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Recent Development

***473** Receiving **Electronic Messages**

Eastern Power v. Azienda Communale Energia & Ambiente

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**1. INTRODUCTION**

The law of contract is based on intention, on the will of people to create legal relations between themselves. The intention must be shared, and thus be communicated from one party to the other. Communication of intention may occur in many ways. The intention to convey land was once communicated by livery of seisin, historically by physical transfer of a representative clod of earth from the land to be transferred. Intention may be shown by action in response to a request or offer. Today, however, communication is most frequently in words of negotiation, offer, and acceptance.

When the parties are not in each other's presence, they need some way to convey the words to each other. The traditional way of doing so is in writing on paper, sent to the other party by private or public messenger. Cheap efficient public postal service is a couple of centuries old. Alternative methods are nearly as old, however. The telegram was developed in the first half of the nineteenth century, and the telephone in the second half. The first half of the twentieth century saw both these methods adapted to produce words on paper immediately accessible to the recipient, through the teleprinter (telex) and the facsimile machine (fax). The late twentieth century brought us computer communications, with a rapidly expanding mix of media and intermediaries: point-to-point electronic mail and electronic data interchange, Internet e-mail, faxes generated or received directly by computers, pagers, mobile telephones with e-mail capacity, the World Wide Web, with new methods or devices being invented seemingly every month.

***474** The law faces two challenges from the evolution of communications technology: first, are the new methods of communication effective to create the legal relations that we want? Does the law allow people to communicate effectively that way? Second, how do we manage the risks of miscommunication? While the questions are related - the legal effectiveness may depend on the degree of risk - this comment will focus on the second question. [FN1] Recently, *Eastern Power Limited v. Azienda Communale Energia & Ambiente* [FN2] produced a relatively rare appellate level review of new technologies of communications. This note suggests that the case was correctly, but perhaps too timidly, decided.

**2. THE POSTAL ACCEPTANCE RULE**

The basic rule is that for intention to be shared, it must be communicated to and received by the other party. [FN3] The person who sends the communication takes the risk of its not arriving. However, the common law has long accepted a significant exception to this rule. When an offer to contract may be accepted by mail, the person who seeks to accept (the offeree) does so effectively merely by putting the acceptance into the mailbox. If delivery of the acceptance is delayed or fails, the offeror is nevertheless bound to the accepted contract. The

exception is known as the “mailbox rule” or the “postal acceptance rule.”

The law on this point grew out of an English decision called *Adams v. Lindsell*. [FN4] The Court decided that it was impractical to make the communication of the acceptance effective on receipt by the offeror. If completion of the contract had to wait until the offeror knew that the offer had been accepted, why should it not have to wait until the offeree knew that the acceptance had been received, and so on? There was a risk ***475** of infinite regression. “No contract could ever be completed by post,” [FN5] in the words of Lord Ellenborough. The Court held that the offeror was bound as soon as the acceptance was mailed, and therefore a purported sale to a subsequent purchaser was improper. [FN6]

It has been argued that this result favours certainty in contracts, ending at the earliest point the doubt whether the offer would be accepted and stopping the possibility of the offer being revoked. [FN7] Mellish L.J. spoke in *Harris's case* [FN8] of “the extraordinary and very mischievous consequences which would follow if it were held that an offer might be revoked at any time until the letter accepting it had been actually received.”

In addition, if the contract is formed (the offer is accepted) when the acceptance is mailed, the offeree may then start to perform the contract, perhaps by spending money to be able to do so. [FN9] The economy is made more efficient by reducing the delay.

It has sometimes been argued that the rule assumes that the postal system is the agent of the offeror, since the offeror may specify the means for communicating the acceptance. [FN10] It is certainly true that the offeror may require mail to be used for accepting the offer, and/or may require some other means. However, the agency theory is not widely accepted today. [FN11] In the United States, it did not work because senders were sometimes able to recover their mail from the postal system, so the system must be the agent of the sender offeree, if anyone. In Canada, ***476** one did not need an agency theory. The *Post Office Act* [FN12] provided, until 1981, that a letter deposited in a postbox became the property of the addressee at that point. [FN13] In any event, there seems little reason to think that giving authority to the post office to receive one's communications necessarily gives it the authority to create legal relationships. [FN14]

The rule of course meant that the offeror could be bound by a contract without knowing the offer had been accepted. Allocating this risk to the offeror was said to be fair because while neither party knew where the message was, the offeror had more control over a potential solution. The offeror determined expressly or by implication the acceptability of communication by mail, and could require that the acceptance be received to be effective. The absence of such a requirement, especially in the past 150 years, suggests that the offeror has accepted the risk. In addition, once the acceptance had been mailed, the offeree would not expect further notice, thinking the contract was formed. The offeror, however, still expected to receive the acceptance. If the acceptance was delayed or lost, it was fair to make the offeror, not the offeree, inquire about the missing communication. [FN15]

**3. USE OF THE POSTAL ACCEPTANCE RULE**

The postal acceptance rule had a triple impact as it was originally developed. First, it determined whether a contract was made at all, in the absence of a received acceptance. Next, it determined when the contract was made, namely at the time the acceptance goes into the mailbox. This is important in many cases, for example in meeting deadlines, in choosing among competing acceptances, in deciding whether an old or a new tax rate should apply to a sale, and so on. Finally, it ***477** fixed the time beyond which the offer could not be revoked. These are all closely related, logical extensions of each other, in a sense.

A further consequence of the rule has the fact of acceptance determine as well where the contract is made. It

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is made at the place the final step is taken to form the contract. Since the mailbox rule deems the acceptance effective on mailing, the contract is made at the place of mailing. [FN16] This determination has been used to support levying particular taxes on the transaction, and the need for parties to a contract to be licensed under provincial statutes. [FN17] It has influenced the jurisdiction of consumer protection authorities over consumer contracts, at least in the United States. [FN18] It has also influenced the choice of law and the choice of forum for resolving disputes about the contract. Since the choice of forum was the issue in the *Eastern Power* case, we will return to this influence in due course.

**4. EXTENDING THE POSTAL ACCEPTANCE RULE TO NEW TECHNOLOGIES**

**(a) Telegram**

Besides extending to different legal questions, the rule has also extended to other technologies of communication. The first, and the easiest, was the telegram. Courts did not seem to hesitate in deciding that an acceptance sent by telegram was effective when sent. [FN19] Unfortunately there was little analysis of the rationale for the rule as it applied to mail, and thus little express justification for the extension to a quite different method of conveying intention. [FN20] Nevertheless, it is clearly established that telegram acceptances follow the rules about mailed acceptances.

***478 (b) Telephone**

The courts were at first tempted to apply the rule to the telephone. [FN21] However, this position has not prevailed in Anglo-Canadian law. Rather, the courts have held that phone conversations resemble face to face communications. There is much less risk that communications will go astray without the knowledge of one or both parties. As Lord Denning pointed out in the *Entores* case, [FN22] people speaking on the telephone generally say when they do not hear properly, or misunderstand (if they know they are misunderstanding!), or if they are cut off before completing the communication. In other words, instantaneous communications did not present the same considerations as delayed communications. *Entores* was followed, and extensively quoted, in Ontario in *Re Viscount Supply Co. Ltd.* [FN23] The law is now said to be “clear” that “the contract is made at the place from which the offeror is telephoning as that is the place to which the acceptance is communicated by the offeree.” [FN24]

**(c) Telexes**

The notable pair of English cases on telexes are *Entores* [FN25] and *Brinkibon v. Stahag Stahl GmbH*. [FN26] Both were jurisdiction cases, on choice of forum, rather than disputes about whether a contract was made at all. There was no miscommunication in either.

In *Entores*, a company in London, England, had made an offer by telex to agents of an American corporation's offices in Holland. The offer was accepted by telex sent from Holland and received in London. The question was whether the English company was allowed to start a suit in England and serve the American corporation out of the jurisdiction, which required consent of the court.

***479** The Court of Appeal said yes. [FN27] All three judges said that instantaneous communication like telexes should be equated to communication when the parties were physically in each other's presence, so the acceptance had to be received, and was effective when and where received. The parties could inquire into any interruption of the communications or any misunderstanding. Denning L.J. did qualify the principle by noting that the offeree might not know, even with telex, that the acceptance did not go through. If the offeror was not aware of a failure through its own fault, and did not inquire, then the offeror would be bound by the acceptance. If there was no fault, there would be no contract. [FN28]

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The reasoning of *Entores* was expressly approved in *Brinkibon*. In that case, a contract had been negotiated between an English and an Austrian company. The English company had accepted a telexed offer from Austria, replying by telex to that country. When a dispute arose, the English company sued in England, and the Austrian defendant submitted that the court should not take jurisdiction because the contract had been made in Austria. The House of Lords (in the footsteps of the lower courts) agreed with the Austrian defendant. It held that the facts showed a simple case of instantaneous communications, and that the reasoning of *Entores* was persuasive.

From these telex cases, Lord Wilberforce said that there could be no universal rule about when and where acceptances were effective when sent by electronic communications. A number of practical considerations should be considered, such as the time when the communications were sent (during business hours or not), errors that prevented reception, the use of intermediaries for communications, etc.

In *Brinkibon*, Lord Fraser of Tullybelton engaged in such an analysis to distinguish between the law applicable to telegrams and the ruling here in which he concurred. The technology is essentially the same; the telex devised a way of producing telegraphic code in a way that was easy for the operator and the recipient to use, without the intermediary of a skilled telegraph operator. [FN29] "There is very little, if any, difference ***480** in the mechanics of transmission between a private telex from one business office to another, and a telegram sent through the post office." [FN30] The differences were in the direct receipt of the telex in the office, [FN31] and the possibility for the sender of having confirmation of receipt. In addition, Lord Fraser noted that *Entores* had not caused difficulties in practice in the intervening decades.

Lord Wilberforce concluded that the courts would have to judge such cases "by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie." [FN32]

There seem to be no Canadian cases on contracts made by telex.

**(d) Faxes**

Both telexes and faxes create writing for the other party to the communication. [FN33] While the transmission takes place electrically, almost instantaneously, the message may yet go astray, though both types of device produce a confirmation record to help determine that. [FN34] Likewise, the transmission may arrive at the destination immediately but sit unnoticed and unread for an indefinite time. This is beyond the control and sometimes beyond the knowledge of the sender of the message. [FN35] To date, however, Canadian courts have generally not applied particularly subtle reasoning in handling fax cases.

***481** Canadian courts have, however, been quite open to the use of faxes and their inclusion in existing legal regimes. For example, in *Beatty v. First Explorer Fund 1997 & Co.*, [FN36] it was held that a faxed proxy was a signed proxy within the meaning of the *Societies Act* of British Columbia, and thus valid. The Court said "[t]he law has endeavoured to take cognizance of, and to be receptive to, technological advances in the means of communications" [FN37] These "improvements should not be rejected automatically ... [U]nless there are compelling reasons for rejection, they should be encouraged, applied and approved." [FN38] The Ontario Court of Appeal used similar language in holding that a fax could be used to communicate an offer to the holder of a right of first refusal to buy property. [FN39]

The earliest Canadian case on the receipt of fax messages appears to be *Joan Balcom Sales Inc. v. Poirier*, [FN40] which held that the postal acceptance rule did not apply to faxes. A fax acceptance of an offer to purchase real estate sent from Ontario was effective on receipt in Nova Scotia. As a result, the Nova Scotia court found it had jurisdiction to hear a dispute about the purchase of land in Nova Scotia.

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The next Canadian fax case was *Bickmore v. Bickmore*. [FN41] The court there considered an offer to settle an action for spousal support. The offer to settle some of the outstanding issues was faxed on Friday afternoon. An acceptance was sent by fax on Saturday at noon. The solicitor for the offeror did not learn of the fax until several hours later. [FN42] Between the time of the offer and its acceptance, the offeror was entitled to a ***482** higher rate of court costs, solicitor and client costs. Once the offer was accepted, the costs dropped to the significantly lower party-party scale.

The Court held that electronic communications like faxes were effectively instantaneous, and that they could therefore be taken to be received immediately on their sending. As a result, the acceptance was effective when it was sent, and the offeree spouse had to pay the lower scale of costs from that time on. The offeror took the risk of not paying attention to his fax machine, since he had chosen that method of communication. His time spent preparing arguments on the issues that were settled was thus not fully compensated by the opposing party.

The reasoning in *Bickmore* is not very satisfactory, whatever the justice of the result. The Court did not examine the leading cases, or the principles behind the need for communication or the postal exception to that need. How reasonable was it to expect someone to watch his fax machine all weekend when he had research to do?

More important, the Court did not have to use language reminiscent of the mailbox rule at all. When delivery was instantaneous, it could simply have held that the acceptance was effective on receipt, not on sending. [FN43] It is well established that an organization receives a message when it arrives in a place accessible to the person responsible, whether or not the person becomes aware of it immediately. [FN44] The same is true for individuals: once a letter is delivered to my home or office, I have received it, whether I look at it or not.

*Bickmore* is thus weak authority for focusing on the time of sending the fax, or for extending the mailbox rule to faxes.

The most recent judicial consideration at the time of writing is the Ontario Court of Appeal's decision in *Eastern Power*. [FN45] In that case, an Ontario company had negotiated to build an alternative fuel energy plant ***483** near Rome, Italy. A number of meetings were held and faxes sent, ultimately constituting an agreement for a joint venture. When a dispute arose, the Ontario company brought action in Ontario, and the Italian company argued that the case should properly be heard in Italy. The trial judge, Mr. Justice Juriansz, found for the Italian company entirely on traditional conflict of law grounds. [FN46] The Court of Appeal disposed of those grounds in the same sense, but directed particular attention to one: where was the contract made? The facts resembled those in *Brinkibon*, and the Court adopted the reasoning of the House of Lords. [FN47] “In my view, this analysis is equally applicable to facsimile transmissions, another form of instantaneous communication.” [FN48] As a result, the contract was held to have been made in Italy.

**(e) Newer technologies**

As a result of *Eastern Power*, it can be said that the mailbox rule has not been extended to the two mid-century communications methods, telex and fax. While the courts say that there is no universal rule for instantaneous communications, these technologies are fairly clearly disposed of. What are we to make of newer technologies like e-mail, communications on the World Wide Web, or cellular phones and pagers? For that matter, what of converging technologies like computer-generated faxes or faxes sent to computers, either through a fax modem or using e-mail? Must we examine how they work in each case, and estimate how close they come to being instantaneous? As noted in *Brinkibon*, and as happened in *Bickmore*, a communication may arrive instantaneously but then sit unread. Communications may be sent but not arrive in readable form. Must we consider, as Lord Denning suggested in *Entores*, whose fault it is that such lapses are not noticed in time to

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do something about them? How are we to apply the factors listed in *Brinkibon*: the intentions of the parties, sound business practice, and where the risks should lie?

***484** *(i) Contracts and conflicts*

The first step in answering these questions is to sort out properly why we need to know. Both *Entores* and *Brinkibon* were cases about serving process out of the country. *Balcom (Joan) Sales* and *Eastern Power* were also cases about the jurisdiction of the court. So were the principal telephone cases, such as *Viscount Supply*. In not one of these cases was there any issue about whether a contract had been made, nor was there an attempted revocation, or a miscommunication. All of the cases set out to determine where a contract had been made, because that determined or influenced the jurisdiction of the court.

In my view, it is time to stop worrying, in jurisdiction cases, about where the contract was made. In *Eastern Power* this was only one of eight factors considered by the court, though it was one of the four described as "particularly important." [FN49] The court was applying the well-established principles of the Supreme Court of Canada from the early 1990s in *Morguard Investments v. De Savoye* [FN50] and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* [FN51] that a court must have a real and substantial connection with a case. The *forum conveniens* is the court with the closest connection. The Supreme Court did not, however, spell out the connecting factors in detail. Subsequent cases have done that, but often based on authority that predates the Supreme Court's newer thinking. The main source of authority tends to be the *Rules of Civil Procedure*, and, in particular, the rules for serving process out of the territory of the court. In Ontario, Rule 17.02(f)(i) says that service may be made out of the territory when the action concerns a contract made in Ontario.

This is an outdated and artificial test. Lord Wilberforce in *Brinkibon* said, "The place of making a contract is usually irrelevant as regards validity, or interpretation, or enforcement. Unfortunately it remains in Order 11 as a test for purposes of jurisdiction, and courts have to do their best with it." [FN52] Swan and Reiter go on at length:

> [I]t is unclear, to say the least, why the result of the kind of technical game playing that goes on in these cases [citing *Entores* and *Brinkibon*] should have any ***485** relevance to either the suitability of the particular court to hear the case or the fairness of a decision that an absent defendant should be required to answer the plaintiff's allegations in that court .... What is happening here is that the rules of offer and acceptance are being used to deal with a problem that really has nothing to do with them. [FN53] Professor Waddams agrees:

> But the question in issue in the jurisdictional cases is poles apart from those in issue in the "genuine" contract cases. In the former the question is: are there sufficient connecting links between the foreign defendant and the domestic jurisdiction for it to be just for the domestic court to assume jurisdiction? In the contract cases the questions concern the balancing of the interests and expectations of the offeror and the offeree. There is no rational connection between the two questions and it is unfortunate that the wording of some Rules of Court has caused an association to be made. [FN54] The Uniform Law Conference examined at length what factors might constitute the kind of connection referred to by the Supreme Court, and recommended that they be enacted in legislation. [FN55] The *Uniform Court Proceedings and Proceedings Transfer Act* [FN56] excludes from its list of factors the place the contract was made. The Conference thought that the place was likely to be incidental to the serious connecting factors for the court, such as place of business of the parties, place for carrying out the obligations under the contract, and so on. This view was supported in consultations that the Conference held with the practising Bar. The place of contracting was included in a list of connecting factors in the draft uniform

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statute, [FN57] but omitted from the final version.

In the days of cross-border transactions in a global economy, determining the place of contracting becomes increasingly artificial, and ***486** the connection of that place with the practical transaction is remote. [FN58] Electronic communications push further in the same sense. Electronic addresses represent computer servers that may reside in any number of countries. Names may change - or the effective Internet address may change, through a dynamic dial-up - while the host computer stays the same, or names may stay the same while the host computer changes, even between jurisdictions. The same person may have many addresses, which may or may not designate the same place in practice. People can be assigned electronic addresses though they do not “visit” them. [FN59] In short, electronic communications often make the place of contracting virtual, with no real, let alone substantial, connection with the territory of any court.

When one looks at the legal regimes for global trade, one finds that the international trend is away from seeking the place of contracting to decide jurisdiction. Even the *Civil Code of Quebec*, in force in 1994, does not refer to the place of contracting. [FN60] Also, the draft *Hague Convention on International Jurisdiction and the Effects of Judgments in Civil and Commercial Matters* [FN61] does not refer to the place of contracting.

*Eastern Power* itself demonstrates how marginal this one issue is in a consideration of the jurisdiction of the court. The other connecting factors - the law of the contract, the jurisdiction in which the factual matters arose, and the presence or absence of jurisdictional advantage - had much more practical impact on the fairness of the proceeding. In the telephone contract case, *Clifford Chance*, [FN62] the Court held that the contract had been made in Ontario, but the appropriate forum to resolve the dispute was England. Even in *Re Viscount Supply*, [FN63] the Court held that the place the contract was to be performed was the critical factor to jurisdiction, not the place the contract was made. The two in that case were the same, however.

***487** In short, the issues that the new technologies present between the parties to a purported contract should be resolved by rules that are not appropriate to determine the jurisdiction of courts, and vice versa. [FN64]

*(ii) Contract rules*

As between the parties or potential parties to a contract who are not in each other's presence, the risks that need to be managed are a delay or failure of communications. The delay inherent in some means of communications at a distance also creates a risk that the parties will change their intentions while communications are in transit. The offeror may wish to revoke the offer, for example. [FN65] Where the delay - including inherent delay - has been caused by the use of the post or telegrams, the law has favoured the offeree. For telephone, telex and fax, the law has reverted to the general principle that communications must be received to be effective, though with some reservations.

Should we say, with *Brinkibon* and *Eastern Power*, that there is no general rule, and leave it at that? In my view, we do not have to be so open-ended. We can and should dispense with the mailbox rule for electronic communications. The result of future cases may depend on their facts, but without the spectre of the mailbox rule to distract and distort the discussion.

Does this leave “very mischievous consequences” for the offeree, as Mellish L.J. said in *Harris' Case*, [FN66] namely that the offeror might revoke the offer before the acceptance has reached him or her? Several ***488** reasons suggest not. First, electronic communications are substantially instantaneous, even if some delays are possible. Delays over 24 hours are rare. Compare this to postal service today. For example, Ontario's *Rules of Civil Procedure* provide that service by mail is effective five days after mailing. [FN67] That suggests a relatively long period during which parties may change their minds, so the offeree might need protection in a

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way that current communications do not require.

Second, electronic commerce carried out through World Wide Web sites is often handled by electronic agents, *i.e.*, software programmed to respond to communications. The people dealing with web sites may use their own electronic agents, sometimes called "bots" (short for robots), to search for the best deals. Generally the web site is not an offer but an invitation to treat, so the person communicating with the web site sends in an offer. [FN68] The response is often instantaneous. The offeree web site will not even be programmed to recognize an attempted revocation. [FN69] The risk of inappropriate, unfair, or speculative revocation is tiny.

Third, the rule proposed here for the time of receipt [FN70] sets receipt at the time the message is accessible, not necessarily when it is read. As a result, some of the delays hypothesized in *Entores* and *Brinkibon* are avoided.

In these circumstances it no longer seems unduly harsh to allow the offeror to revoke the offer until receipt of the acceptance. A revocation is not effective until it is received, [FN71] which lengthens the time for the acceptance to be received by the offeror and become final.

The risk caused by unexpected delay or loss of electronic communications should not be borne by the offeror either, under all the circumstances. This argument rests on two key foundations: the reliability***489** of the communications methods, and the desirability of harmony among legal systems.

**5. RELIABILITY**

We have looked at reasons why it may be thought fair to impose the risk of delay or failure of mailed communications on the offeror. An underlying premise, however, is arguably that the mail system is reliable. Most letters are delivered promptly. The mailbox rule allocates the risk of the rare exception. "If [the offeror] trusts to the post he trusts to a means of communication which, as a rule, does not fail." [FN72] "[I]n the newly prevailing conditions [in the 1840s], posting and delivery were little different ... once posted, a letter was as good as delivered." [FN73] "Another factor [in judging the mailbox rule where there is no receipt] is the likelihood that a letter or telegram properly addressed, stamped, or paid for is delivered in the ordinary course of mail or telegraphy." [FN74] If the mail is that reliable, then it is all the more reasonable that the sender of the acceptance should be able to presume its receipt, and act as if the contract was formed.

If the mail is no longer so reliable, or if another technology is less reliable, then this presumption is less justifiable. "[O]ur contemporary culture, justly or not, tends to emphasize the possibility that a letter will be lost or delayed in the post, the very reverse of the old equation." [FN75] The postal rule is doubtless too well established in our law to be displaced by the decline in postal service, but any claim to extend it should be judged against the reliability of the new technology. [FN76]

***490** In *Brinkibon*, Lord Fraser of Tullybelton said that with telex, the sender has a better idea than the recipient whether the message got through or was interrupted. [FN77] The same may be true of fax. At least the sender is told if the machines did not connect, or the message was incomplete. The sender's machine will, however, not tell if the printing was impaired at the recipient's end. Likewise with e-mail, misdirection is usually signalled to the sender. Some programs provide notice of the addressee's absence from the office too. Not every failure or delay will come to the notice of the sender, but the sender has perhaps an equal chance with the addressee of knowing that something has gone amiss. It seems inappropriate in such cases to follow the postal rule that the sender can be careless of the actual fate of the message. [FN78]

Further, if either party has any doubts about the receipt of a message, that party has access to a number of

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instantaneous methods of communications to check, which was not the case when the postal acceptance rule was created. In short, the conditions that justified the postal rule are disappearing.

Lord Wilberforce's list of factors for judging electronic communications in *Brinkibon* included “sound business practice.” [FN79] Some indication of sound business practice with respect to e-mail is the standard form trading partner agreement between commercial parties to electronic data interchange (EDI) arrangements. The standard form in the United Kingdom requires not only receipt, but confirmation of receipt for a message to be effective. [FN80] Canadian and American standards are similar. [FN81]

***491** In short, electronic mail and its electronic variants are not sufficiently reliable to extend the postal acceptance rule to them. The rule is an exception to the general rule about communications, and proponents of any extension of the exception should have the burden of demonstrating the desirability of the extension. This, in my view, has not been done. [FN82]

**6. HARMONY**

In deciding if old rules should be extended to new technologies, we should consider the context in which they operate: a world where borders are decreasingly important for many legal purposes. The legal regimes into and from which electronic messages travel will influence our choices.

One need only look to the civil law of Quebec to find a regime that does not recognize a mailbox rule. [FN83] The rest of the civil law world takes the same view. The global legal standard for sales contracts is the *United Nations Convention on Contracts for the International Sale of Goods*. [FN84] This *Convention* was ratified in Canada effective in 1992, [FN85] and at the end of 1999 was in force in 56 countries. [FN86] It applies to Canadian sales contracts with parties in other contracting states, unless the parties opt out. Article 15 of the *Convention* says:

> (1) An offer becomes effective when it reaches the offeree. ***492** (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. Article 18(2) of the *Convention* says:
>
> (2) 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 ... The collection of cases on the *Convention* from around the world does not show any judicial interpretation of these provisions, [FN87] possibly because the principle is so thoroughly familiar in so much of the world. [FN88]

The Sales Convention applies to written and electronic communications, [FN89] although it was created in the late 1970s, before widespread electronic messages and long before the commercial use of the Internet. More recent international lawmaking has focused on electronic messages in particular, but they have tended to leave the basic law alone in order to deal with the particularities of transmission of the messages.

In 1996, the United Nations Commission on International Trade Law developed the *Model Law on Electronic Commerce*, formally adopted by the General Assembly. [FN90] Article 15 of the Model Law deals ***493** with the time and place of sending and receiving electronic messages. As an international document, the Model Law reflects the same policy choices as the Sales Convention: receipt means receipt, not sending. However, the Model Law is essentially a set of procedural rules aimed at making the law media neutral, equally

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applicable to electronic and to paper communications. It does not change the law of contract. [FN91] If the law of contract focuses on sending rather than receiving, then the Model Law also tells us when electronic messages have been sent (when they enter an information system outside the control of the sender [FN92]), and we can draw our own legal conclusions. [FN93] The Principles for International Commercial Contracts prepared by the International Institute for the Unification of Private Law take the same positions though they do not distinguish between electronic messages and others. [FN94]

The national and international trend is arguably towards a rule based on actual receipt. However, it is hard to speak of harmony without noting the law in our largest trading partner, the United States. The Restatement (Second) of the Law of Contract states the mailbox rule broadly: “an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror.” [FN95] However, “acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other.” [FN96] The question there, as here, is the extent to which new technologies will be held to fall into the exception. It is possible to make a dry technical analysis of the characteristics of technology and conclude that faxes or e-mail are not sufficiently instantaneous,***494** or not sufficiently two-way, to be treated like telephones. [FN97] It would make more sense in my view to re-examine the breadth of the initial statement of the mailbox rule, and consider both the reliability of the communications, and the real interplay between the parties using modern communications. Doing so would tend, I submit, to the result recommended here. American law is no more fixed than Canadian law on the subject. It therefore does not prevent us from following proper principles on our own. Law Reform in the United States is moving in this direction. See the proposed revisions to Article 2 of the Uniform Commercial Code on Sales [FN98] and Article 2A on leases, [FN99] and the Uniform Computer Information Transactions Act. [FN100]

Sound business practices in a global communications era, the intention of the parties, and a proper analysis of where the risk should lie in communicating with the new technologies - the *Brinkibon* factors - all suggest that the law should hold acceptances effective on receipt, not dispatch. But what does receipt really mean? How is the risk allocated in such a case?

**(a) The Meaning of Receipt**

Article 15 of the U.N. *Model Law on Electronic Commerce* provides a rule for the time of receipt of electronic messages (which it calls “data messages”):

> (2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows: (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
>
> (i) at the time when the data message enters the designated information system; or (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee; (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

***495** The key feature of this provision of the Model Law is the concept of the “designated information system.” If the addressee has designated a system, then the message is received only when it enters that system. However, if the addressee has not designated a system, then the message is received when it enters any system of the addressee. This seems to put the sender at an advantage if the addressee has not designated a system. In

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such a case, the sender can send the message to any e-mail address that it may be able to associate with the addressee.

The Model Law needs to be implemented by domestic legislation in order to have legal effect. The uniform law bodies in both the United States and Canada has prepared implementing legislation. In the United States, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") [FN101] adopted the *Uniform Electronic Transactions Act* ("UETA") in July 1999. [FN102] Here, the Uniform Law Conference of Canada adopted the *Uniform Electronic Commerce Act* ("UECA") in September 1999. [FN103]

Both the UETA and the UECA qualify the receipt rules of the Model Law. [FN104] They both provide that someone can designate an information system by using it for messages of the type at issue in any discussion. They add two elements: that the recipient is able to retrieve the message from that information system, and that the message is in a form capable of being processed by that system. [FN105] The UETA does not provide a rule for a message sent to a non-designated system. The UECA says that if an addressee has not designated or does not use an information system for the purpose of receiving documents of the type sent, then the ***496** electronic document is presumed received only when the addressee becomes aware of the electronic document and the electronic document is capable of being retrieved and processed by the addressee. [FN106]

The two implementing statutes reflect the contract principle that the offeror can name the method of communication to be used. They go beyond that simple statement to provide rules for a particular information system that has been designated, in order that receipt be made clear. The Canadian statute, however, is more cautious than the American statute in two respects. The first is the express provision about the non-designated system, noted above. The second is this: the section provides a presumption, not a rule, on when a message is received. Current practices of storing and checking messages and concerns about the reliability of delivery suggested that it was premature to create any rule about receipt. [FN107] The UN Model Law and the UETA deem a message to be received when it enters an information system within the control of the addressee, or where it is accessible to the addressee. However, people may not check their e-mail regularly, especially if they have several addresses. Both statutes mean, however, that if addressees designate an address, or use it for a purpose, then they will have a duty to check that address for appropriate messages. [FN108]

A late draft of the UETA contained a provision effectively abolishing the mailbox rule for electronic records. However, the provision was deleted in the final stages, for two reasons. First, it was a rule of substantive contract law in a statute that was meant principally as an interpretive guide to electronic procedures. Second, the states' attorneys general lobbied against the provision on the ground that they determined their right to assert their consumer protection authority based on the mailbox rule, and they wanted to leave the argument open that the rule applied to electronic communications. [FN109] The Canadian statute did not ***497** address the mailbox rule solely for the first of these reasons, though the working group was invited to address the issue one way or the other.

The UETA also contains this cryptic rule:

> If a person is aware that an electronic record purportedly sent under subsection (a), or purportedly received under subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. [FN110] As noted earlier, some opinion in the United States takes the view that even if the sender knows the message has not got through, it should still be deemed to be received. [FN111] This is contrary to the principle of the Model Law, [FN112] and seems likely to allocate risk in favour of the offeree inappropriately on occasion. Once the sender knows an electronic communication is not effective, it should have to try again.

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Besides elaborating on the need for a designated system, both the UETA and the UECA require that the incoming message must be accessible to the addressee. However, the statutes do not require actual retrieval and processing, in order to prevent people from avoiding receipt by refusing to open messages that they could open if they chose to. [FN113] This is consistent with existing law on the receipt of messages, as noted above. [FN114] There is no general duty to check any e-mail system one has, but once one designates the system, then the duty exists. Designating a system puts one under a duty similar to that with mail at any address: one cannot simply ignore it, and one may have to make arrangements to check what mail arrives in one's absence. Once one knows about a message, the same rule applies.

***498** However, that does not invoke the postal acceptance rule in such cases. Receipt is needed to make an electronic acceptance effective. Receipt means accessibility in a designated system or accessibility plus awareness (plus consent) in an undesignated system. This goes some way to resolving the question of timing where a person may have to download e-mail from an Internet Service Provider (ISP). It also reduces delay before the contract is made, and thus the risk of revocation. Once the message is at a designated ISP, or the addressee knows it is there, then it has been received. Of course, if people really need to know for sure that communications have arrived, they will follow the practice of EDI agreements and insist on acknowledgements. [FN115]

**7. CONCLUSION**

In conclusion, I submit that *Eastern Power* rightly decided that fax communications, like telexes, should not be governed by the postal acceptance rule. It is unfortunate that the Court of Appeal did not take the opportunity to examine the rule in more detail and discourage its application to newer technologies. On the other hand, that might be asking too much, since *Eastern Power* was not a contract law case at all. At best, one might have hoped that the Court would have declined to use the place of contracting as a factor in deciding *forum conveniens*. That would allow future discussion of the postal rule to turn on contract not conflict considerations.

The thesis of this comment is that parties have to bear their own risks while technology develops. It has been said that the attribution of risk has only two choices - offeror or offeree - and what the law arguably needs is a “tiebreaker,” [FN116] where certainty is more important than the content of the rule. Nevertheless, one should not tamper with the general rules of contract without good reason. Reliability is an essential***499** part of the calculation. Given the reliability of today's postal system, would one decide *Adams v. Lindsell* the same way today? Clearly the postal acceptance exception is too well established to reverse at this point. One hopes that Canadian courts will not extend that exception to our evolving electronic communications at any early date.

[FNa1]. General Counsel, Policy Branch, Ministry of the Attorney General (Ontario). The views expressed here are not necessarily those of the Ministry.

[FN1]. One may contrast the legal tasks as managing risk or creating trust. Jeffrey B. Ritter, “The New Frontiers: Electronic Commerce Law in 2000.” Advanced Institute on Electronic Commerce, Georgetown University Law Center, Washington D.C., December 10, 1999. For more on supporting legal effectiveness, see John D. Gregory, “Solving Legal Issues in Electronic Commerce” (1999) 32 C.B.L.J. 84.

[FN2]. (1999), 178 D.L.R. (4th) 409 (Ont. C.A.) [hereinafter *Eastern Power*]. Decision also available online at: <http:// www.ontariocourts.on.ca/decisions/1999/September/eastern.htm>.

[FN3]. G.H.L. Fridman, *The Law of Contract in Canada*, 3d ed. (Carswell: Toronto, 1994) at 74.

[FN4]. (1818), 1 Barn. & Ald. 681, 106 E.R. 250 (Eng. K.B.)

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[FN5]. *Ibid.*, at 251.

[FN6]. Professor Waddams has pointed out that the case really involved delay in receipt of the offer, rather than miscommunication of the acceptance. The delay was due to its being mis-addressed, so the offeror arguably was at fault in any event. S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999) at 74.

[FN7]. E.A. Farnsworth, *Farnsworth on Contract*, 2d ed., vol. 1 (New York: Aspen Law & Business, 1998) at 317. “In practice, this is probably the most important application of the rule,” *Chitty on Contracts*, 28th edition (London: Sweet and Maxwell, 1999) at 113. Some complex cases on a second message revoking what had been accepted, or accepting what had been refused, need not concern us here.

[FN8]. *In re Imperial Land Co. of Marseilles: Harris' Case* (1872), L.R.7 Ch. 587 at 594.

[FN9]. *Harris' case, ibid.*

[FN10]. *Fridman, supra*, n. 3 at 73.

[FN11]. “This rule is artificial and inconvenient ....” Waddams, *supra*, n. 6 at 75. It is described as the “oft-destroyed agency concept” in I.R. Macneil, “Time of Acceptance: Too Many Problems for a Single Rule” (1964), 112 U.Penn. L.R. 947 at 958.

[FN12]. R.S.C. 1970, c. P-14, s. 41. “... mailable matter becomes the property of the person to whom it is addressed when it is deposited in a post office.” “Post office” is defined to include “any ... receptacle ... authorized by the Postmaster General for the deposit, receipt ... or dispatch of mail” (s. 2).

[FN13]. The provision does not appear in the *Canada Post Corporation Act*, R.S.C. 1985, c. C-10. The new statute was enacted in 1981: *Canada Post Corporation Act*, S.C. 1980-81-82-831, c. 54.

[FN14]. See S. Gardner, “Trashing with Trollope: A Deconstruction of the Postal Rules in Contract” (1992), 12 Oxford J. of Legal Studies 170 at 175. The agency thesis was disapproved as early as *Henthorn v. Fraser*, [1892] 2 Ch. 27 (Eng. Ch. Div.).

[FN15]. Waddams, *supra*, n. 6 at 77.

[FN16]. *Imperial Life Assurance Co. v. Colmenares*, [1967] S.C.R. 443 [[[S.C.C.] at 447.

[FN17]. *Nova Scotia v. Weymouth Sea Products Ltd.* (1983), 149 D.L.R. (3d) 637 (N.S. T.D.), aff'd (1983), 4 D.L.R. (4th) 314 (N.S. C.A.)

[FN18]. See the discussion of the evolution of the *Uniform Electronic Transactions Act, infra*, n. 102, and text accompanying note 108.

[FN19]. See, *e.g., Island Properties Ltd. v. Entertainment Enterprises Ltd.* (1983), 146 D.L.R. (3d) 505 (Nfld. T.D.), *Bruner v. Moore*, [1903] 1 Ch. 305 (Eng. Ch. Div.).

[FN20]. “The analogy between the telegraph and mail is by no means perfect .... In the use of the telegraph the risks of error are also vastly greater than in the case of mail.” Williston, *Selections from Williston's Treatise on the Law of Contracts* (1938), cited in *Re Viscount Supply Co.* (1963), 40 D.L.R. (2d) 501 (Ont. S.C.) at 505.

[FN21]. *Carow Towing Co. v. The “Ed McWilliams”* (1919), 46 D.L.R. 506 (Ex. Ct.)

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[FN22]. *Entores Ltd. v. Miles Far East Corp.*, [1955] 2 Q.B. 327 (Eng. C.A.), *per* Denning L.J. at 332-333. The case is discussed in more detail with respect to telexes, *infra*.

[FN23]. *Supra*, n. 20.

[FN24]. *National Bank of Canada v. Clifford Chance* (1996), 30 O.R. (3d) 746 (Gen. Div.) at 761 [hereinafter *Clifford Chance*], citing *Viscount Supply*. See also *McDonald & Sons v. Export Packers Co.*, [1979] 2 W.W.R. 764 (B.C. S.C.) [[hereinafter *Export Packers*].

[FN25]. *Supra*, n. 22.

[FN26]. [1983] 2 A.C. 34 (U.K. H.L.) [hereinafter *Brinkibon*].

[FN27]. Affirming the court below.

[FN28]. *Entores, supra*, n. 22 at 333.

[FN29]. On the evolution of the technology, see Encyclopedia Britannica on "telegraph," available online: <http:// www.britannica.com/bcom/eb/article/0/0,5716,119000 2,00.html> , and links to "telex" and "teleprinter."

[FN30]. *Brinkibon, supra*, n. 26 at 43.

[FN31]. If there was delay at that point, said Lord Fraser, the recipient was responsible for it, unlike the delay caused by waiting for delivery by the telegraph company or post office. This is the right rule for electronic messages. See text below at n. 114.

[FN32]. *Brinkibon, supra*, n. 26 at 42.

[FN33]. Traditional faxes produce writing. Fax-to-computer presents different characteristics to be considered later.

[FN34]. The risk of fraudulent confirmations does not influence the discussion, though it is submitted, *infra*, that the reliability of the delivery system, and the availability of confirmation systems, should do so. The cases focus on the allocation of risk of accidental miscarriage. It is arguable, but not argued here, that the vulnerability of the system to fraud should also influence one's policy choices.

[FN35]. The sender will often know whether the message is being delivered during the addressee's business hours, if not the efficiency of the message retrieval during those hours.

[FN36]. (1988), 25 B.C.L.R. (2d) 377 (S.C.) [hereinafter *Beatty*]

[FN37]. *Ibid.*, at 383.

[FN38]. *Beatty* at 383 and 385. One wonders if the court would have been quite so sanguine if the issue had been who had signed the proxy, rather than whether the proxy was signed at all. The court might have considered whether a forgery was harder to detect on a fax than with an original ink signature. In his *Computer Law* (Toronto: Irwin Law, 1998) at 341, G. Takach says that cases dealing with faxes from a paper original should be used with caution for computer-generated faxes. In short, the general language may be a bit misleading.

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[FN39]. *Rolling v. Willann Investments Ltd.* (1989), 70 O.R. (2d) 578 (C.A.).

[FN40]. (1991), 106 N.S.R.(2d), 288 A.P.R. 377 (N.S. Co. Ct.) [[hereinafter *Joan Balcom Sales*].

[FN41]. (1996), 7 C.P.C. (4th) 294 (Ont. Gen. Div.) [hereinafter *Bickmore*].

[FN42]. The lawyer for the offeree also tried to call the offeror's lawyer at home and at the office to tell him of the acceptance fax.

[FN43]. The language is not always consistent in *Bickmore*. Sometimes the court seems to say that the fact of receipt is the key, but more often that the fact of sending, and the expectation of immediate receipt, is the central focus.

[FN44]. In "*The Pendrecht*," [1980] 2 Lloyd's L.R. 56 (Q.B.), it was held that a fax delivered on Friday night was effective then, not on the next business day the following Monday. In general, if the offeror specifies delivery at a particular place, the offeror may be held to the agreement if no one is there to receive the acceptance. *Carmichael v. Bank of Montreal* (1972), 25 D.L.R. (3d) 570 (Man. Q.B.)

[FN45]. *Supra*, n. 2.

[FN46]. The trial decision is unreported. This is the account by the Court of Appeal.

[FN47]. The Court of Appeal did not mention the *Bickmore* case, *supra*, n. 41, though it did quote with approval from *Joan Balcom Sales, supra*, n. 40.

[FN48]. *Eastern Power, supra*, n. 2 at para. 25.

[FN49]. *Ibid.*, at para. 50.

[FN50]. [1990] 3 S.C.R. 1077 (S.C.C.).

[FN51]. [1993] 1 S.C.R. 897 (S.C.C.).

[FN52]. *Brinkibon, supra*, n. 26 at 40.

[FN53]. J. Swan & B.J. Reiter, *Contracts: Cases, Notes and Materials*, 4th ed. (Toronto: Emond Montgomery, 1991) at 303.

[FN54]. Waddams, *supra*, n. 6 at 78-79. See also Macneil, *supra*, n. 11 at 951: "Fortunately, in the conflicts field itself the trend is very much away from such mechanistic rules [as the place where the contract was made]."

[FN55]. As noted, the law of conflicts in most provinces is found at least in part as a kind of subtext to the rules of civil procedure about when parties are allowed to serve other parties outside the forum. One hopes for rationalization through a conscious legislative effort that will address the issues of jurisdiction directly, in the light of the Supreme Court decisions of the 1990s, and clear out the anachronisms in the process.

[FN56]. Proceedings of the Uniform Law Conference of Canada, 1994, Appendix C, available online at: <http://www.law.ualberta.ca/alri/ulc/acts/ejurisd.htm>.

[FN57]. Proceedings of the Uniform Law Conference of Canada, 1993, Appendix B at 106.

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[FN58]. See for example the comments of the court in *Export Packers, supra*, n. 24 at 767-768.

[FN59]. To some extent most of these phenomena can occur with physical addresses, but they are not widespread. People reasonably expect stability of physical addresses; no such expectation can yet be justified for electronic addresses.

[FN60]. Articles 3148-3150.

[FN61]. Available online at: <http://www.hcch.net/e/workprog/jdgm.html>.

[FN62]. *Supra*, n. 24.

[FN63]. *Supra*, n. 20.

[FN64]. Similar arguments could be made about using the place of contracting to determine the application of consumer protection laws. The residence of the consumer, the degree of presence of the vendor in the consumer's home jurisdiction, and the demands of electronic commerce on the World Wide Web and otherwise have more relevance to such a decision than the place an offer or acceptance happens to become effective. While the jurisdiction to regulate may be grounded on different rules than jurisdiction over civil litigation (or jurisdiction to prosecute for criminal offences), the rights of the parties between themselves are not obviously the right source for any jurisdictional rules, and vice versa. For more on Internet jurisdiction, see O. Renault's "Jurisdiction and the Internet - Are Traditional Rules Enough?" available online at: <http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm>.

[FN65]. The parties also risk misunderstanding the communications that are received. The law provides rules for resolving mistakes, and these rules apply whether the mistakes are made in person or at a distance.

[FN66]. *Supra*, n. 8.

[FN67]. *Rules of Civil Procedure*, Rule 16.06 under the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[FN68]. See A.M. Gahtan, M.P.J. Kratz & J.F. Mann, *Internet Law: A Practical Guide for Legal and Business Professionals* (Toronto: Carswell, 1998) at 233-234.

[FN69]. This characteristic makes difficult the correction of mistakes, too. The uniform statutes on electronic commerce discussed, *infra*, at the text accompanying notes 93 to 105, make specific provision for mistakes made when dealing with an electronic agent.

[FN70]. *Infra* at text accompanying n. 111.

[FN71]. Fridman, *supra*, n. 3 at 68.

[FN72]. *Household Fire & Carriage Accident Insurance v. Grant*, [1879] 4 Ex. D. 216 (Eng. C.A.) *per* Thesiger L.J. at 223.

[FN73]. Gardner, *supra*, n. 14 at 180.

[FN74]. Macneil, *supra*, n. 11 at 966.

[FN75]. Gardner, *supra*, n. 14 at 191. "The empirical efficiency of the system still matters to some extent, in that

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the argument [for the postal rule] would not work unless the system were perceived as at least adequately efficient; but we have seen that in the 1840s this was the case." *Ibid.*, at 180-181. Gardner's article traces the development of different features and qualifications of the postal rule, according to the then current estimation of the usefulness of postal service.

[FN76]. It has been suggested, not entirely facetiously, that the postal rule is inappropriate in days when junk mail threatens to overwhelm regular mail, causing a risk of losing the legal notices among the dross [private correspondence].

[FN77]. *Brinkibon, supra*, n. 26 at 43.

[FN78]. One article on this subject, in supporting the application of the postal rule to e-mail, submits that even a sender who receives notice of non-delivery should be able to profit from the rule. P. Fasciano, "Internet Electronic Mail: A Last Bastion for the Mailbox Rule" (1997) 25 Hofstra L.R. 971 at 998. It may depend on when the sender finds out, for example, whether he or she had acted on the apparent existence of the contract first. Only a system with the delays of postal mail should tolerate such a result.

[FN79]. *Brinkibon, supra*, n. 26 at 42.

[FN80]. This argument is made by E. Jacobs, "Communication of Acceptance" (1983) Lloyd's Maritime and Commercial L.Q. 663.

[FN81]. See Electronic Data Interchange Council of Canada, *Model Form of Electronic Data Interchange Trading Partner Agreement and Commentary* (Toronto: EDI Council of Canada, 1990), and Electronic Messaging Task Force, "The Commercial Use of Electronic Data Interchange - A Report and Model Trading Partner Agreement" (1990) 45 Bus. Law. 1645.

[FN82]. For a particularly thorough review of the reliability of the receipt of e-mail, see the submission of Cem Kaner, a software specialist, and lawyer to the U.S. Federal Trade Commission inquiry into consumer issues in electronic commerce, online at: <http://www.ftc.gov/bcp/icpw/comments/kaner.htm>.

[FN83]. At least one early case suggested the contrary - *Magann v. Auger* (1901), 30 S.C.R. 186 (S.C.C.) - but now see the *Civil Code of Quebec*, art. 1387.

[FN84]. 11 April 1980, 1489 U.N.T.S. 3.

[FN85]. Most provinces and territories have adopted the Uniform International Sale of Goods Act adopted by the Uniform Law Conference of Canada in 1985. See for example the *International Sale of Goods Act*, R.S.O. 1990 c. 1.10, which publishes the *Convention* as a schedule. (Ontario statutes are online at: <http://www.attorneygeneral.jus.gov.on.ca/htm/Legis/legis.htm>.) The text of the *Convention* can also be found online at: <http:// www.uncitral.org/english/texts/index.htm>.

[FN86]. The current list of countries that have implemented the *Convention* is available online at: <http://www.uncitral.org/english/status/index.htm>.

[FN87]. See Cases on the Law of United Nations Treaties ("CLOUT"), online at: <http://www.uncitral.org/english/clout/index.htm>.

[FN88]. The *Convention* also follows the civil law, however, in requiring that offers to contract remain open for

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a reasonable time. Thus the offeree does not need protection against hasty revocation, as is argued in favour of the postal rule. The common law will not treat a unilateral offer as irrevocable, because that would be a kind of contract without consideration. Macneil, *supra*, n. 11 at 953. The reasons for being less concerned about undue revocation of electronic offers are set out, *supra*, in the text accompanying notes 64ff.

[FN89]. Art. 11 says there is no form requirement for agreements, and Art. 13 includes telegrams and telexes within the class of written documents. (Art. 12 allows member states to require that agreements be in writing only. Very few members have made such a declaration.)

[FN90]. *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17). See UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, online at: <http:// www.uncitral.org/english/texts/electcom/mlec.htm> for the text [hereinafter *Guide to Enactment*]. The first legal text of note is perhaps the *United Nations Model Law on International Credit Transfers*, adopted by the United Nations in 1992. The rule on receipt is limited to defining the "receiving bank," one of the parties to a credit transfer, as "the bank that receives the transfer." Since funds transfers are not subject to a postal acceptance rule in common law world, this is not helpful.

[FN91]. *Guide to Enactment, ibid.*, at para. 76.

[FN92]. Art. 15(1)

[FN93]. It is also worth noting as well that the *Guide to Enactment, supra*, n. 90, says at para. 100 that Art. 15 is not intended to establish a conflicts of laws rule.

[FN94]. See art. 2.3, 2.4 and 2.6. The Principles are available, online at: <http://www.unidroit.org/english/principles/pr-main.htms>.

[FN95]. *American Law Institute Restatement (Second) of Contract* (Washington, D.C.: American Law Institute, 1979) s. 63(a).

[FN96]. *Ibid.*, at s. 64.

[FN97]. See for example Fasciano, *supra*, n. 78.

[FN98]. S. 2.204(d)(3), March 2000 draft, online: <http:// www.law.upenn.edu/bll/ulc/ulcframe.htm>.

[FN99]. S. 2A-204(d)(3), March 2000 draft, *ibid.*

[FN100]. S. 203(4), February 2000 draft, *ibid.*

[FN101]. Available online at: <http://www.nccusl.org>.

[FN102]. See the text of the UETA, online at: <http:// www.law.upenn.edu/library/ulc/fnact99/1990s/ueta.htm>, and a history of its development, online at: <http://www.webcom.com/legaled/ETAForum>. At the end of January 2000 it had been passed in California, Idaho, Indiana, Kentucky, Minnesota, Nebraska, Pennsylvania, Sout Dakota, Utah and Virginia, and was pending in 15 other states. A current report of the adoption of the UETA among the states is available online at: <http:// www.bmck.com/ecommerce/uetacomp.htm>.

[FN103]. The annotated UECA is online at: <http:// www.law.ualberta.ca/alri/ulc/current/euecafa.htm>. It was introduced and given Second Reading by Saskatchewan in December 1999.

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[FN104]. See the UETA, *supra*, n. 102 at s. 15(b) and the UECA, *ibid.*, at s. 23(2).

[FN105]. The Model Law had deliberately stopped short of such provisions. See *Guide to Enactment, supra*, n. 90 at para. 103.

[FN106]. Para. 23(2)(b) of the UECA, *supra*, n. 103. This provision resembles subsection 14(4) of the Australian *Electronic Transactions Act*, passed in November 1999, which says that the electronic record is received in such cases when it comes to the attention of the addressee. See online at: <http://www.law.gon.au/ecommerce>.

[FN107]. See comments about the reliability of e-mail, *supra*, n. 82.

[FN108]. This paragraph is adapted from the Commentary to s. 23 of the UECA, *supra*, n. 103.

[FN109]. Private correspondence with Professor P.B. Fry, chair of the NCCUSL drafting committee for the UETA, December 1999, on file with the author.

[FN110]. UETA, *supra*, n. 102 at s. 15(g).

[FN111]. Fasciano, *supra*, n. 78, at 998.

[FN112]. "A data message should not be considered to be dispatched if it merely reached the information system of the addressee but failed to enter it." *Guide to Enactment, supra*, n. 90 at para. 104. This may however be hard to reconcile with the rule that a data message is sent when it leaves control of the sender (Art. 15(1)).

[FN113]. The consent principle of s. 6 of the UECA, *supra*, n. 103 (s. 5 of the UETA, *supra*, n. 102) continues to operate, so someone who is told that an electronic message is available on his or her system may still be able to decline to deal electronically at all and insist that a writing requirement be satisfied on paper. However, the usual rules in contract law about choosing a medium of communication should protect parties from unpleasant surprises on this ground.

[FN114]. See the cases cited, *supra*, n. 44, and Lord Fraser of Tullybelton in *Brinkibon, supra*, n. 26 at 43.

[FN115]. Art. 14 of the Model Law deals with the effect of acknowledgements, but the Uniform Law Conference considered that its rules went without saying. The commentary to s. 23 of the UECA, *supra*, n. 103, does deal with the desirability of acknowledgements. A.A. Macchione, "Overview of the Law of Commercial Transactions and Information Exchanges in Cyberspace - Canadian Common law and civil law perspectives" (1995) 13 CIPR 129 at 139, also suggests that contracting parties use confirmation messages. Similar advice is found in Takach, *supra*, n. 38 at 366. See also B. Harrison, "E-Contracts: The Where and When of Consensus ad Idem in Cyberspace" forthcoming, U.T. Fac. L.R. (Spring 2000).

[FN116]. Gardner, *supra*, n. 14 at 177.
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