. Reidenberg, *Lex Informatica: The Formation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 586-87 (1998) (standard setting organizations); Anne W. Branscomb, *Overview: Global Governance of Global Networks*, in TOWARD A LAW OF GLOBAL COMMUNICATIONS NETWORKS 1, 21 (Anne W. Branscomb ed., 1986); Paul Frissen, *The Virtual State: Postmodernisation, Informatisation and Public Administration*, in THE GOVERNANCE OF CYBERSPACE 111 (Brian D. Loader ed., 1997); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993, 1019-21 (1994); Aron Mefford, *Lex Informatica: Foundations of Law on the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 211 (1997); Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism*, 12 BERKELEY TECH. L.J. 413, 461-63 (1997); Matthew R. Burnstein, Note, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75 (1996).

61. POLAŃSKI, *supra* note 60, at 225-26; *cf.* U.C.C. § 1-205 cmt. 5 (2000) ("A usage of trade under subsection (2) must have the 'regularity of observance' specified. The ancient English tests for 'custom' are abandoned in this connection. Therefore, it is not required that a usage of trade be 'ancient or immemorial,' 'universal' or the like. Under the requirement of subsection (2) full recognition is thus available for new usages. . . .").

62. POLAŃSKI, *supra* note 60, at 220-22; *cf.* U.C.C. § 1-205(2) ("A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."); U.C.C. § 1-205(2) cmt. 6 ("The policy of this Act controlling explicit unconscionable contracts and clauses . . . applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be 'reasonable'. However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facie case that a usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable.").

Applying these tests to contract formation practices on Internet Web sites, Polański identified four current practices potentially amounting to customary law of Internet contracting.<sup>63</sup> For example, a potential Internet customary law might require an online business to display all the steps necessary to conclude an electronic contract, based on the adherence to this practice by at least seventy-five percent of randomly surveyed Internet vendors.<sup>64</sup>

#### 4. Comparison of CISG Rules, CUECIC Rules, and Customary Law

The CUECIC electronic “writing” test of “accessible so as to be usable for subsequent reference” is an improvement upon the CISG Advisory Council test of “retrievable in perceivable form” if it adds an implication of continued accessibility. CUECIC provides an electronic “signature” test where the CISG provides none. CUECIC also provides a test for “original” electronic communications, while the CISG provides none.

CUECIC explicitly recognizes the legal equivalence of electronic contracts, signatures, and originals. The pre-Internet CISG text must be

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63. *Id.* at 333-37.

64. *Id.* at 214-16, 333-34; *cf.* Directive 2000/31, Directive on Electronic Commerce, 2000 O.J. (L 178), (EC), ¶ 56:

As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations [of on-line businesses] should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract.

##### Article 10:

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:
  - (a) the different technical steps to follow to conclude the contract;
  - (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
  - (c) the technical means for identifying and correcting input errors prior to the placing of the order;
  - (d) the languages offered for the conclusion of the contract.
2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.
3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.
4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

analyzed through statutory interpretation and advisory opinions in order to legitimize electronic contracts and electronic signatures and originals where international commercial sale of goods contracts require them pursuant to the municipal law of a Contracting State in which a party has its contract place of business, pursuant to CISG article 12 and article 96 declarations by that Contracting State.

Ratification of CUECIC by a Contracting State that previously ratified the CISG with an article 96 declaration requiring paper "writings"<sup>65</sup> would overturn any such previous requirement for international commercial contract formation, modification, and related communications.<sup>66</sup> The treaty-based framework of electronic communication rules established by CUECIC provides an incentive for those nations that have maintained a "writing" requirement under the CISG to legitimize electronic contracts and contract communications.<sup>67</sup> The alternative to CUECIC ratification is the governance of electronic communications by customary international law.<sup>68</sup> Customary law will make such communications subject to rules chosen by the marketplace of international contract participants, rather than to rules consciously chosen by national representatives making explicit public policy choices.<sup>69</sup>

## B. *Time of Dispatch and Receipt Rules*

### 1. CISG Definitions and Rules

The times of dispatch and receipt of an electronic communication might become important to the determination of contract-related time deadlines.<sup>70</sup> The terms "reach" and "received" are used by the CISG regarding the recipient of a communication, while "send," "give," "made," and "dispatch" are used regarding the acts of a sender of a communication.<sup>71</sup>

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65. See *supra* note 4 and accompanying text.

66. CUECIC, *supra* note 1, art. 20.

67. *Id.*

68. Cf. Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 818 (2005) ("[W]here one or more parties to a dispute have not ratified the relevant international instruments, customary law governs.").

69. See Norman & Trachtman, *supra* note 20, at 569 ("Custom is a mechanism for international 'legislation' that requires only a degree of consensus, not affirmative unanimity. Given the difficulty of establishing global treaties without significant holdouts, and given the need to avoid free riders, we might understand the [customary international law] process as an alternative mechanism for global legislation.").

70. Eiselen, *supra* note 35, at 27.

71. *Id.*

The term “reach” is defined for purposes of part II of the CISG, Formation of the Contract, in article 24 by stating:

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention “reaches” the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.<sup>72</sup>

In contrast, for purposes of performance of contracts in part III of the CISG, Sale of Goods, CISG article 27 states:

Unless otherwise expressly provided . . . if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.<sup>73</sup>

CISG articles 47(2) (seller notice to buyer of nonperformance), 48(4) (seller request to buyer to accept late performance), 63(2) (buyer notice to seller of late performance), and 79(4) (notice of *force majeure* excuse of nonperformance) require that certain communications be “received” in order to be effective.<sup>74</sup> These choices of effective times have been described as the “receipt theory” for contract formation communications and the “dispatch theory” for contract performance communications.<sup>75</sup>

CISG article 24’s definition of “reaches” is ambiguous regarding whether an oral communication can be made electronically and whether “delivered by any other means to him personally” includes electronic communications such as e-mail. The other nondefined terms used by the CISG, “receive,” “dispatch,” “give,” and “made” also require interpretation in the context of electronic communications.

CISG article 7(2) provides a rule of treaty interpretation that uses the general principles on which the CISG is based or, in their absence, law chosen by private international law conflict-of-laws principles.<sup>76</sup> This interpretation rule first requires a determination of whether an ambiguity in terminology is “governed by this Convention”; second, whether the matter is expressly “settled in it”; and third, if the matter is so governed,

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72. CISG, *supra* note 5, art. 24.

73. *Id.* art. 27.

74. *Id.* arts. 47(2), 48(4), 63(2), 79(4).

75. Eiselen, *supra* note 35, at 23-34.

76. CISG, *supra* note 5, art. 7(2).

but not so settled, whether the general principles on which the CISG is based answer the question and how.<sup>77</sup>

As noted above, the timing of contract-related communications is addressed in various articles of the CISG. Therefore, unlike the validity of defenses to contract formation, which is excluded from CISG coverage pursuant to article 4(a), or the effect of the contract on the property rights in the goods sold, which is excluded by article 4(b), the timing of contract communications is clearly “governed by this Convention.”<sup>78</sup> Because of the ambiguous application to electronic communications of CISG phrases like “made orally” and “delivered . . . to him personally,” such matters are also not “expressly settled” in the Convention. Therefore, pursuant to article 7(2), for interpretation of such phrases, one must resort next to “the general principles on which [the CISG] is based.”<sup>79</sup>

The first general principles that inform the interpretation of article 24 are those stated in article 7(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.”<sup>80</sup> The application of the international uniformity principle requires that foreign legal interpretations of ambiguous provisions receive consideration equal to domestic interpretations.<sup>81</sup> The principle of “good faith in international trade” might require application of concepts of reasonableness, trade usage, and analogues to municipal law definitions of “good faith.”<sup>82</sup> The definition of “reaches” in CISG article 24 has itself become a type of general principle through which the term “received” has been interpreted.<sup>83</sup>

a. Time of Receipt of Communication

The 2003 CISG Advisory Council Opinion addressed the time of receipt of electronic communications in the various CISG provisions that depend on the timing of contract communications. Regarding the definition of “reaches” in CISG article 24, the Advisory Council opined:

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77. See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, UNDER THE 1980 UNITED NATIONS CONVENTION § 96 (3d ed. 1999).

78. *Id.*

79. *Id.*

80. CISG, *supra* note 5, art. 7(1).

81. See HONNOLD, *supra* note 77, §§ 86-93.

82. *Id.* §§ 94-95.

83. *Id.* § 179.



The term “reaches” corresponds to the point in time when an electronic communication has entered the addressee’s server, provided that the addressee expressly or impliedly has consented to receiving electronic communications of that type, in that format, and to that address.

The term “orally” includes electronically transmitted sound and other communications in real time provided that the addressee expressly or impliedly has consented to receive electronic communications of that type, in that format, and to that address.<sup>84</sup>

Regarding CISG article 27, the Advisory Council opined that for purposes of this provision: “A notice, request or other communication may be given or made electronically whenever the addressee expressly or [sic] impliedly has consented to receiving electronic messages of this type, in that format, and to that address.”<sup>85</sup>

b. Time of Receipt of Offer

CISG article 15(1) provides that “[a]n offer becomes effective when it reaches the offeree.”<sup>86</sup> The Advisory Council stated that for purposes of this provision, “[t]he term ‘reaches’ corresponds to the point in time when an electronic communication has entered the offeree’s server.”<sup>87</sup>

c. Time of Withdrawal of Offer

CISG article 15(2) provides that “[a]n offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.”<sup>88</sup> The Advisory Council explained the purposes of this provision as follows:

An offer, even if it is irrevocable, can be withdrawn if the withdrawal enters the offeree’s server before or at the same time as the offer reaches the offeree. A prerequisite for withdrawal by electronic communication is that the offeree has consented, expressly or impliedly, to receive electronic communications of that type, in that format and to that address.<sup>89</sup>

d. Time of Revocation of Offer

CISG article 16(1) provides that “[u]ntil a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has

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84. Electronic Communications Under CISG, *supra* note 41.

85. *Id.*

86. CISG, *supra* note 5, art. 15(1).

87. Electronic Communications Under CISG, *supra* note 41.

88. CISG, *supra* note 5, art. 15(2).

89. Electronic Communications Under CISG, *supra* note 41.

dispatched an acceptance.”<sup>90</sup> The Advisory Council opined that for purposes of this provision:

[T]he term “reaches” corresponds to the point in time when an electronic communication has entered the offeree’s server. An offer may be revoked if the revocation enters the offeree’s server before the offeree has dispatched an acceptance. A prerequisite is that the offeree has consented, expressly or impliedly, to receiving electronic communications of that type, in that format, and to that address.<sup>91</sup>

e. Time of Termination of Offer by Rejection

CISG article 17 provides that “[a]n offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.”<sup>92</sup> The Advisory Council opined that for purposes of this provision:

[T]he term “reaches” corresponds to the point in time when an electronic message has entered the offeror’s server. An offer is terminated when a rejection enters the offeror’s server. A prerequisite is that the offeror has consented expressly or impliedly to receiving electronic communications of that type, in that format, and to that address.<sup>93</sup>

A comment to the opinion adds that “[i]n electronic environments the exact time of ‘reaches the offeror’ can be determined.”<sup>94</sup>

f. Time of Acceptance of Offer

Article 18(2) provides as follows:

An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.<sup>95</sup>

The Advisory Council noted for purposes of this provision:

An acceptance becomes effective when an electronic indication of assent has entered the offeror’s server, provided that the offeror has consented, expressly or impliedly, to receiving electronic communications of that type, in that format, and to that address.

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90. CISG, *supra* note 5, art. 16(1).

91. Electronic Communications Under CISG, *supra* note 41.

92. CISG, *supra* note 5, art. 17.

93. Electronic Communications Under CISG, *supra* note 41.

94. *Id.* ¶ 17.1.

95. CISG, *supra* note 5, art. 18(2).

The term “oral” includes electronically transmitted sound in real time and electronic communications in real time. An offer that is transmitted electronically in real time communication must be accepted immediately unless the circumstances indicate otherwise provided that the addressee consented expressly or impliedly to receiving communications of that type, in that format, and to that address.<sup>96</sup>

g. Time of “Oral” Objection or “Notice” of Objection to Terms in Reply to Offer

CISG Article 19(2) provides that “a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect.”<sup>97</sup> The Advisory Council stated that for purposes of this provision:

The term “oral” includes electronically transmitted sound provided that the addressee expressly or impliedly has consented to receiving electronic communication of that type, in that format, and to that address.

The term “notice” includes electronic communications provided that the addressee expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.<sup>98</sup>

h. Time Period for Acceptance of Offer

CISG article 20(1) begins the time period for acceptance fixed by the offeror in a letter or telegram from the time of dispatch. Time periods for acceptance fixed by the offeror by telephone, telex, “or other means of instantaneous communication,” however, begin from the moment that the offer reaches the offeree.<sup>99</sup>

The Advisory Council stated that, for the purposes of this provision:

A period of time for acceptance fixed by the offeror in electronic real time communication begins to run from the moment the offer enters the offeree’s server.

A period of time for acceptance fixed by the offeror in e-mail communication begins to run from the time of dispatch of the e-mail communication.

“Means of instantaneous communications” includes electronic real time communication.

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96. Electronic Communications Under CISG, *supra* note 41.

97. CISG, *supra* note 5, art. 19(2).

98. Electronic Communications Under CISG, *supra* note 41.

99. CISG, *supra* note 5, art. 20(1).

The term “reaches” is to be interpreted to correspond to the point in time when an electronic communication has entered the offeree’s server.<sup>100</sup>

Regarding e-mails, the accompanying commentary states that the running of the time period from dispatch of the e-mail is proposed “because this time can be easily ascertained and e-mails can be seen as functional equivalents of letters.”<sup>101</sup> The opinion only covers real time communications, thus it does not cover nonreal time offers made on “passive” Web sites,<sup>102</sup> but it does cover communications in “chat rooms.”<sup>103</sup>

i. Late Acceptance Waiver and Presumption of Acceptance by Offeror

CISG article 21 provides as follows:

- (1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.
- (2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.<sup>104</sup>

The Advisory Council stated for purposes of Article 21(1):

The term “oral” includes electronically transmitted sound provided that the offeree expressly or impliedly has consented to receiving electronic communication of that type, in that format, and to that address.

The term “notice” includes electronic communications provided that the offeree expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.<sup>105</sup>

Regarding the rule on late acceptances due to faulty message transmission of CISG article 21(2), the Advisory Council stated:

The term “writing” covers any type of electronic communication that is retrievable in perceivable form. A late acceptance in electronic form may thus be effective according to this article.

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100. Electronic Communications Under CISG, *supra* note 41.

101. *Id.* ¶ 20.3.

102. *Id.* ¶ 20.4.

103. *Id.* ¶ 20.5.

104. CISG, *supra* note 5, art. 21.

105. Electronic Communications Under CISG, *supra* note 41.

The term “oral” includes electronically transmitted sound and communications in real time provided that the offeree expressly or impliedly has consented to receiving electronic communication of that type, in that format, and to that address.

The term “notice” includes electronic communications provided that the offeree expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.

The term “dispatch” corresponds to the point in time when the notice has left the offeree’s server. A prerequisite is that the offeree has consented expressly or impliedly to receiving electronic messages of that type, in that format, and to that address.<sup>106</sup>

j. Time of Withdrawal of Acceptance

CISG article 22 provides that “[a]n acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.”<sup>107</sup> The Advisory Council determined for purposes of this provision:

The term “reaches” corresponds to the point in time when an electronic communication has entered the offeror’s server, provided that the offeror expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.<sup>108</sup>

k. Contract Performance Specifications and Notices

Regarding the rule of CISG article 65 on the seller’s making of specifications in the event the buyer fails to make them, the Advisory Council stated: “Specifications and communications may be electronic provided that the addressee expressly or impliedly consented to receiving such communications.”<sup>109</sup>

Regarding the use of the term “notice” in CISG articles 26, 32(1), 39, 43, 67, 71, 72, 79, and 88(1) and (2), the Advisory Council opined: “The term ‘notice’ includes electronic communications, provided that the addressee expressly or impliedly has consented to receiving electronic communications of that type, in that format, and to that address.”<sup>110</sup>

The CISG applies both “dispatch theory-” and “reception theory”-based rules.<sup>111</sup> For example, CISG article 15(1) and (2) makes offers and

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106. *Id.*

107. CISG, *supra* note 5, art. 22.

108. Electronic Communications Under CISG, *supra* note 41.

109. *Id.*

110. *Id.*

111. *See* Eiselen, *supra* note 35. Eiselen has proposed that, for three reasons, the time when an international electronic communication becomes valid and binding (absent agreement by

withdrawals of offers effective when they “reach” the offeree (for withdrawals, before or at the same time as the offer for a withdrawal/revocation).

In contrast, CISG article 27, for example, makes notices, requests, or other communications that fulfill a condition for the exercise of certain rights after breach of contract by the other party, such as those referred to in articles 26 and 39, effective if sent “by means appropriate in the circumstances” despite “a delay or error in the transmission of the communication or its failure to arrive.”<sup>112</sup> This rule applies unless another specific rule of part III provides otherwise. However, where a defaulting party seeks to create or preserve certain rights, such as in articles 48(4) and 79(4), the notice required from the defaulting party must be received by the innocent party. CISG article 71(3) permits suspension of performance because of anticipatory breach by the other party only if notice of the suspension is given, whether or not received.<sup>113</sup> Where

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the parties) should be based on the civil law “reception theory” that only requires the recipient to be capable of comprehending the sent communication. *Id.* at 23-24. First, capability of message reading and comprehension can be proved more objectively than the alternative requirement of proof of actual subjective notice of the content of a message. Second, computers frequently automatically receive and acknowledge electronic messages without actual human comprehension (such as a supplier computer’s acknowledgement of orders). Third, the objective test of receipt prevents unfair manipulation of the time of dispatch or receipt by a party. *Id.* at 24.

For parties communicating sequentially, rather than simultaneously, the civil law “reception theory” rules were developed outside the context of revocable offers, which normally do not exist in civil law countries. *Id.* at 25. Because of the normal revocability of offers in common law jurisdictions, the “dispatch theory” or “postal theory” was developed to shift the risk of delay, loss, or change in transmission to the recipient of a communication who has consented to the method used to communicate. In choosing between these dominant theories as the basis for time of dispatch and receipt rules in international contracts, however, the balance of risk between a message sender and recipient could be reconsidered. *Id.*

Eiselen has suggested six factors to be weighed in determining which theory to follow for international contracts, absent party agreement, practice, or trade usage. First, if the communication is an initiating contact to a party with whom the initiator does not have a prior relationship, it would be fairer to place the risk of loss, delay, or change in the communication on its sender through a reception theory-based rule than to place the risk on an unprepared purported recipient. Second, if the communication is in response to the fault of another party, such as a notice of default, it would be fairer to place the risk of loss, delay, or change on the recipient through a dispatch theory-based rule. Third, if one party has chosen a particularly hazardous method of communication, it would be fairer to place the risk on that party through a reception theory-based rule. Fourth, if the consequences of loss, delay or alteration of a message are significantly greater for one party than for another, fairness might dictate that the risk be borne by the party with less at stake. Fifth, if one party has significantly greater ability than the other to monitor the progress of a communication, this party should bear the risk of a failed communication. Sixth, the increasing rapidity and reliability of electronic communications has reduced the need for a dispatch theory-based mailbox rule in either national or international contracts. *Id.* at 25-26.

112. CISG, *supra* note 5, art. 27.

113. *Id.* art. 71(3).

notices are required to be given by a seller to a buyer for goods shipped through a carrier, CISG articles 32(1) and 67(2) require that notice be given by the seller to the buyer, whether or not received.<sup>114</sup>

Finally, regarding the use of the term “notice” in CISG article 47 (on seller notice to buyer of nonperformance), article 63 (on buyer notice to seller of nonperformance), and article 79 (on notice by a party failing to perform because of a *force majeure* obstacle), the Advisory Council stated that “[t]he term ‘notice’ includes electronic communications.”<sup>115</sup> Article 79 includes electronic communications in the term “notice” only “provided that the addressee expressly or impliedly has consented to receiving electronic communications of that type, in that format, and to that address.”<sup>116</sup>

## 2. CUECIC Rules

The CUECIC establishes the following rules regarding the time of dispatch and receipt of electronic communications in article 10:

1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.
2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee’s electronic address.
3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.
4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is

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114. *Id.* art. 32(1), 67(2).

115. Electronic Communications Under CISG, *supra* note 41.

116. *Id.*

located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.<sup>117</sup>

### 3. Multiple Sources of Electronic Commerce Law on Dispatch and Receipt and Offer and Acceptance

CUECIC does not deal in the same level of detail as the CISG with contract default rules on time of dispatch and receipt of electronic contract communications. For example, the CUECIC Explanatory Note contemplates that where custom or trade usage establishes receipt of an encoded electronic communication before it is usable by, or intelligible to, the addressee, CUECIC will not displace such customary law.<sup>118</sup>

Neither the CISG Advisory Council opinion nor CUECIC changes the policy choices made by the CISG regarding which party bears the risk of failed communications. As the UNCITRAL Secretariat stated regarding CUECIC, “[t]he Convention does not venture into determining when offers and acceptances of offers become effective for purposes of contract formation.”<sup>119</sup> Whether a communications dispatch is described as leaving a party’s server or as leaving an information system under a party’s control, the dispatch theory of risk allocation is still applied through the CISG. Whether a communications receipt is described as entering an offeree or offeror’s server or as capable of being retrieved by an addressee, the receipt theory of risk allocation is still applied through the CISG.<sup>120</sup>

Non-CISG rules for international commercial contracts will also not be significantly altered in their risk allocation policy choices by application of either the CISG Advisory Council opinion or the CUECIC tests for the timing of communications. Such rules could be created by the custom or trade usage of commercial parties contracting through Internet Web sites.<sup>121</sup>

### 4. Comparison of CUECIC, the CISG, and Customary Law

In contrast to the focus of the Advisory Council opinion on the entering of an electronic communication into a server, a specific

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117. CUECIC, *supra* note 1, art. 10.

118. *See* Secretariat, *supra* note 54, ¶ 182.

119. *Id.* ¶ 10.

120. CISG, *supra* note 5, art. 18.

121. *See* POLAŃSKI, *supra* note 60, at 333-34 (noting potential Internet customary law might exist requiring every online business to display the steps required to conclude an electronic contract with the business).



computer dedicated to the routing of electronic communications between its users, CUECIC article 10 defines the dispatch and receipt of electronic communications more broadly. The sending of a communication is triggered by the communication's departure from the sender's "information system," or by its capability of retrieval by the addressee either at the address designated for that communication, or at a nondesignated electronic address when the recipient becomes aware that the communication was sent to the nondesignated address.<sup>122</sup> An evidentiary presumption is created that an electronic communication is capable of being retrieved by the addressee when it reaches either such address.<sup>123</sup>

The language of the CUECIC rules on time of dispatch and receipt are less likely to become outdated in the context of new communication technologies than the CISG Advisory Council opinion's references to "servers."<sup>124</sup> The CUECIC Explanatory Note of the UNCITRAL Secretariat also emphasizes the intent of its drafters to avoid possible involvement in the regulation of third-party intermediaries because "[t]he focus of the Convention is on the relationship between the originator and the addressee, and not on the relationship between either the originator or the addressee and any intermediary."<sup>125</sup> Furthermore, "as the convention was not conceived as a regulatory instrument for electronic business, it does not deal with the rights and obligations of intermediaries."<sup>126</sup> Again, the alternative to CUECIC ratification is acceptance of the governance of customary international law on electronic contract communications that would subject these communications to rules chosen by the marketplace of international contract participants, rather than by national representatives making explicit public policy choices.

### C. *Electronic Agents*

Neither the CISG, nor the UNCITRAL-sponsored MLEC, nor the later UNCITRAL-sponsored Model Law on Electronic Signatures provides for electronic agents or automated electronic contracts. The E-SIGN, however, provides for formation of contracts through the interaction of a computer program or other automated means of

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122. CUECIC, *supra* note 1, art. 10.

123. *See id.* Unlike the requirement of reliability for electronic signatures in CUECIC article 9, paragraph 4, CUECIC article 10's presumption might not be overcome by proof of trade custom or usage. *See id.* art. 9.4, 10.

124. *See* Electronic Communications Under CISG, *supra* note 41.

125. Secretariat, *supra* note 54, ¶ 99.

126. *Id.*

communication and an individual or another electronic agent.<sup>127</sup> The UETA provides for contract formation by the “interaction of electronic agents” or an “electronic agent and an individual.”<sup>128</sup> CUECIC article 12 provides for contract formation through the interaction of “automated message systems” or through the “interaction of an automated message system and [an individual].”<sup>129</sup>

The inclusion of a provision for contract formation by “electronic agents” in CUECIC appears to represent a belated acceptance by non-U.S. legal systems of the legitimacy and utility of such methods.<sup>130</sup> CUECIC acceptance of contract formation by electronic agents might be limited, however, to the human-programmed action of such “agents,” and might exclude the independent action of electronic agents initiated through “artificial intelligence.”<sup>131</sup> The legal capacity of “electronic agents” to form electronic contracts pursuant to human-programmed protocols and through artificial intelligence would facilitate the expansion of both commercial and consumer electronic commerce.<sup>132</sup> Potential problems created by such contracts, however, will be identified in Part III.D.

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127. Electronic Signature in Global and National Commerce Act (E-SIGN), 15 U.S.C. § 7001(h) (2000).

128. Uniform Electronic Transactions Act (UETA) § 14 (1)-(2) (1999), *available at* <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>.

129. CUECIC, *supra* note 1, art. 12.

130. *See* Secretariat, *supra* note 54, ¶¶ 208-210 (“Automated message systems, sometimes called ‘electronic agents’, are being used increasingly in electronic commerce and have caused scholars in some legal systems to revisit traditional legal theories of contract formation to assess their adequacy to contracts that come into being without human intervention. . . . A number of jurisdictions have found it necessary or at least useful to enact similar provisions in domestic legislation on electronic commerce.”).

131. *Id.* ¶¶ 211-212:

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

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

132. *Id.*

#### D. *Invitations for Offers*

CISG article 14(2) 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.”<sup>133</sup>

CUECIC article 11 establishes a presumption regarding the effect of Web site information as an offer to contract. Unless the site clearly indicates the intention of the Web site sponsor to be bound to acceptances by parties treating the Web site’s terms as an offer, such “proposal[s] to conclude a contract . . . that make use of interactive applications for the placement of orders,” if addressed generally to the public and not to one or more specific parties, are “to be considered as an invitation to make offers.”<sup>134</sup>

### III. WITH WHAT TERMS ARE INTERNATIONAL ELECTRONIC CONTRACTS FORMED?

#### A. *“Original”*

When the terms of a contract are questioned, the authenticity of the version of the contract from which the purported terms are taken is often an issue. Sometimes the “original” version of a contract is stipulated by the parties to be the only or primary version from which terms are to be determined in order to eliminate unauthorized alterations to contract terms in later copies. If an international electronic contract gives primacy to the “original” version of the contract, how is such an “original” to be identified?

#### 1. CISG Rules

The CISG does not require retention of a contract in its original form. If the CISG is the applicable law of the contract, the authenticity of contract terms may be proved in other ways. CISG article 8 permits interpretation of the statements and the conduct of a party according to his subjective intent, if known by the other party, or otherwise according to his intent as determined under an objective standard.<sup>135</sup> CISG article 9 permits interpretation of contract terms according to party course of dealing, course of performance, and applicable trade usage.<sup>136</sup> A CISG-

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133. CISG, *supra* note 5, art. 14(2).

134. CUECIC, *supra* note 1, art. 11.

135. CISG, *supra* note 5, art. 8.

136. *Id.* art 9.

governed contract cannot be required to be in writing, unless the CISG version includes a declaration to that effect under article 96. Therefore, no “parol evidence” type of rule under the CISG generally excludes evidence of contract terms external to the “original” version of a contract.

## 2. CUECIC Rules

CUECIC will apply in enforcement lawsuits under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which requires an “original” arbitration agreement to be proffered for enforcement of a foreign arbitral award.<sup>137</sup> CUECIC articles 9.4 and 9.5, however, are not limited to original arbitration agreements and apply rules of “originality” to all contracts subject to CUECIC as follows:

4. Where the law requires that a communication or a contract should be made available or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:
  - (a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and
  - (b) Where it is required that the information it contains be made available, that information is capable of being displayed to the person to whom it is to be made available.
5. For the purposes of paragraph 4(a):
  - (a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display; and
  - (b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all relevant circumstances.<sup>138</sup>

## 3. Customary Law

If a CISG-governed contract or applicable municipal law makes the “original” version of the contract the sole or primary source of authentic contract terms, customary law and trade usage, in the form of the MLEC, might support the equivalence of certain electronic communications with

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137. CUECIC, *supra* note 1, art. 20.1.

138. *Id.* art. 9.4-5.

“originals.”<sup>139</sup> The MLEC was enacted in part to provide a source of customary law.<sup>140</sup> It permits “data messages” to satisfy any requirement that information be presented or retained in its original form if there is “reliable assurance of the integrity of the information from the time when it was first generated in its final form,” and the “information is capable of being displayed to the person to whom it is to be presented.”<sup>141</sup> Customary law either requiring an “original” electronic document to conclude an electronic contract and/or establishing a test of such originality might also arise from the consistent practices of a strong majority of commercial Web site providers and users.<sup>142</sup>

#### 4. Comparison of CISG, CUECIC, and Customary Law Rules

The CUECIC provisions on “original” communications establish a useful set of default rules for authentication of electronic communications in the place of the CISG’s reliance on customary law, trade usage, and party practices. The CUECIC rules on originality do not, however, contemplate total displacement of customary law and trade usage-based rules on originality. Custom and trade usage are expected to supplement the test of “originality” regarding article 9.5(b)’s standard of reliability of information integrity.<sup>143</sup> According to Polański, customary law might have already developed requiring an online business to summarize a transaction before accepting payment,<sup>144</sup> thereby confirming the accuracy of contract terms. Customary law might also require an online business to confirm an online order instantly and by electronic means,<sup>145</sup> thereby confirming the intent of the parties to contract on specified terms.

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139. MLEC GUIDE TO ENACTMENT, *supra* note 4, at 17.

140. *Id.*

141. MLEC, *supra* note 25, art. 8.

142. *See* POLAŃSKI, *supra* note 60, at 210-16.

143. *See* Secretariat, *supra* note 54, ¶ 162.

144. *See* POLAŃSKI, *supra* note 60, at 337.

145. POLAŃSKI, *supra* note 60, at 337; *cf.* Council Directive 2000/31, *supra* note 64, art.

11:

Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

- the service provider has to acknowledge the receipt of the recipient’s order without undue delay and by electronic means,
  - the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.
3. Paragraph 1, first indent . . . shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

## B. *Place of Dispatch and Receipt Rules*

### 1. CISG Rules

Although the CISG establishes various default rules for international commercial contracts, CISG article 4(a) states that, except as otherwise expressly provided, the CISG does not govern issues regarding the validity of a contract or any of its provisions or usages, i.e., defenses to contract existence or invalidity of contract terms.<sup>146</sup> Such issues are to be determined in accordance with applicable municipal law. Consequently, the places of dispatch and receipt of contract-forming electronic communications might become relevant to the determination of what municipal law is applicable to issues of contract formation or validity through the rules of private international law, i.e., international conflict-of-laws rules.

CISG article 10 provides limited rules for determining a party place of business as follows:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.<sup>147</sup>

### 2. CUECIC Rules

CUECIC article 6 provides the following rules regarding a party's place of business:

1. For the purposes of this Convention, a party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.
2. If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.
3. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.

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146. CISG, *supra* note 5, art. 4(a).

147. *Id.* art. 10.

4. A location is not a place of business merely because that is:
  - (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or
  - (b) where the information system may be accessed by other parties.
5. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.<sup>148</sup>

### 3. Customary Law

In the absence of an applicable CISG or CUECIC rule, the MLEC might again provide a rule of customary law or trade usage for determining the place of dispatch or receipt of an electronic communication in the formation of an international commercial contract.<sup>149</sup> MLEC article 15(4) provides that unless otherwise agreed, “a data message 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.”<sup>150</sup> The places of dispatch and receipt provided for in the MLEC might be the same “place of business” of a party as the “place of business” upon which the applicability of the CISG is based in articles 1 and 10(a).<sup>151</sup> Judicial decisions applying the CISG and its legislative history make clear that the place of business is not necessarily the place of incorporation of a business, or its headquarters, but is instead the place where the commercial party entering a contract fulfills its primary contract functions.<sup>152</sup> Similarly, the MLEC “place of business” test is not tied to the location of the information systems used by a party.<sup>153</sup> How an MLEC place of business is determined, however, is not clear.

The MLEC states that “[i]f the originator or the addressee does not have a place of business, reference is to be made to its habitual

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148. CUECIC, *supra* note 1, art. 6; *cf.* Council Directive 2000/31, *supra* note 64, ¶ 19 (“[T]he place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located . . .”).

149. *See supra* text accompanying note 4.

150. MLEC, *supra* note 25, art. 15(4).

151. CISG, *supra* note 5, arts. 1, 10(a).

152. *See, e.g.*, 20 February 1997 Decision of Switzerland District Court (T171/95) that Swiss branch office of company was relevant place of business rather than Lichtenstein headquarters, *available at* [www.cisgw3.law.pace.edu/cases/970220s1.html](http://www.cisgw3.law.pace.edu/cases/970220s1.html); UNCITRAL Secretariat Commentary on Article 9 of 1978 Draft ¶ 6, *available at* [www.cisg.law.pace.edu/cisg/text/secomm/secomm-10.html](http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-10.html).

153. MLEC GUIDE TO ENACTMENT, *supra* note 4, ¶ 100.

residence.”<sup>154</sup> The CISG similarly provides that “[i]f a party does not have a place of business, reference is to be made to his habitual residence.”<sup>155</sup>

#### 4. Comparison of CISG, CUECIC, and Customary Law Rules

The CUECIC provisions on place of business provide a set of default rules that are more useful than the CISG rules or the MLEC-based customary law rules for determining the applicable municipal law governing contract issues beyond the scope of applicable treaty law. The CUECIC rules establish a basic test for determining a “place of business,” while the CISG and customary law relying on the MLEC only provide such tests when a party has multiple places or no place of business.<sup>156</sup> Customary law relying on the MLEC would also fail to provide a basic “place of business” test.<sup>157</sup>

### C. *Errors in Communications Rules*

#### 1. CISG Rules

CISG article 27 provides:

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.<sup>158</sup>

#### 2. CUECIC Rules

CUECIC article 14 provides a more extensive set of rules:

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

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154. MLEC, *supra* note 25, art. 15(4)(b); *see also* CUECIC, *supra* note 1, art. 6.3.

155. CISG, *supra* note 5, art. 10(b).

156. *Id.* art. 10.

157. *See* MLEC, *supra* note 25, art. 15(4)(a).

158. CISG, *supra* note 5, art. 27.



- (a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and
  - (b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.
2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.<sup>159</sup>

### 3. Customary Law

MLEC article 13(5) provides:

- (5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.<sup>160</sup>

### 4. Comparison of CISG, CUECIC, and Customary Law Rules

The CUECIC provisions on errors in electronic communications provide a more useful set of default rules for determining which party bears the risk of such errors than is currently provided by the CISG as treaty law or the MLEC as customary law. Nonstatutory customary law might also develop to require online businesses to “provide means of identifying and correcting [party] input errors” before an online contract

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159. CUECIC, *supra* note 1, art. 14.

160. MLEC, *supra* note 25, art. 13(5); *cf.* Council Directive 2000/31, *supra* note 64, art. 10.1(c) (“Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service: . . . (c) the technical means for identifying and correcting input errors prior to the placing of the order . . . 4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.”); Council Directive 2000/31, *supra* note 64, art. 11.2 (“Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.”).

may be legally concluded<sup>161</sup> and to require confirmation of “an online order instantly and by electronic means.”<sup>162</sup>

#### D. *Standardized Terms*

Electronic communications facilitate the “[s]tandardization of contract terms[, which] reduces transaction costs.”<sup>163</sup> Thus, cost-reducing standardization has potential advantages for both business-to-consumer and business-to-business electronic contracts. Potential disadvantages of standardized terms for commercial parties are not addressed under either the CISG or CUECIC. CISG article 4 specifically states that, except as otherwise expressly provided, the CISG “is not concerned with . . . validity of the contract or of any of its provisions or of any usage.”<sup>164</sup>

The potential disadvantages of standardized terms include the difficulty of reading and understanding such terms because of their electronic form<sup>165</sup> and the greater difficulty of negotiating individual changes to objectionable terms because of their standardization.<sup>166</sup> The CISG and CUECIC each apply only to commercial, and not consumer, contracts.<sup>167</sup> Nevertheless, defenses to electronic contracts pertinent to their particular form, such as procedural and substantive unconscionability, are often raised.

Legal limitations on freedom of electronic contracts in the United States have tended to be proscriptive in nature, limiting contract terms only when they exceed certain outer bounds of acceptability. In contrast, European and other jurisdictions have tended towards more prescriptive limitations, such as the European Union Directive on Privacy<sup>168</sup> and the European Union Directive on Electronic Commerce.<sup>169</sup> By following a technology-neutral and national origin-neutral framework for facilitating electronic contracts, CUECIC promotes a more proscriptive approach to the development of electronic contracts within a broad range of technological solutions and national legislation.

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161. See POLAŃSKI, *supra* note 60, at 337 (citing examples of automatic double-checking of passwords, email addresses, postal codes, credit card numbers, and red-flagging of missing party information).

162. *Id.* ch. 9, § 4.4.

163. See MARGARET J. RADIN ET AL., INTERNET COMMERCE: THE EMERGING LEGAL FRAMEWORK ch. 10.1.C. (2d ed. 2006).

164. CISG, *supra* note 5, art. 4-4(a).

165. See RADIN ET AL., *supra* note 163, at 836-38.

166. *Id.*

167. See CISG, *supra* note 5, art. 2(a); CUECIC, *supra* note 1, art. 2.1(a).

168. Council Directive 2006/24, 2006 O.J. (L 105) 54 (EC) (amending Directive 2002/58/EC).

169. See generally Council Directive 2000/31, *supra* note 64.

## IV. CONCLUSION

The first purpose of this Article has been to analyze the shape of international electronic contract law in the absence of the CUECIC. This analysis attempts to illustrate current international electronic contract law regarding the subjects addressed by CUECIC and the legal sources and rules that could apply to future disputes in which CUECIC is not the applicable law.

CUECIC sanctions the use of electronic communications for the purposes of six listed treaties, including the CISG, the Convention on the Limitation Period in the International Sale of Goods, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>170</sup> CUECIC may also apply to other nonspecified treaties to which Contracting States to the Convention become a party.<sup>171</sup>

CUECIC differs significantly from the CISG in its scope by its application to non-sale of goods contracts, such as sales of services, sales and licenses of information, and barter and auction contracts. By requiring each ratifying nation to limit CUECIC's application through individual declarations under articles 19 and 21, CUECIC establishes its presumptively broad applicability to all "electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States."<sup>172</sup> This presumptively broad scope might support the future use of CUECIC rules as customary international law.

CUECIC creates a new treaty definition for the term "place of business" used in the CISG and new rules on electronic contract legal sufficiency, electronic writings, signatures, originals, and agents. CUECIC creates a new rule on correction of errors that obligates an online business to provide a party with an opportunity to correct an input error, failing which the party making the error is permitted to withdraw the erroneous portion of its communication.

Without the new CUECIC rules, the main sources of applicable international electronic contract law will remain: (1) the CISG and its Advisory Council Opinion, as treaty law and interpretation, (2) the MLEC as a possible source of customary international law, and (3) Internet trade usage as possible customary international law. CUECIC's weight as a possible source of customary international law for

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170. CUECIC, *supra* note 1, art. 20.1.

171. *Id.* art. 20.2.

172. *Id.* art. 1.1.

nonratifying States will increase as its ratifications and usage increase.<sup>173</sup> Equity and good faith will remain sources of electronic contract law, as for all international law, and are incorporated by reference into the CISG<sup>174</sup> and CUECIC.<sup>175</sup>

The second purpose of this Article has been to identify CUECIC ratification options that might be desirable because of the differences between CUECIC and current international electronic contract law. In ratifying CUECIC, its initial sponsor, the United States, could declare a scope of application of CUECIC that matches the U.S.-ratified CISG's scope limitation. In ratifying the CISG, the United States made a declaration to exclude CISG applicability through private international law conflict-of-laws analysis.<sup>176</sup> Unlike CISG article 1(1)(b), however, no CUECIC provision specifically permits private international law conflict-of-laws determination of its applicability. Therefore, a similar U.S. declaration might not be necessary for CUECIC.<sup>177</sup>

A declaration that the parties must have their contract places of business in Contracting States that have ratified CUECIC is permitted.<sup>178</sup> The CISG included this requirement as a basic rule of the scope of CISG application, while CUECIC does not require it.

CUECIC norms might eventually become *erga omnes* obligations applicable to all parties making international commercial contracts. Until then, the two U.S.-ratified CISG scope limitations could be applied to CUECIC. These are the nonapplicability of CUECIC through conflict-of-laws analysis and a CUECIC applicability limitation to parties with places of business in Contracting States. These types of declarations would reinforce the general philosophy of CUECIC that its norms are both created through and limited by freedom of contract.<sup>179</sup>

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173. Cf. Norman & Trachtman, *supra* note 20, at 567 (noting that multilateral customary international law rules are more likely to develop among states having frequent interactions over extended periods of time).

174. CISG, *supra* note 5, art. 7(1) (guide to interpretation of CISG in "good faith in international trade"); *id.* art. 7(2) (questions on CISG matters "to be settled in conformity with the general principles on which it is based").

175. CUECIC, *supra* note 1, art. 5.1 (guide to interpretation of CUECIC in "good faith in international trade"); *id.* art. 5.2 (questions on CUECIC matters "to be settled in conformity with the general principles on which it is based").

176. See CISG, *supra* note 5, arts. 1(1)(b), 95; Status 1980 United Nations Convention on Contracts for International Sale of Goods, *supra* note 38, at n. (i).

177. See Secretariat, *supra* note 54, ¶¶ 65-66.

178. *Id.* ¶ 64.

179. *Id.* ¶ 140 (stating that principle of party autonomy supports exclusion of non-State sponsored sources of law). *But see id.* ¶¶ 63-64 (stating two reasons for broader scope are the sufficiency of one Contracting State court as a source of binding law if otherwise applicable, and the undesirability of a Contracting State court being required to interpret its own laws to require

CUECIC's Explanatory Note defines other law outside of CUECIC that might apply to transactions within CUECIC's scope by excluding the customary law of *lex mercatoria* for purposes of CUECIC article 9.<sup>180</sup> This CUECIC article 9 exclusion might have minimal importance because CUECIC article 9 relates only to contract form requirements. If this exclusion is applied to articles 7 and 13, however, an exclusion of *lex mercatoria* as potential customary law for other purposes, such as regarding party identity and contract terms disclosure pursuant to CUECIC articles 7 and 13, might negatively impact the growth of customary law of Internet transactions by prohibiting reference to it to supplement the rules of CUECIC.

The CUECIC Explanatory Note describing CUECIC article 9's rule on electronic signatures, however, appears to contradict article 9's exclusion of *lex mercatoria* by describing this rule as subject to supplementation by "compliance with trade customs and practice" regarding proof of party identification and signature authentication.<sup>181</sup> CUECIC article 10 also recognizes the value of customary law in the form of trade usage in establishing rules of message receipt regardless of intelligibility.<sup>182</sup> Therefore, the U.S. ratification of CUECIC might express a clearly favorable view of international customary law of electronic contracts, at least where such trade custom or usage fulfills the normal purposes of customary law of transaction facilitation without prescription of specific contract form requirements.<sup>183</sup>

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communications to be treated differently depending on whether or not the other party's place of business is also in a Contracting State).

180. See *id.* ¶ 127 (citing article 7 provision of no CUECIC effect on outside law imposing information disclosure requirements); *id.* ¶ 140 (noting laws referred to in article 9 as requiring a contract to be in writing, signed by a party, or made available or retained in its original form do not include *lex mercatoria*); *id.* ¶ 223 (noting article 13 provision stating no CUECIC effect on outside law imposing contract terms disclosure requirements).

181. *Id.* ¶ 162; cf. Council Directive 2000/31, *supra* note 64, art. 17.3 ("Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.").

182. See Secretariat, *supra* note 54, ¶ 182.

183. See POLAŃSKI, *supra* note 60, at 1-4. Polański posits the potential advantages of customary Internet contract law are its speed, flexibility, user acceptance and familiarity, and ability to override outmoded legislative norms and to help interpret and fill in gaps in legislation. Customary Internet contract law might also serve to harmonize varying national legislation in the absence of a relevant international convention.