

E-Commerce and ODR: Current Status and Prospects in the Region

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[[Global Outlook on the Electronic Communications Convention]]

Prospects for Canadian Implementation of the UNCITRAL Electronic Communications Convention

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Abstract

This article examines the policy questions facing Canada in deciding whether and how to implement the UNCITRAL Electronic Communications Convention. It explains the nature of treaty implementation in Canada's federal system. It reviews expert opinions on whether the Convention was compatible with Canada's civil law and common law systems. It then discusses the policy issues considered by the Uniform Law Conference of Canada in preparing model legislation to implement the Convention. These issues include the scope of the Convention, whether it should apply to other conventions to which Canada is a party, whether domestic law should be made to conform to the Convention, what exclusions or permissions should be applied compared to Canadian domestic law, and similar matters. The paper records the conclusions of the Conference on each question but also notes that there has been little legal, academic or political support for the Convention in recent years.

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Key Words

Electronic Communications Convention, UNCITRAL, Electronic Commerce, Canada, federal state clauses, Uniform Law Conference of Canada

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Introduction

Canada's interest in the UNCITRAL Convention on the use of Electronic Communications in International Contracts (the Convention, or the ECC) has been developing only slowly since the Convention was adopted by UNCITRAL in 2005. One may attribute this weak interest to the existence of an already satisfactory legal framework for electronic transactions on the domestic level, based on

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the UNCITRAL Model Law on Electronic Commerce.¹ However, some preparatory work has been done with a view to accession. This paper describes that work and the current state of readiness.

Making and Implementing Treaties in Canada

In Canada, the national government has the power to make treaties. Treaties have no legal effect within Canada, however, unless they are implemented by an act of Canadian law-making. This act is usually in the form of legislation, though sometimes Executive action is sufficient, and sometimes other methods are found to ensure that the Canadian legal system responds properly to the international obligations of particular treaties. For example, The Hague Convention on the Service of Documents Abroad has been put into effect in Canada through the Rules of Civil Procedure.²

Treaty implementation by Canada is further complicated by the country's federal system. While the national (or 'federal') government may enter into treaties, it may not implement them if the legislative authority over the subject matter of the treaty belongs to the provinces.³ Therefore the federal government discusses with the provinces before entering into such treaties and often – at least in private law matters – includes representatives of provinces on delegations at the negotiation stage.⁴

To minimize the inconvenience of fourteen law-making bodies,⁵ Canadian governments early last century formed the Uniform Law Conference of Canada.⁶ It has developed a number of uniform laws that are open for adoption by the provinces and sometimes also by the federal government. In matters of private international law, the Conference has been especially useful, in part because not all provinces have the capacity to analyse the benefits or the operation of conventions, so pooling the effort is efficient, and in part because conventions do not permit partial or differential implementation (unless they do so through declarations or reservations), so uniformity is required by the subject matter. Most private international conventions of interest to Canada over the past three decades have been the subject of uniform legislation.

In 2007, the federal Department of Justice asked the Uniform Law Conference to consider preparing implementing legislation for the E-Communications Convention. The Conference invited well known professors from a common law and civil law university to review the Convention and advise on its suitability for Canada.

1 The main method of implementing the Model Law has been by enactment of the Uniform Electronic Commerce Act, which was adopted in 1999 by the Uniform Law Conference of Canada. The Uniform Act is now in force in all the provinces and territories of Canada except Quebec, which has its own legislation still based on the Model Law. The Uniform Act can be found at <http://ww.ulcc.ca> Uniform Acts , Older Uniform Acts, Electronic Commerce: <http://goo.gl/Mtal5J>. A list of the statutes that implemented it is at <http://www.ulcc.ca/en/general-info-status/other-implementation-tables/2129-table-iii-pre-2000-uniform-acts-enacted-by-statute>.

2 See for example Ontario's Rules of Civil Procedure, Rule 17.03, online at http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm.

3 Canada has ten provinces and three territories. For economy of expression, this paper refers only to provinces, but the territories are largely in the same position.

4 Canada is a 'bijural' state. One of its provinces, Quebec, has a civil law system derived from the Code Napoléon, though the current Civil Code of Quebec dates from 1994. The others all have laws based on the common law of England, as developed over 200 years of colonial and post-colonial jurisprudence. Canadian delegations often have one provincial representative from each legal system.

5 The federal government and the government of ten provinces and three territories.

6 A description of the Uniform Law Conference's work is available at <http://www.ulcc.ca>.

Compatibility with existing Canadian law

The two papers on the compatibility of the Convention with Canadian law were by Professor Michael Deturbide of Dalhousie University on the common law provinces and territories⁷, and by Professor Vincent Gautrais of the Université de Montréal on the law of Quebec.⁸

Professor Deturbide found that the Convention was very compatible with the law of the common law jurisdictions. He recommended small amendments in order to harmonize the law for domestic and international transactions, but said that “the benefits gained from a uniform international scheme outweigh concerns over perfect harmonization with domestic legislation.” (para 60) He found that “no 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.” (para 64)

Professor Gautrais found that the law of Quebec on the use of electronic communications, mainly found in the *Act to establish a legal framework for information technology*⁹ and in the *Civil Code of Quebec* as recently amended¹⁰, was also largely compatible with the Convention. Differences in terminology or perspective did not concern him. Both bodies of law rested on the principles of technology neutrality and the determination of functional equivalents to the rules that traditionally required paper media for legal effect.

However, Professor Gautrais did find one major difference, one that he concluded was fatal to the adoption of the Convention in Quebec. That was in the treatment of writing requirements. Article 9 of the Convention says that an electronic communication satisfied a legal requirement that information be in writing, “if the information contained therein is accessible so as to be usable for subsequent reference.”

The Quebec rule is found in the Legal Framework statute, section 5, which says that “where the law requires the use of a document, the requirement may be met by a technology-based document whose integrity is ensured.” Professor Gautrais refers to the evidence part of the Civil Code of Quebec, which says that the integrity of various kinds of document must be assured for it to be used to adduce proof in the same way as a paper-based document of the same kinds (article 2838).

Professor Gautrais sets out (paras 56 – 62) several criticisms of the “subsequent reference” test and several advantages of the “integrity” test, find them incompatible and prefers the latter, both in principle and as better fitted in the context of Quebec law.

It is beyond the scope of this note to analyze that discussion in detail. However, I submit that the

⁷ Michael Deturbide, *Pre-Implementation Report on the Convention on the Use of Electronic Communications in International Contracts*, 2008 PROCEEDINGS OF THE UNIFORM LAW CONFERENCE OF CANADA, available at <http://www.ulcc.ca>, annual meetings, 2008, civil section documents: <http://goo.gl/62lQuZ>.

⁸ Vincent Gautrais, *Comparative Analysis of the United Nations Convention on the Use of Electronic Communications in International Contracts and the Civil Law of Quebec*, 2008 PROCEEDINGS OF THE UNIFORM LAW CONFERENCE OF CANADA, available at <http://www.ulcc.ca>, annual meetings, 2008, civil section documents: <http://goo.gl/Vv1wNu>.

⁹ Revised Statutes of Quebec, chapter C-1.1, online: <http://www.canlii.org/en/qc/laws/stat/rsq-c-c-1.1/latest/rsq-c-c-1.1.html>.

¹⁰ Revised Statutes of Quebec, chapter C-1991, online: <http://www.canlii.org/en/qc/laws/stat/lrq-c-c-1991/latest/lrq-c-c-1991.html>.

difference is much less than it is said to be. The Convention's test requires that “the information” be usable for subsequent reference. That does not mean part of the information, or amended information. It means the information that the law requires to be in writing. If what is usable for subsequent reference is something different, then it does not meet the Convention's test. As Professor Gautrais said about elements of article 14 of the Convention (para 51), “I am not certain they are lacking [in Quebec law], in that they are self-evident.” Likewise the integrity requirement in the Convention is self-evident. It goes without saying, or should be able to do so.

Professor Gautrais (paras 27 and 59) says that the subsequent reference test for an electronic equivalent of writing serves only to fulfill the evidence function but not the “formality ad validitatem”, making the party aware of the nature of the transaction with which the information is associated. While this may be true, the “integrity” test is no better for this purpose so does not provide a ground for preferring the Quebec formulation to the Convention's.

Finally, Professor Gautrais says (para 60) that the “subsequent reference” test was new at the time of the Model Law, and thus is not sufficiently tested. While that test was new, it was influenced by the American uniform formulation found in all revisions to the Uniform Commercial Code, and other uniform statutes, since the early 1990s. Those statutes define “record” as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”¹¹ These statutes have been in force in many states for several years and that definition has not caused difficulties.

The negative reaction from Professor Gautrais was shared by the Quebec delegation to the Conference, and no action was taken on the Convention after the reports were delivered. However, in the following year the Conference resolved to prepare uniform legislation in any event, and the policy content of the legislation was approved in principle in 2010 and a Uniform Act was adopted in 2011.

It may be of interest to review here the policy issues that faced the Conference in creating implementing legislation.¹² Any Canadian government considering enactment of the Uniform Act may reopen the debate on these issues, but normally they trust the Conference to have got most of it right, especially on matters of technical interpretation of private international law.

1. Should Canada accede to the Convention?

The main reason to accede to the Convention is to help build consistent rules around the world for using e-communications in international contracts. (Countries that signed the Convention while it was open for signature may ratify it; others may accede. The legal effect is the same.) For Canada's internal purposes, it does not need the Convention's rules; its own laws allow for e-communications in negotiating, making and performing contracts. Likewise the laws of many of its major trading partners, notably the United States, Europe and Korea, accommodate e-communications, though not always on identical terms.

However, many countries do not specify that e-communications can be used with legal effect in their

11 Patricia Brumfield Fry, *X Marks the Spot: New Technologies Compel New Concepts for Commercial Law*, 26 LOY. L.A. L. REV. 607 (1993), available at <http://digitalcommons.lmu.edu/llr/vol26/iss3/7>.

12 These policy questions were put before the 2010 meeting of the Civil Section of the Uniform Law Conference, online at <http://www.ulcc.ca> Annual Meetings 2010 Civil Section Documents: <http://goo.gl/ONgAww>.

systems, and those that do so specify may do so in different language or use different concepts. It is not always possible in negotiating a contract to agree that Canadian law, or the law of a particular Canadian province or territory, will apply. It would therefore be an advantage to have an accepted international standard on the point.

It makes sense for countries that are already familiar with e-commerce laws, and especially those whose e-commerce laws are inspired by the UNCITRAL Model Law on Electronic Commerce, a forerunner of the Convention, to become a party to the Convention. By doing so they declare to the international community that they consider the Convention's rules to be acceptable, based on their experience.

The Convention's rules apply to the medium for making international contracts. It is a separate question, discussed below, whether its rules should be adopted domestically at the same time. Someone who thinks that its rules are not ideal, or even undesirable, may wish to oppose their adoption at home. However, this view need not stand in the way of accession for international uses. As noted, there is no guarantee that the law applicable to an international contract will be Canadian domestic law, and the Convention may well be preferable either to uncertainty about the use of the electronic medium or to the application of even less desirable rules found in the domestic law of the other party.

The Conference concluded that Canada should accede to the Convention, at least for international contracts. Jurisdictions that disagree are not obliged to enact the Uniform Act to be developed from the current project. Article 18 of the Convention allows the Convention to be brought into force only in the jurisdictions that ask the federal government to be designated for that purpose.

2. Application of the Convention: how is it triggered?

On its face, the Convention applies to communications about contracts when the parties are in different countries. What makes the Convention apply to those circumstances? The law applicable to those communications may be the Convention because it is the law of both parties' countries, or because it is the law of one of the parties' countries and that law applies by choice or operation of law; or because the rules of private international law may apply the law of another Contracting State to them.

Article 19(1) allows any Contracting States to declare that it will apply the Convention only when the states of both parties are Contracting States, or when the parties have agreed that the Convention will apply.

Article 3 allows parties to opt out of the Convention, so if they do not want it to apply, they can avoid it. Similar rules apply to the application of the Convention on the International Sale of Goods (CISG), and Canada has experienced no problems with its application in the twenty years or so that it has been in force there.

The Conference concluded that Canada should not make a declaration under article 19(1). The general language of application is satisfactory, and leads to a broader application of the Convention.

3 Application of the Convention: what other conventions?

The Convention applies to communications about international contracts subject to the general law of

contracts of one of the parties' states. It also extends its rules to communications about international contracts governed by other conventions. Article 20 spells out six United Nations Convention that fall into that category: two to which Canada is a party – the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the CISG – and four to which it is not yet a party – conventions on limitations periods, the liability of operators of transport terminals, independent guarantees and stand-by letters of credit, and the assignment of receivables.

This does not amount to amending these conventions; amending them would be a cumbersome process. It merely says that the use of electronic communications in association with contracts that they govern will be understood as in the E-Communications Convention. This is a very useful means of encouraging the legally effective use of e-communications. UNCITRAL believed that there was little if any risk in allowing for e-communications under these conventions, for a country that was prepared to accept the Convention itself.

The Convention goes further to apply similarly to international contracts governed by any other international convention to which a Contracting State to the Convention is now or later becomes a party. (Article 20(2)).

However, Contracting States are allowed to tailor this application with respect of other conventions by a series of opting out and opting in. Without getting into the mechanics here, the result is that Contracting States may have a general rule accepting the Convention's rules for other conventions except as specified, or a general rule rejecting the Convention's rules for other conventions except as specified. The 'other specifications' can exclude any of the six listed conventions as well as others not named. So a Contracting State may apply the Convention to whatever other conventions it chooses.

What should Canada do? Does somebody need to review the terms of every convention to which Canada is a party, to see if any rules applicable to international contracts that might be affected by the convention are consistent with those of the Convention? Or should it take a chance on acceding without declaring any exclusions? The Convention allows a Contracting State to make a declaration or a revised declaration at any time, so if a problem is discovered in the future, Canada could exempt contracts governed by the problematic convention at that time.

The Singapore consultation paper from 2009 concluded on this point that there was no reason to prevent the Convention from applying to all conventions to which Singapore was a party, for three reasons.¹³

- (a) The domestic e-commerce statutes already applied to contracts under those additional conventions, to the extent that the contracts were governed by Singapore law.
- (b) Matters in which the use of electronic communications may be a cause for concern are excluded from the domestic law and can be excluded from the Convention through the use of article 19(2). See the discussion below.
- (c) The extension of the Convention to other conventions has a narrow effect. It merely achieves

¹³Singapore (Info-communications Development Authority and Attorney General's Chambers), *Joint IDA-AGC Review of Electronic Transactions Act Proposed Amendments 2009*, (Report), LRRD No.1/2009, para. 2.10.6, available at http://app.agc2.agc.gov.sg/DATA/0/Docs/PublicationFiles/ETARReport_LRRD1of2009.pdf.

functional equivalence for electronic communications in connection with the formation or performance of a contract to which the other conventions apply. It does not affect the substantive legal questions governed by those conventions.

The Conference concluded that Canada should accede to the Convention without any declarations of exclusion or special inclusion under Article 20.

4. Application of the Convention: international and domestic contracts?

UNCITRAL's mandate is international trade law, so the Convention is drafted to apply to international contracts. However, it is also drafted to work as a domestic law on contractual communications where the Contracting State has no existing law on that topic.

What should happen when, as in Canada, the Contracting State already has good law on that topic? Should it have a 'dual system', one law for communications about international contracts and one about communications for domestic contracts? Or should it bring its domestic law into conformity with the international rules so it can apply the same law to all?

It is important in this context to note that the Convention is almost the same as Canadian domestic law, and in particular with the Uniform Electronic Commerce Act (UECA). This similarity arises from the common ancestry of the Convention and the UECA, namely the UN Model Law on Electronic Commerce of 1996. In addition, the Convention has added a couple of provisions inspired by domestic legislation that the UECA already has, so the Convention in this respect is 'catching up' to the UECA.

That said, some of the terminology of the Convention is a bit different from that in the UECA. Acceding to a convention means applying its terms as written; a Contracting State may not change them. If Canada objects to any of the rules or wording of the Convention, then perhaps it should not try to implement them for its domestic law as well.

The main provision in the Convention that is not in Canadian domestic law is that a proposal to conclude a contract not addressed to specific parties, including those that can be engaged by interactive communications, is not an offer but an invitation to receive offers – what the common law would call an invitation to treat. This is probably current Canadian law, but it is not codified. (The CISG has the same rule.) It is safe to conclude that this Convention rule would be acceptable in Canadian law.

Studies in Singapore,¹⁴ a unitary state, and Australia,¹⁵ a federal state, recommended that domestic law be amended to conform with the Convention, in order to avoid a dual legal regime. Singapore has done so; see the *Electronic Transactions Act, 2010*:¹⁶

14 Ibid, and see also Chong Kah Wei & Joyce Chao Suling, *United Nations Convention on the Use of Electronic Communications in International Contracts – A New Global Standard*, [2006] 18 SINGAPORE ACADEMY OF LAW JOURNAL 116, available at <http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/390/2006-18-SAclJ-116-Chong.pdf>.

15 Australian Attorney General's Department, *Australian e-commerce review – UN Convention on Electronic Communications*, (a collection of consultation papers and public submissions), available at: <http://www.ag.gov.au/Copyright/Pages/AustralianecommercereviewUNConventiononElectronicCommunications.aspx>

16 STATUTES OF SINGAPORE 2010 ch. 88, available at <http://unpan1.un.org/intradoc/groups/public/documents/UN->

3. This Act shall be construed consistently with what is commercially reasonable under the circumstances and to give effect to the following purposes:
- (g) to implement the United Nations Convention on the Use of Electronic Communications in International Contracts adopted by the General Assembly of the United Nations on 23rd November 2005 and to make the law of Singapore on electronic transactions, whether or not involving parties whose places of business are in different States, consistent with the provisions of that Convention. (emphasis added)

Australia is in the process of doing so. In Australia, that means amending legislation in all states and the Capital Territory. (Both the original Singaporean and Australian e-commerce statutes varied more from the Convention than does the UECA, because they were enacted earlier, and the Convention adopted a couple of provisions that the United States and Canada added to the Model Law.)

The Drafting Committee of the American Uniform Law Commission (ULC) has recommended, on the other hand, that the Convention be implemented to apply only to international contracts.¹⁷ The concern about proceeding the other way was the risk of non-uniform state implementing laws, and amendment of state laws at different times, leading to a patchwork that could be very confusing for foreign parties trying to understand the law applicable to a contract to be negotiated. The Executive Committee of the ULC has on the other hand prefers to proceed by a federal implementing statute that would be preempted by the appropriate uniform state law. In doing this, it would be necessary to ensure that the broad party autonomy of the Convention was not reduced by the limits on party autonomy in the current version of the Uniform Electronic Transactions Act.¹⁸

The Canadian situation can be summarized in this way:

In favour of having a single law (i.e. amending the domestic law to conform with the Convention)

- The Convention is almost the same as the UECA, so its provisions are largely acceptable and tested in practice here.
- To the extent that the Convention's rules are new, they are better than those in the UECA and the jurisdictions that have implemented it.
- Parties should not be caught by surprise by having different rules depending on where the other party is. This is particularly important for electronic transactions, which may attract foreign parties (though the Convention applies only if the parties know or ought to know that they are in different countries – Article 1(2)).
- Professor Deturbide's recommendations to the ULCC in 2008 were that “harmonization between the Convention and domestic legislation is desirable to avoid the possibility of two different sets of rules.... The impact of these differences will not likely be significant ... However, the possibility that judicial examination of these differences could result in unanticipated interpretations cannot be entirely discounted.”

[DPADM/UNPAN040992.pdf](#) .

17 Henry D. Gabriel & D. Benjamin Beard, *Report and Recommendations of the Committee to implement the UN E-Commerce Convention*, UNIFORM LAW CONFERENCE, October 28, 2009, available at https://www.law.upenn.edu/library/archives/ulc/ecom/2009oct23_report.pdf.

18 For a discussion of the US situation, see J. Gregory, *Implementing the Electronic Communications Convention: Ratification Isn't What It Used To Be*, 18 BUSINESS LAW TODAY, Jan.-Feb. 2009, available at <http://apps.americanbar.org/buslaw/blt/2009-01-02/gregory.shtml>.

In favour of having a dual regime (i.e. the Convention for international contracts and the UECA for domestic ones)

- Harmonizing provincial legislation will be too difficult. The UECA already has a non-uniform enactment, and getting uniform amendments will meet the same challenges, though for international purposes all the legislation must be consistent with the Convention. If one wants to touch the domestic law, there may be more political resistance and lobbying either to keep what is there or to improve it in non-uniform ways.
- Harmonizing provincial legislation may take too long. Although Canada can accede to the Convention in stages (through the 'territorial unit' clause of Article 18), a substantial number of provinces would have to have done implementing laws before the federal government would accede. It would probably be faster to get agreement on and enactment of uniform legislation that applied only to communication about international contracts.
- Since the legal effect of the Convention is almost the same as that of the UECA, parties will not be prejudiced if they find themselves in the international regime of the Convention.
- Parties may opt out of all or any part of the Convention, including by conduct (such as a draft of a contract) that is inconsistent with it. They are not trapped in any event, so long as they can agree on an alternative. It should be noted in this connection that the Convention itself is rarely mandatory: it says how e-communications are to be treated if the parties choose to use them. Canada's domestic law is similar. It does not require anyone to use or accept information in electronic form, though some of its rules are mandatory once e-communications are chosen.
- Quebec has a separate legal regime for e-contracts and may not wish to harmonize domestically with the Convention rules. It might be willing to implement the Convention rules for international contracts affecting parties in the province.

There may be a third option: revise the UECA to make it more consistent with the Convention, but insert an “international application” part that would accommodate those few differences where Canada or its enacting jurisdictions want to maintain the domestic rules as they are.

The Conference concluded that Canada should adopt the Convention only for international contracts.

5. Attach the Convention or rewrite the UECA?

The Uniform Law Conference commonly prepares statutes to implement conventions with a short active part, saying 'the Convention is in force in the enacting jurisdiction' and giving local meaning to terms in the convention, like naming the appropriate courts, then annexing the convention to the Act.

If the answer to Question 4 were to restrict the Convention to international contracts, then that would probably be the best process: it would be quick and easy to understand and it would ensure that the language of Canadian law is exactly that of the Convention – which, as noted earlier, no Contracting State has the right to change.

If the answer to Question 4 were to apply the Convention's rules to domestic law as well, then it would probably be preferable to rewrite the domestic law statute, i.e. the UECA, to conform with the Convention. The UECA covers a number of topics not in the Convention and the integration of the

Convention might need more direction than a simple annex could achieve. Experts in Australia and Singapore recommended doing that in those countries. (The only issue becomes the exclusions, and they can be harmonized through article 19. See more detailed discussion of Canadian exceptions below.)

The Conference concluded that the Convention should be annexed to a short introductory statute.

6. Application of the Convention: exclusions and permissions

A. Harmonizing exclusions from the Convention and from domestic law

The Convention excludes from its scope consumer contracts (contracts for personal, family or household purposes), transactions “on a regulated exchange” (essentially sophisticated financial transactions among institutions that already have their legal rights in electronic communications spelled out satisfactorily among themselves), and bills of exchange, promissory notes, and other transferable documents of title.

The UECA excludes a somewhat different, though overlapping, group of documents or transactions: documents of title, wills and trusts created by wills, and powers of attorney respecting individuals. Until 2011 it also excluded most transfers of land. A few provincial implementing statutes have slightly different exclusions.

Through the use of article 19(2) of the Convention, a member state can exclude from its application any of its domestic exceptions, either because it believes that the exceptions are right in principle for international as well as for domestic transactions, or just to keep the domestic and international laws consistent. Singapore's consultation paper on the Convention recommended the use of article 19 for this purpose.

Note that wills, trusts created by wills, and powers of attorney are not contracts so would not be covered by the Convention, without need for an express exclusion. Thus the UECA's exclusions are fairly accurately covered by the Convention's exclusions. (It was suggested that Canada would want to use article 19(2) to exclude transactions in land that require registration to be effective against third parties, the formula in the UECA. However, the Conference repealed that exclusion in 2011, so article 19 would not need to be invoked for that purpose, except in provinces that retain the exclusion.)

The question remains what to do domestically with the Convention's exclusions of named kinds of financial transaction. If the UECA and its implementing statutes are to be amended to accommodate the Convention, probably their exemption clauses can be rewritten to exclude only the international aspects of those transactions – if any such transactions rely on the UECA statutes for the domestic validity of their electronic communications in any event.

Some provisions of the UECA apply differently – with more restrictions – to electronic communications to which “government” is a party. The Convention applies to contracts without regard to the “civil or commercial character of the parties”, which suggests that it does not allow a distinction based on whether a party is a government entity. It may be that the special governmental rules in the UECA can be revisited, more than a decade after its adoption. Governments may be more comfortable with the general rules than they were in 1999, at least for the contract-related communications to which

the Convention applies. Otherwise some adaptation to international transactions will be needed, or an exception stated under article 19(2).

The Convention does not say expressly that each territorial unit (in Canada's case province or territory) that comes into the Convention by a declaration of Canada under article 18 can make its own declarations under article 19. However, there is a precedent for such a jurisdiction-specific declaration. When the CISG was extended to British Columbia by declaration, Canada declared that the provision on applicable law would operate differently in BC than elsewhere, in a manner contemplated by the CISG. In other words, the declaration of extension to BC also made for BC one of the other declarations under that Convention. There is no reason to believe that the Convention works any differently. (BC later removed its additional declaration and the CISG now works the same way across Canada.)¹⁹

Thus a province that wants to maintain its own exclusion list for international contracts can do so. Whether that is a good idea is a different question. Each province or territory with non-uniform exclusions will have to consider this question. Of course now that the Conference has concluded that Canada should implement the Convention only for international contracts, the decision may be easier. Canada might not wish to export our domestic exclusions to international contracts.

B. Harmonizing permissions in domestic law and the Convention

It may be harder to decide what to do when the domestic law is more open to e-communications than the Convention. There are several examples:

- The UECA's rule apply to consumer contracts, while the Convention excludes such contracts.
- The rule on the validity of electronic signatures is broader in the UECA than in the Convention, though the new provision in the Convention (new compared to the Model Law on Electronic Commerce) allowing for a signature to be proved reliable in fact, goes some way to bridging the gap.
- The rule on correcting a unilateral mistake in the UECA is not on its face restricted to “input errors”, and the remedy in the UECA is non-enforceability of the contract, not, as in the Convention, only the right to “withdraw” the portion of the communication that was mistaken input. Additional conditions are listed in the UECA beyond what are provided for in the Convention.
- The time of sending an electronic message is measured in the UECA from the time the message arrives in a system outside the control of the sender (a rule taken from the Model Law), while the Convention now measures it from the time the message leaves a system within the control of the sender. This may be a distinction without a difference. The reason that the Model Law and the UECA chose the time of entry into another system is that system logs were thought to record the time of entry of messages but not the time of departure. The difference is a question of evidentiary focus and not of actual time.²⁰

¹⁹ A discussion of the territorial unit clause is found at John D. Gregory & Joan Remsu, *Article 18: Effect in Domestic Territorial Units*, in *THE UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS: AN IN-DEPTH GUIDE AND ANALYSIS* (Amelia H. Boss and Wolfgang Kilian eds., Kluwer 2009).

²⁰The Australian Information Industry Association wondered how one would apply a test depending on the sender's control Presented in Seoul, Korea, September 20 2012

- The time of receiving an electronic message is measured in the UECA from the time the message has entered an information system designated or used by the addressee and is capable of being retrieved. The Convention speaks of the message being capable of being retrieved at the electronic address designated by the addressee. It is unlikely that the different wording will produce different results on this point.

Is a Contracting State allowed to permit the use of e-communications more broadly in international contracts than the Convention requires? The parties to such contracts can expand on the Convention, though not so as to undermine protections for integrity of the communications (so parties could not rely on the Convention – as implemented in the state whose law made it applicable – to validate an e-signature but by agreement purport to extend the validation to an e-signature that did not meet the tests of article 9 of the Convention. However, the Convention takes such agreements into consideration in applying its tests of reliability of the signing method.)²¹

It is arguable that parties to international contracts would want to rely on the limits to the Convention, and not just to its permissions, so finding themselves subject to e-signatures that do not meet the Convention's standards, or finding their contracts voidable for unilateral error more broadly than the Convention requires, may be unwelcome to them.

Although Contracting States may not change the provisions or the scope of the Convention, to what extent must the Convention displace the otherwise applicable domestic law? Where the Convention sets out rules, those rules prevail, as in the e-signature example above. But where the Convention does not apply at all, then the applicable domestic law can supplement it. This is routine analysis for matters such as civil liability or the substantial validity of contracts; the Convention leaves such issues to the domestic law.

The Convention does not apply to consumer transactions. Will the applicable domestic law on such transactions apply to international contracts? The parties to those contracts should not be surprised to find international consumer contracts covered by somebody's domestic law. The Convention's exclusion of consumer transactions should be treated only as a limit inherent in UNCITRAL's mandate, not affecting the desirability of some rules to be applied to the transactions. If the general Canadian law (provincial or territorial law) on electronic communications applies to those communications, then the parties will be able to rely on that law – including the consumer protection measures that are also part of the applicable law.

However, it should not be forgotten in this discussion that the Convention applies only to communications related to contracts, while the UECA applies to all uses of electronic communications not expressly excluded. So long as Canadian law reflects the Convention with respect to the contracts that it covers, nothing in the Convention requires that Canadian law should not apply to non-contractual communications or communications about other contracts, domestic or international.

of the system, when the sender may be using 'software as a service' or cloud computing, and not technically ever have control of the system it uses – since it is by definition someone else's system. Letter from the Association to Helen Daniels (January 28, 2009) available at: <http://www.ag.gov.au/Documents/Submission%20from%20the%20Australian%20Information%20Industry%20Association.PDF>. One suspects that systems subject to 'control' would be read to include systems that are obliged by contract to follow the sender's instructions.

²¹ See paragraphs 14, 85, 86 and 137 of UNCITRAL's EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT on the Convention, available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.

Conclusion

Canada appears to be able to benefit from more certainty in the use of electronic communications in its international trade by acceding to the Electronic Communications Convention. The Convention is very largely compatible with existing Canadian law. However, existing Canadian law does not support the Convention without some amendments. Choosing the approach to take to those amendments raises several questions discussed in this paper.

Likewise, the Convention itself provides options for some matters of application, and a country that accedes to it must choose among them. The basic choices have been set out here, with conclusions that are reflected in the Uniform Act.

After drawing these conclusions in principle in 2010, the Conference in 2011 adopted a uniform statute to implement the Convention.²² As agreed, the uniform act contains a brief enactment part, authorizing the Minister to request that the Convention be extended to the enacting jurisdiction (in the first instance when Canada accedes to it; after accession, with the usual waiting period provided in the Convention) and giving the terms of the annexed Convention force of law in that jurisdiction.

One may note section 4 of the Uniform Act, which gives precedence to provisions of the Convention over inconsistent domestic statutes. While this helps to ensure that the Convention operates as intended on its face, it does not appear to tell us whether domestic law can supplement the Convention on matters to which the Convention does not apply. A similar provision appears in several Canadian statutes that implement international treaties, but no case law deals with that particular question.

As noted, the Convention provides in article 18 an option by which Canada could accede to the Convention and bring it into force in the provinces and territories that implement it. If Quebec maintains the scepticism it showed in 2008, it may decide not to implement it, in order to protect its concepts or principled framework. This need not prevent the common law jurisdictions from benefiting from the Convention if they agree with Professor Deturbide that it will be a benefit.

It must be noted, however, that since the adoption of the Uniform Act in 2011, no Canadian province or territory, or the federal government, has brought forward implementing legislation or even expressed interest publicly in doing so. The Convention came into force internationally internationally, in March 2013. It remains to be seen whether Canada may feel a further impetus to take up implementation as a result.

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²² Uniform Electronic Communications Convention Act, 2011 PROCEEDINGS OF THE UNIFORM LAW CONFERENCE OF CANADA, available at <http://www.ulcc.ca>, Uniform Acts, Current Uniform Acts: <http://goo.gl/6nuP3V>.

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