

UNIFORM LAW CONFERENCE OF CANADA

**Pre-Implementation Report on the Convention on the Use of Electronic
Communications in International Contracts**

By: Michael Deturbide¹

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult Resolutions on this topic as adopted by the Conference at the Annual meeting.

Québec City, Québec

August 2008

Table of Contents

I. Background.....	1
II. Introduction and Methodology.....	1
III. Exclusions.....	3
IV. Application and Derogation.....	5
V. Definitions.....	6
VI. Location of the Parties.....	7
VII. Information Requirements.....	7
VIII. Functional Equivalency and Technological Neutrality.....	7
IX. Electronic Contracts.....	9
X. Automated Message Systems.....	12
XI. Final Provisions.....	14
XII. Summary Conclusions.....	15

Pre-Implementation Report on the Convention on the Use of Electronic Communications in International Contracts

I. Background

[1] The United Nations Commission on International Trade Law (UNCITRAL) has been active in proposing law reform to enable electronic commerce. The organization's Model Law on Electronic Commerce² has formed the template for the Uniform Law Conference of Canada's Uniform Electronic Commerce Act (UECA),³ which in turn has had great influence on the development of electronic commerce legislation in the common law provinces and territories of Canada.⁴

[2] UNCITRAL has lately developed the *United Nations Convention on the Use of Electronic Communications in International Contracts* (the "Convention"),⁵ which was adopted by the U.N. General Assembly in 2005. The objective of the Convention is "to establish uniform rules intended to remove obstacles to the use of electronic communications in international contracts (...), with a view to enhancing legal certainty and commercial predictability."⁶ Except for the specific focus on international contracts, the UECA and its provincial counterparts have similar goals.

[3] The impetus for developing a transnational electronic commerce convention arises from a recognition that domestic legislation varies significantly. A convention dealing with international electronic commerce would increase commercial predictability across borders.⁷ However, the adoption of a transnational convention could produce confusing results if it is significantly different from existing domestic electronic commerce legislation.

II. Introduction and Methodology

[4] The purpose of this Report is to review the Convention in light of existing Canadian law extant in the common law provinces and territories of Canada, and to present findings on the impact the Convention will have on existing law and contractual practices.⁸ In assessing the Convention in the context of existing Canadian law, the primary source of law examined was the UECA, which is based on the UNCITRAL model law on electronic commerce. Some provinces and territories have adopted the complete UECA into their legislation governing electronic commerce; others have selectively borrowed from the UECA. Reference in this Report to facets of the UECA will incorporate by implication enacted provincial and territorial legislation, unless differences in such legislation are specifically highlighted.

**UNIFORM LAW CONFERENCE OF CANADA
COMMERCIAL LAW STRATEGY**

[5] Some provinces have incorporated particular idiosyncrasies into their electronic commerce legislation; these have not been considered in this analysis unless similar concepts are explicitly reflected in the Convention. Where appropriate, the intersection of the precepts of the Convention with established principles of common law is evaluated.

[6] The fundamental purpose for this comparison is to determine to what extent the Convention, if adopted by Canada, will conflict with established common law norms and existing domestic electronic commerce legislation. Certain differences may be appropriate to the focus and purpose of the Convention. Alternatively, significant variations in approach and wording may result in interpretive anomalies and different legal rules being applied to international and domestic electronic transactions without sound reason.

[7] The focus of the UECA is functional equivalency between paper-based and electronic communications and information, and the establishment of rules relating specifically to contracting in the online environment. The Convention's specific sphere of application is in connection with the formation or performance of contracts between parties whose places of business are in different States. The Convention does not address many substantive law issues relating to contract formation (such as time and place of acceptance). These issues will require a consideration of domestic contract law principles.

[8] The Convention deals with the relations between parties to an existing or contemplated contract. It does not extend to communications to third parties that have a connection to the contract. Therefore, the Convention's scope of application is narrow: only those parties whose places of business are in different countries and who have formed or intend to form contracts fall within its authority. The application of the Convention is further limited by the exclusions listed in Article 2, discussed below.

[9] Because the Convention focuses on international "business to business" relationships, questions may arise as to the determination of such status. Article 1 specifically directs that neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration. Thus, a non-Canadian whose place of business is in Canada would be subject to the Convention. The special nature of "consumer" contracts is addressed as an exclusion in Article 2. The treatment of consumer transactions conforms to the United Nations Convention on Contracts for the International Sale of Goods, which has been adopted as domestic

PRE-IMPLEMENTATION REPORT ON THE CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

legislation in Canada.⁹ Like the latter convention, the Convention places limitations on its application to “consumer” contracts (discussed below).

[10] However, unlike the United Nations Convention on Contracts for the International Sale of Goods, the Convention does not require that both parties to the contract have their places of business in contracting States. The rationale for this position appears to be that if both parties were required to be from contracting States, a court in a contracting State might apply domestic law, different from that of the Convention, to an international electronic contract if the other party’s place of business was in a non-contracting State.¹⁰

[11] Canada’s domestic electronic commerce legislation differs in some ways from the Convention. However, the substantive domestic law of contract and the rules of private international law may still be applicable in either case. Article 19 would allow Canada to declare that the adopted Convention would apply only to parties whose places of business were in contracting States¹¹ if, for example, it was felt that the legislative differences between Canada’s domestic law and the Convention necessitated the application of the Convention only to contracting States. However, the invocation of Article 19 for this purpose would not be necessary because of the substantial similarity between the Convention and Canada’s domestic legislation.

[12] The Convention does not preclude parties from selecting a choice of law in their agreements, and the Convention’s application would be subject to private international law rules.¹² Therefore, if Canada adopts the Convention into its domestic law, and Canada has jurisdiction over an international contract pursuant to application of the private international law rules applied by Canadian courts, the Convention would be applied to the contract as part of the law of Canada. As mentioned above, this would be so even if the other party’s place of business was in a non-contracting State, unless Article 19 was invoked.

III. Exclusions

[13] The UECA is designed to have a broad application, with limited exceptions. Domestic electronic commerce legislation provide for various exclusions, depending on the province or territory. The scope and type of exclusions is not uniform, although some common, recurring exclusions include wills and their codicils, trusts created by wills, enduring powers of attorney, negotiable instruments, and documents that create or

**UNIFORM LAW CONFERENCE OF CANADA
COMMERCIAL LAW STRATEGY**

transfer interests in land and that require registration to be effective against third parties.¹³

[14] So-called “consumer” contracts are not excluded from the application of any provincial or territorial domestic electronic commerce legislation. Therefore, consumers are subject to the electronic equivalence provisions and rules governing the formation of electronic contracts contained in such legislation. Article 2.1.(a) of the Convention specifically and absolutely excludes contracts concluded for personal, family or household purposes.¹⁴ The rationale for this appears to be that consumer protection is beyond the scope of the Convention, that domestic legislation governing consumer protection would be available to parties who are consumers pursuant to the application of private international law rules,¹⁵ and that the significant use by consumers of the Internet required a complete exclusion of consumer contracts from the Convention, which is not designed to address consumer protection issues.¹⁶

[15] Excluding consumers from the Convention potentially removes the benefit of legal certainty in transnational electronic contracting with consumers.¹⁷ However, domestic electronic commerce and consumer protection legislation will usually be available to consumers pursuant to the application of private international rules. Some provincial online-specific consumer protection legislation will broadly apply where a party resides in the province or if an offer or acceptance is sent from or made in the province.¹⁸ In limited situations (if, for example, a consumer resides in a province or territory with consumer protection legislation that is silent on its jurisdictional application, and private international law rules indicate the law of the contract is that of another jurisdiction) consumers may lose the certainty of domestic electronic commerce legislation and will not have the provisions of the Convention to rely on.

[16] The Convention also excludes specific financial transactions (Article 2.1.b) and negotiable instruments and similar documents (Article 2.2). Most provinces and territories exclude negotiable instruments, and some exclude documents of title, from the application of their electronic commerce legislation. Many, but not all, provinces and territories specifically exclude documents that create or transfer interests in land and require registration to be effective against third parties, and wills.

[17] As different states have different reasons for imposing restrictions that might not be required or desirable in other jurisdictions, the Convention has limited exclusions. Canada would still have the option of making specific exclusions by declaration pursuant to Article 19. For the purpose of uniformity between domestic and international

PRE-IMPLEMENTATION REPORT ON THE CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

transactions, consideration should be given as to whether any of the exceptions reflected in most domestic electronic commerce legislation should also be included in the Convention.

IV. Application and Derogation

[18] Article 8.1, which provides for functional equivalency of electronic communications with their paper-based counterparts, reflects section 5 of the UECA. Similarly, Article 8.2 reflects section 6(1) of the UECA: parties are not required to use or accept electronic communications, but consent to do so may be inferred from conduct. However, pursuant to Article 13 of the Convention, any rule of law that requires terms of a contract that have been negotiated through electronic communications to be made available to the other party in another format, will still be applicable.¹⁹

[19] The UECA and several of the provinces stipulate that the respective legislation applies to the Crown,²⁰ that the inference of consent does not apply to government parties, and that consent of a government to accept information in electronic form must be expressed by communication accessible to the public or to those likely to communicate with it.²¹ Special rules for government apply in other circumstances as well.²² The Convention does not define “government” and does not contain any provisions dealing specifically with government parties.

[20] The frequency and types of interactions between governments and other parties are clearly greater in the domestic sphere. Also, the primary purpose of the Convention, which is the facilitation of international trade, is narrower than the rationale for domestic electronic commerce legislation, which includes clarification of the legal effectiveness of communication with government. Nevertheless, whenever government is a party to an international contract, no specific exclusions or exceptions are available that deviate from the fundamental provisions of the Convention. In Particular, Article 1.3 states that “*neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.*”

[21] The preservation of party autonomy appears to be a guiding principle of the Convention. As stated in Article 8.2, parties are not required to accept or use electronic communications. Article 3 of the Convention also broadly allows parties to derogate from or vary the effect of any of its provisions. Although a similar provision specifically permitting “contracting out” is not contained in the UECA or domestic electronic

**UNIFORM LAW CONFERENCE OF CANADA
COMMERCIAL LAW STRATEGY**

commerce legislation, the use or acceptance of electronic communications under such legislation is not mandatory.²³ However, under the Convention the ability of the parties to derogate or vary the statutory provisions is greater because of Article 3.²⁴

V. Definitions

[22] Most of the definitions contained in the Convention reflect the concepts of the UNCITRAL Model Law on Electronic Commerce on which the UECA is based. For example, the definition of “data message” in the Convention is similar to the UECA definition of “electronic”. The UECA’s definition (which is the same in the domestic statutes) includes “recording” as a means by which something can be considered electronic, while the Convention uses “stored” in its definition.

[23] The Convention does not use the term “electronic agent”. However, the definition of “automated message system” in the Convention equates it to that of “electronic agent” in the UECA and the domestic statutes. The main differences are that the Convention specifies that the automated message system involves being able to “...*initiate an action or respond to data messages or performances... without review or intervention by a natural person each time an action is initiated or a response is generated by the system.*” The domestic statutes define an electronic agent as being able “...*to initiate an action or to respond to electronic documents or actions in whole or in part without review by a natural person at the time of the response or action.*”

[24] The UECA and the domestic statutes (except for New Brunswick) all use the term “place of business” but do not define it. The Convention does provide a definition for “place of business” in Article 4(h) as “*any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.*”

[25] The UECA and the domestic statutes all define “electronic signature”. New Brunswick and Prince Edward Island have more detailed definitions than the others. The Convention foregoes a definition of “electronic signature” but in other respects reflects the UECA’s requirements of identification and reliability. The comparison is examined in more detail in Section VIII of the Report.

PRE-IMPLEMENTATION REPORT ON THE CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

VI. Location of the Parties

[26] Because the Convention applies to international contracts, the place of business of the parties is a vital detail. Article 6 sets out rules for determining the location of the parties for the purposes of ascertaining the “place of business” defined in Article 4 (h). Factors such as habitual residence, locations indicated by the parties, and relationship to the contract are considered in the determination. Article 6.5 stipulates that a connection between a domain name or electronic mail address and a particular country may not be sufficient to link the party with that country. Although no similar guidance is provided in the UECA or domestic electronic commerce legislation, the significance of this exercise is primarily for determining if the parties are in different states and consequently whether the Convention is applicable.

[27] Assuming that the Convention would apply to government, the “place of business” of a provincial government would likely be the particular province, whereas the “place of business” for the federal government could be the place of the particular governmental department.

VII. Information Requirements

[28] Article 7 stipulates that the parties must comply with domestic law requirements, such as providing accurate and truthful representations. No special duty is imposed under the Convention, which is in conformity with international business transactions in traditional, non-electronic environments.²⁵

VIII. Functional Equivalency and Technological Neutrality

[29] The Preamble to the Convention specifically states that technological neutrality and functional equivalence are the guiding principles of the Convention.²⁶ These principles have also guided the UECA, and were embraced by the courts in Canada even before the implementation of electronic commerce legislation.²⁷

[30] Article 9 of the Convention recognizes the functional equivalency of electronic communications with respect to the requirements that contracts be in writing, be signed, or be in original form. Other concepts which are covered by the UECA and domestic electronic commerce legislation, such as requirements for retention and storage, are not reflected in the Convention. The Explanatory Note indicates that because the Convention deals with international transactions *per se*, and not governmental regulatory

**UNIFORM LAW CONFERENCE OF CANADA
COMMERCIAL LAW STRATEGY**

objectives, and different countries have different degrees of technological development, issues such as retention and storage were not addressed in the Convention.

[31] Various laws in Canada require that documents be in writing or signed, or be in their original form. For example, the common law provinces have enacted legislation based on the English *Statute of Frauds* that require certain contracts, such as contracts for the sale of land or contracts that cannot be performed within one year, be in writing and signed by the person sought to be charged.²⁸ These issues have been addressed by the provincial and territorial electronic commerce legislation, which stipulate that any requirement in law that must be in writing or in a specific form, such as signatures and original documents, is satisfied by using an electronic equivalent.

[32] The requirements under Article 9 of the Convention relating to the necessity of writing mirror those of the UECA and provincial/territorial legislation (that is, the information must be accessible so as to be usable for a subsequent reference). Similarly, the requirements under the Convention for situations where the law requires a communication or contract to be made available or retained in original form are comparable to the UECA.²⁹ With respect to requirements that a communication or contract be signed by a party, the language of the Convention and the UECA diverge somewhat. As noted earlier, the Convention does not use the term “electronic signature”, but simply requires a method to identify the party and to indicate that party’s intention in respect of the information contained in the electronic communication.³⁰ The UECA defines “electronic signature” as information in electronic form that a person has created in order to sign a document.³¹ Although most provincial and territorial electronic commerce legislation adopts the UECA definition of “electronic signature”, some provinces augment the definition somewhat.³²

[33] Both the Convention and the UECA anticipate the signature method will be reliable in light of all circumstances.³³ In the case of the Convention, the method may be proven in fact to have been reliable in the alternative.³⁴ The UECA stipulates that relevant provincial or territorial authorities may make regulations respecting reliability of electronic signatures.³⁵ The reliability issue is one of objective determination under the Convention.³⁶ Consequently, the reliability requisite under the Convention does not depend on a government regulation.

[34] The Convention’s more general language reflects a deliberate effort to refrain from identifying specific technologies that could be equivalent to handwritten signatures.³⁷ In this respect the provisions of the Convention relating to equivalencies for

PRE-IMPLEMENTATION REPORT ON THE CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

the signature requirement are somewhat more technologically neutral than the UECA and its provincial/territorial counterparts. Although the standard of reliability in the circumstances is a guiding principle under both regimes, the Convention does not allow a party to repudiate its signature for its unreliability when the identity of the party has been proven and is not in dispute.³⁸

[35] The differences in the functional equivalency provisions developed by UNCITRAL between the Convention and the UECA (which is based on the earlier UNCITRAL Model Law on Electronic Commerce)³⁹ demonstrate a honing of language in the later Convention that attempts to capture ongoing technological developments. However, existing concepts of “electronic signatures” under provincial and territorial electronic commerce legislation are broadly defined and not appreciably dissimilar to the Convention’s requirements.

IX. Electronic Contracts

[36] The UECA provides for explicit recognition of making or accepting an offer “*by any action in electronic form, including touching or clicking an appropriately designated icon.*”⁴⁰ Article 8 of the Convention permits contracts to be in the form of “electronic communications”, which is defined as “*any communication that the parties make by means of data messages.*”⁴¹ The term “data message” is broadly defined to include “*electronic, magnetic, optical or similar means.*”⁴² . Under both regimes, electronic communications are clearly acceptable for forming contractual relations.

[37] Article 11 of the Convention states that electronic communications that are generally accessible, and not addressed to specific parties, are considered to be mere invitations to make offers, unless the party making the proposal clearly indicates an intention to be bound in case of acceptance. Although provincial and territorial electronic commerce legislation does not contain a similar provision, the Convention’s position is in accordance with established common law principles,⁴³ and courts in Canada have generally been willing to apply the established rules of the common law of contract to analogous situations in the electronic environment.⁴⁴ Article 11 conforms to traditional common law considerations of the legal effect of advertising in the paper-based environment.

[38] The time and place of acceptance are fundamental to contract formation and the rules that will apply to it. The general rule of contract formation indicates that acceptance takes place when and where the offeror receives notice of acceptance. The

**UNIFORM LAW CONFERENCE OF CANADA
COMMERCIAL LAW STRATEGY**

mailbox rule deviates from the general rule: acceptance of an offer is made once a letter addressed to the offeror is posted, despite the fact that the offeror does not yet have actual notice of acceptance. The application of the mailbox rule to more technologically advanced modes of communication, such as telephone and fax, has been evaluated by Canadian courts.⁴⁵ Generally, courts have determined that because telecommunications are instantaneous, the mailbox rule should not apply, and acceptance occurs when it is actually received by the offeror.

[39] There has not been any decision on the timing of acceptance via online communications in Canada. Presumably, one must ascertain whether online communications, such as e-mail or “clicking”, are analogous to telephone or fax communications. Several complicating factors, such as the many intermediate servers through which such communications are shunted and mechanisms that can stop delivery (such as spam filters), may indicate that online communications are not, in fact, instantaneous.

[40] This issue is fundamental to the Convention for two reasons. First, Article 10 of the Convention deals with time of dispatch and receipt of electronic communications. It does not deal with the issue of acceptance, on which the formation of a contract depends. Second, Article 5 requires the rules of private international law to be applied in these circumstances, which could result in the application of the domestic law of contract formation.

[41] The Explanatory Note unequivocally states that the Convention does not attempt to provide a rule governing the timing of contract formation.⁴⁶ Rather, the Convention provides guidance on the time and place of dispatch and receipt of electronic communications, issues that are important to the concepts of offer and acceptance, but are not determinative of contract formation.

[42] Under the Convention, the time of dispatch of an electronic communication is the time when a message leaves an information system under the control of the sender.⁴⁷ Under the UECA, the focus is on the time it enters an information system out of the originator’s control.⁴⁸ Although the reason for the change in focus is not obvious, there does not appear to have been any intention by UNCITRAL to refer to a different time in the newer Convention.⁴⁹

[43] The time of receipt of an electronic communication under the Convention is the time it becomes capable of being retrieved by the addressee at an electronic address

PRE-IMPLEMENTATION REPORT ON THE CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

designated by the addressee.⁵⁰ The UECA states that an electronic document is received when it enters an information system designated or used by the addressee, and is capable of being retrieved by the addressee.⁵¹ The Convention avoids the concept of “entering another information system” because of the perceived growing use of message screening devices (such as spam filters) that could prevent reception,⁵² although there is a presumption that an electronic communication is capable of being retrieved when it reaches the addressee’s electronic address.⁵³

[44] In the circumstance where an electronic message is received by the addressee at an electronic address not designated, the time of receipt is when the message 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.⁵⁴ The UECA provision is similar, except it focuses again on entering an addressee’s information system.⁵⁵

[45] It is difficult to predict whether the difference in wording between Canada’s domestic electronic commerce legislation and the Convention will have any practical differential impact. Neither the Convention nor the domestic legislation dictates when acceptance occurs. For example, in a circumstance when an addressee designates an address, an electronic message is received when it enters an addressee’s information system and is capable of being retrieved and processed (in the case of UECA) or when it becomes capable of being retrieved at that address (in the case of the Convention). But neither stipulates whether an offer contained in an electronic message is accepted when sent, when received, or when retrieved. The timing of the contract formation will be governed by the applicable law which, if it is Canadian, awaits resolution by the courts.⁵⁶

[46] Despite these uncertainties, the determination of when acceptance occurs in electronic contracts involving an international sale of goods may be more ascertainable. Article 20 of the Convention⁵⁷ stipulates that the Convention’s provisions are applicable to the use of electronic communications in connection with the formation or performance of a contract to which the United Nations Convention on Contracts for the International Sale of Goods (CISG)⁵⁸ applies. Canada has ratified the CISG,⁵⁹ and Canadian provinces have adopted it into their domestic legislation.⁶⁰ Article 18(2) of the CISG states:

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

**UNIFORM LAW CONFERENCE OF CANADA
COMMERCIAL LAW STRATEGY**

reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror.....

[47] Applying Article 10.2 of the Convention to the CISG, it would appear that acceptance occurs when the electronic message is capable of being retrieved by the offeror (assuming the terms “reaches the offeror” in the CISG and “receipt” in the Convention are equivalent concepts). If this is a logical assessment of the interaction of these two instruments, it would appear that the mailbox rule does not apply to electronic contracts involving the international sale of goods.

[48] Under both the Convention and the UECA, 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 addressee’s place of business.⁶¹ These provisions provide certainty of time and place for contractual purposes in an era of mobile communications and in circumstances where servers may be in other jurisdictions. Article 10.4 reinforces the concept that the timing of receipt of electronic communications is not determined by the location where the information system supporting an electronic address.

[49] It should be noted that these deeming time and place provisions have no counterparts for telephonic or postal communication, which means that different legal outcomes might result from using these means to conduct business. For this reason, New Brunswick’s *Electronic Transactions Act*⁶² does not include an equivalent of the UECA s. 23(3). Other provincial and territorial electronic commerce legislation adopt the deemed place of business approach to dispatch and receipt taken by the UECA and the Convention.

X. Automated Message Systems

[50] The use of electronic agents in the formation of contracts in the electronic environment is pervasive. The Convention uses the term “automated message system” to mean computer programs or other automated means used to initiate an action or respond to data messages, without review by a natural person each time an action is initiated or a response is generated.⁶³ The UECA uses the equivalent term “electronic agent”.⁶⁴ Automated message systems act within pre-set parameters but lack human input at the vital moment of contract formation. The Convention upholds the validity of contracts formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems.⁶⁵ The UECA and domestic electronic

PRE-IMPLEMENTATION REPORT ON THE CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

commerce legislation provide similar assurances,⁶⁶ as does the common law, which has long been adaptive to mechanical agents being able to bind parties to a contract.⁶⁷

[51] The nature and extent of electronic communication, however, requires a rule to deal with mistakes made in the course of dealing with electronic agents, which have a limited ability to interact with a natural person. In circumstances where an automated message system does not provide a natural person with an opportunity to correct an error, and if that person notifies the other party of the error as soon as possible after learning of the error and has not used or received any material benefit from the goods or services received from the other party, the Convention allows the natural person (or the party on whose behalf that person was acting) to withdraw the portion of the electronic communication in which the error was made.⁶⁸ A key aspect of the provision is the lack of an opportunity for the natural person to correct an error. A natural person who places an order over a commercial web site that provides repeated summaries of essential contract terms and requires confirmation before the order is placed would presumably not have the benefit of this rule.

[52] Article 14 provides a right to withdraw the portion of the electronic communication in which the error was made. In most cases, a withdrawal will make it possible to avoid the part of the transaction resulting from the error; if the error represents a significant component of the contract, such withdrawal may invalidate the whole contract.⁶⁹ Article 14.2 would also preserve the common law on mistake for situations not expressly covered by Article 14.1.

[53] Article 14 applies to “input errors” with automated message systems. These errors typically result from unintentional keystrokes or clicking.⁷⁰ The UECA and domestic legislation contain a provision comparable to Article 14 of the Convention, except that the natural person must have made a material error, and the consequence is that the electronic document has no legal effect. Unlike the domestic legislation, there is room under the Convention to address an error but still preserve parts of the contract.

[54] As discussed earlier, consumer transactions are exempt from the application of the Convention. Article 14 could conceivably provide a degree of consumer protection for individuals who make input errors while contracting online with international entities. Section 51(a) of the *Internet Sales Contract Harmonization Template* provides a consumer with the right to cancel a contract where the consumer is not given an express opportunity to accept or decline the contract or to correct errors immediately before entering into it.⁷¹ However, not all provinces and territories have adopted the *Template*. Given that the

**UNIFORM LAW CONFERENCE OF CANADA
COMMERCIAL LAW STRATEGY**

purpose of the Convention is to facilitate electronic contracting between parties whose places of business are in different states, it would be inappropriate to add consumers to its sphere of application in order to remedy a domestic legislative deficiency.

XI. Final Provisions

[55] Chapter IV of the Convention deals with customary treaty provisions, not substantive issues relating to electronic communications. Except as already specifically noted above, these provisions do not fall within the scope of this assessment. However, the following additional Articles will be relevant considerations to Canada's adoption of the Convention, and are therefore highlighted for the particular purposes stated:

- [56] Article 18 permits a contracting state that has two or more territorial units with different systems of law to declare that the Convention is to extend to all territorial units or only some of them. Although typical under most private international law conventions, it is worth noting that this Article allows Canada to adopt the Convention but limit its application to those provinces that enact the Convention's provisions.
- [57] Articles 19 and 21 would allow Canada to declare that the Convention will only apply to countries that are also contracting states, to declare that the Convention will apply only if the parties to a contract agree that it should apply, or to declare that certain matters are excluded from the Convention's application (for example, if it is considered desirable to harmonize the exclusions with domestic electronic commerce legislation).
- [58] Article 20 imports the provisions of the Convention to other international conventions (such as the CISG, discussed *supra*). It would also allow Canada to declare that the Convention will not apply to any specified international convention.
- [59] Article 24 stipulates that the Convention applies prospectively and does not affect contracts existing before the date the Convention enters into force in respect of each Contracting State.

PRE-IMPLEMENTATION REPORT ON THE CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

XII. Summary Conclusions

[60] The Convention will provide a global legal approach for international electronic commerce. Despite the fact that it differs somewhat from the UECA, the models are similar. Its principles are consistent with Canadian law, including the common law of contract. The benefits gained from a uniform international scheme outweigh concerns over perfect harmonization with domestic legislation.

[61] The Convention is designed to facilitate business to business electronic transactions between parties whose places of business are in different countries. It provides for legal recognition of electronic communications and offers some guidance on dispatch and receipt of electronic messages. However, the law of contract formation is left to private international law principles.

[62] Harmonization between the Convention and domestic legislation is desirable to avoid the possibility of two different sets of rules. The language used in the Convention reflects a greater degree of technological neutrality and considers technological developments to a greater extent than does the domestic electronic legislation. Unfortunately, the language used in the Convention is frequently quite different from that used in UNCITRAL's earlier Model Law on Electronic Commerce, on which the UECA and domestic electronic commerce legislation are based. The impact of these differences will not likely be significant, given the Convention's principal role as a facilitating instrument that does not impose substantive rules of contract law. However, the possibility that judicial examination of these differences could result in unanticipated interpretations cannot be entirely discounted.

[63] In some instances, the refinement of language in the Convention compared with domestic legislation will give rise to different consequences. For example, with respect to automated message systems or electronic agents, the concept of "material error" in domestic legislation is different from "input error" in the Convention, and the Convention contemplates the preservation of the contract, if possible, when input errors are made. In other situations, the Convention addresses issues concomitant with its international business scope, which are not as vital in the domestic sphere (such as providing guidance relating to the location of the parties to the contract).

[64] In a federal system like Canada it would be impractical to seek identical language in the electronic commerce legislation in all jurisdictions. The Convention, the UECA, and domestic electronic commerce legislation use different terminology and phrasing. However, they are all based on the same principles and are compatible. No

**UNIFORM LAW CONFERENCE OF CANADA
COMMERCIAL LAW STRATEGY**

particular provision in the legislation of provincial or territorial common law jurisdictions has been identified that is contrary to the tenets of the Convention or would impede its implementation. Consequently, no amendment would have to be made to such legislation.

[65] The Convention enables electronic commerce by generally providing direction for parties to international contracts. It does not deal with substantive law issues, except in select, specialized matters (such as the impact of input errors made when dealing with automated message systems).

[66] Although consumer transactions are governed by domestic electronic commerce legislation, it appears appropriate to exclude such transactions from a convention dealing with transnational trade where concepts of consumer law may differ between countries and identification of consumer transactions may prove difficult. Such an approach has historically been employed under the CISG. Consumers entering into transnational contracts may have the benefit of both domestic electronic commerce legislation and consumer protection laws through the application of private international law rules to the agreement.

[67] The Convention does not raise any appreciable conflict with the principles of the common law of contract. The “place of business” deeming provisions add certainty to an evaluation of the time and place of contract formation by means of electronic communications, but may produce a result that is different from that reached by the application of common law rules to other communication media.

[68] The application of the Convention to the CISG may resolve an outstanding issue relating to when acceptance occurs in electronic communications, but only in respect of the international sale of goods.

¹ Michael Deturbide is Professor of law and Associate Dean, Academic, at Dalhousie Law School.

² Available online: www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf

³ Available online: <http://www.ulcc.ca/en/us/>

PRE-IMPLEMENTATION REPORT ON THE CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

⁴ See *Electronic Transactions Act*, S.A. 2001, c. E-5.5; *Electronic Transactions Act*, S.B.C. 2001, c. 10; *The Electronic Commerce and Information Act*, S.M. 2000, c. E55; *Electronic Transactions Act*, S.N.B. 2001, c. E-5.5; *Electronic Commerce Act*, S.N.L. 2001, c. E-5.2; *Electronic Commerce Act*, S.N.S. 2000, c. 26; *Electronic Commerce Act*, S.O. 2000, c. 17; *Electronic Commerce Act*, S.P.E.I. 2001, c. E-4.1; *The Electronic Information and Documents Act*, S.S. 2000, c.E-7.22; *Electronic Commerce Act*, S.Y. 2000, c. 10.

⁵ Available online:

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

⁶ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts (hereinafter referred to as “Explanatory Note”), at para. 45, available online:

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

⁷ See John D. Gregory, “The Proposed UNCITRAL Convention on Electronic Contracts” (2003), 59 *The Business Lawyer* 313 at 317.

⁸ Such assessments of the Convention have been performed with respect to the laws of other countries. See, for example, the American Bar Association Recommendation and Report, available online:

www.abanet.org/intlaw/policy/investment/unelectroniccomm0806.pdf, which urges the U.S. government to become a signatory to the Convention.

⁹ See, for example, Nova Scotia’s *International Sale of Goods Act*, S.N.S. 1988, c. 13, available online:

<http://www.gov.ns.ca/legislature/legc/statutes/internls.htm>

¹⁰ Explanatory Note, *supra* note 5, at para. 63.

¹¹ Article 19.1(a) states that any contracting party may declare in accordance with the procedure in Article 21 that it will apply the Convention only “when the States referred to in article 1, paragraph 1, are Contracting States to this Convention.”

¹² See Explanatory Note, *supra* note 5 at para. 65: “Whether the law of a contracting State applies to a transaction is a question to be determined by the rules of private international law of the forum State, if the parties have not validly chosen the applicable law.” See also Article 3, which permits parties to derogate from or vary any provisions of the Convention, and Article 5.2: “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”

¹³ *Supra* note 2, s.2.

¹⁴ Although most contracts within this description would be traditionally labeled “consumer” contracts, other contracts, such as matrimonial property contracts, could be captured by this exclusion. See Explanatory note, *supra* note 5 at para. 74.

¹⁵ *Ibid.* at para. 73.

¹⁶ *Ibid.* at para. 77.

¹⁷ See John Gregory, *supra* note 6 at 321.

¹⁸ See, for example, *Internet Sales Contract Regulation*, Alta. Reg. 81/2001.

¹⁹ For example, the EU Directive on Electronic Commerce, 2000/31/EC, which requires the provider of goods or services to make terms available for downloading and printing. Consumer protection legislation in Canada may also require a supplier to disclose information in an accessible manner that ensures the consumer is able to retain and print the information. See, for example, Ontario’s *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Schedule A, s. 38(3)(b).

²⁰ *Supra* note 2, s. 3.

²¹ *Supra* note 2, s. 6(2).

**UNIFORM LAW CONFERENCE OF CANADA
COMMERCIAL LAW STRATEGY**

²² For example, the UECA states that where the signature or signed document is to be provided to the Government, the requirement is satisfied only if the Government or the part of Government to which the information is to be provided has consented to accept electronic signatures. *Supra* note 2, s. 10(3).

²³ *Supra* note 2, s. 6(1).

²⁴ The Explanatory Note, *supra* note 5, at para. 84 *et seq* indicates that the Convention reflects the view that party autonomy in contractual negotiations should be broadly permitted.

²⁵ Explanatory Note, *supra* note 5 at para. 126.

²⁶ The Preamble states that the parties to the Convention are “of the opinion that uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological neutrality and functional equivalence...” *Supra* note 5.

²⁷ See, for example, *Re Newbridge Networks Corp.* (2000), 48 O.R. (3d) 47 (Sup. Ct.)

²⁸ See, for example, the Nova Scotia *Statute of Frauds*, R.S.N.S. 1989, c. 442.

²⁹ There must exist a reliable assurance as to the integrity of the information (that it be complete and unaltered) from the time it was first generated in its final form, and the information be must be capable of being [displayed to (Convention Article 9.4) / accessed by (UECA s. 11(1))] the person to whom it is to be made available.

³⁰ *Supra* note 5, Article 9(3)(a).

³¹ *Supra* note 2, s. 1(b).

³² See, for example, *Electronic Transactions Act*, S.N.B. 2001, c. E-5.5, s. 10.

³³ *Supra* note 5, Article 9.3(b)(i); *supra* note 2, s. 10(2).

³⁴ *Supra* note 5, Article 9.3(b)(ii).

³⁵ *Supra* note 2, s. 10(2).

Only the federal government has made such regulations, for the purposes of the definition “secure electronic signature” in the *Personal Information Protection and Electronic Documents Act* (S.C. 2000, c. 5), which differs from the UECA. See SOR/2005-30.

³⁶ *Supra* note 5, Article 3(b)(i).

³⁷ Explanatory Note, *supra* note 5 at para. 154.

³⁸ *Supra* note 5, Article 9.3(b)(ii).

³⁹ *Supra* note 1.

⁴⁰ *Supra* note 2, s. 20(1).

⁴¹ *Supra* note 5, Article 4(b).

⁴² *Supra* note 5, Article 4(c).

⁴³ See, for example, *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.*, [1953] 1 QB 401 (C.A.).

⁴⁴ See, for example, *Rudder v. Microsoft*, [1999] O.J. No. 3778 (Ont. Sup. Ct.).

⁴⁵ See, for example, *National Bank of Canada v. Clifford Chance* (1996), 30 O.R. (3d) 746.

⁴⁶ Explanatory Note, *supra* note 5 at para. 175.

⁴⁷ *Supra* note 5, Article 10.1.

⁴⁸ *Supra* note 2, s. 23(1).

⁴⁹ John Gregory, “The UNCITRAL Draft Convention on Electronic Communications in International Contracting”, October 24, 2004.

PRE-IMPLEMENTATION REPORT ON THE CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

⁵⁰ *Supra* note 5, Article 10.2.

⁵¹ *Supra* note 2, s. 23(2).

⁵² John Gregory, *supra* note 48.

⁵³ *Supra* note 5, Article 10.2. Presumably this is a rebuttable presumption which would allow for a defense because of the use of a screening device such as a spam filter. See the ABA Report, *supra*, note 7 at 4.

⁵⁴ *Supra* note 5, Article 10.2.

⁵⁵ *Supra* note 2, s. 23(2)(b).

⁵⁶ For example, per John Gregory, *supra* note 48: “a message that is received after working hours may not be effective until the next working day, depending on the circumstances. That is beyond the scope [of the Convention].”

⁵⁷ The Explanatory Note, *supra* note 5, at para. 289, indicates that the Convention’s substantive rules are intended to apply to the listed international instruments to allow those conventions to operate in an electronic environment.

⁵⁸ Online: www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html

⁵⁹ April 23, 1991.

⁶⁰ For example, Nova Scotia’s *International Sale of Goods Act*, S.N.S. 1988, c.13.

⁶¹ *Supra* note 5, Article 10.3; *supra* note 2, s. 23(3).

⁶² S.N.B. 2001, c. E-5.5, s. 16(3).

⁶³ *Supra* note 5, Article 4(g).

⁶⁴ *Supra* note 2, s. 19.

⁶⁵ *Supra* note 5, Article 12.

⁶⁶ *Supra* note 2, s. 21.

⁶⁷ See, for example, *Thornton v. Shoe Lane Parking Ltd.* [1971] 2 QB 163 (C.A.)

⁶⁸ *Supra* note 5, Article 14.

⁶⁹ Explanatory Note, *supra* note 5 at para. 240.

⁷⁰ *Ibid.* at para. 234.

⁷¹ Available online: http://strategis.ic.gc.ca/pics/ca/sales_template.pdf