

EXHIBIT CD

THE CONVENTION WITH AMERICAN COMMENTARY

Below is the complete text of the Convention. Each article of the Convention is followed by United States commentary prepared by the ULC Committee.

CHAPTER I. SPHERE OF APPLICATION

Article 1. Scope of application

1. This Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States.
2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract.
3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2. Exclusions

1. This Convention does not apply to electronic communications relating to any of the following:
 - (a) Contracts concluded for personal, family or household purposes;
 - (b) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in sale,

EXHIBIT CD

loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary.

2. This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.

COMMENT

Article 1 and Article 2 set out the scope of coverage for the Convention. First, Article 1 makes the Convention apply to the narrow set of contracts entered into in international commerce. There must be parties located in different states, and only those electronic communications related to the formation or performance of a contract are covered. Domestic Legislation (E-Sign and the UETA) covers transactions, which includes any action relating to the conduct of business, including matters other than those related to the formation or performance of a contract (E-Sign §7006(13) and UETA §2(16) e.g., the giving of a statutorily required written notice). Further, the exclusions in Article 2 further narrow the Convention's Scope to contracts in business, that is between commercial parties, by excluding contracts for personal, family, or household purposes. Domestic Legislation is not so limited. Further, the Convention specifically excludes sophisticated commercial and financial transactions beyond those evidenced by negotiable instruments. Consequently, the Convention has a significantly narrower scope than does Domestic Legislation.

The proposed declaration under Article 19(2) will further narrow the scope of the Convention, as ratified by the United States, to better comport with the exclusions under current ~~conform the scope of the Convention with the exclusions currently noted in~~ Domestic Legislation.

Article 3. Party autonomy

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

COMMENT

The concept of party autonomy is applicable under Domestic Legislation, with a few exceptions, notably Sections 8 and 10 of UETA. The provisions that cannot be waived by the

EXHIBIT CD

parties under Domestic Legislation derive largely from concerns related to consumer transactions. Indeed, the principal section of E-Sign that is non-waivable relates only to consumer transactions (E-Sign §7001(c)). ~~Since the Convention does not apply to consumer transactions, it is not necessary to address §7001(c) in the E-Sign Amendment. However, the exception to preemption provision in the E-Sign amendment in Alternative 2 does prevent restraints on party autonomy under the UETA (i.e., non-waivable provisions) from applying to non-consumer, international transactions, thus preserving the intended protections under UETA for consumer transactions. This comment is unnecessary in light of the treatment of E-Sign in the recommendations for implementation.~~

CHAPTER II. GENERAL PROVISIONS

Article 4. Definitions

For the purposes of this Convention:

- (a) “Communication” means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;
- (b) “Electronic communication” means any communication that the parties make by means of data messages;
- (c) “Data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy;
- (d) “Originator” of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;
- (e) “Addressee” of an electronic communication means a party who is

EXHIBIT CD

intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

(f) “Information system” means a system for generating, sending, receiving, storing or otherwise processing data messages;

(g) “Automated message system” means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;

(h) “Place of business” means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.

COMMENT

The definitions of “Communication,” “Electronic Communication,” and “Data Message” are consistent with the definitions of “Electronic,” “Electronic Record,” “Information,” “Record,” and “Transaction” as defined under E-Sign and UETA. “Communication” means statements, declarations, demands, notices and requests, all of which qualify as a subset of “information” defined in Domestic Legislation as including, data, text, images, data bases, and the like. The items noted in the definition of “Communication” will be presented through Information as defined in Domestic Legislation. The Convention covers items set forth as “communications” only when employed as part of the formation or performance of a contract. A contract is a subset of the term “transaction” as defined in Domestic Legislation. Accordingly, the definition of “communication” is consistent with the broader defined terms, information and transaction.

The term “Electronic Communication” is a combination of the Convention terms Communication and Data Message. The definition of Data Message sets forth the concepts of information, and electronic, and is the equivalent of an Electronic Record under Domestic Legislation. This is hardly surprising since both the Convention and Domestic Legislation have as their source the Model Law. In Article 9(2) a legal requirement for a writing can be satisfied by an electronic communication that is “accessible so as to be usable for subsequent

EXHIBIT CD

reference...” This concept of subsequent availability is paralleled in the definition of record which requires that information be “retrievable in perceivable form.”

The terms “Originator” and “Addressee” are not specifically defined in Domestic Legislation, Indeed, E-Sign does not set forth a provision such as Article 10 that addresses when electronic communications are sent or received. However, Section 15 of the UETA does provide default rules for when electronic records are sent and received and the terms recipient and sender as used in Article 15 have the same meaning as the terms Addressee and Originator, respectively, as used in the Convention.

Finally, the terms “Information System” and “Automated Message System” are substantively the same as the terms “Information Processing System” found in the UETA (no similar defined term appears in E-Sign), and “Electronic Agent” as used in Domestic Legislation.

Article 5. Interpretation

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

COMMENT

The requirement that the Convention be interpreted to further uniform rules regarding electronic transactions is wholly consistent with UETA §6 and E-Sign §7031. If UETA amendments are determined to be appropriate, a proposed amendment to the commentary to UETA §6 will explicitly require that UETA be construed consistently with international developments under the Convention. The requirement to account for the international character of the Convention is already consistent with the interpretive requirements under E-Sign §7031.

Article 6. Location of the parties

1. For the purposes of this Convention, a party’s place of business is presumed to be the location indicated by that party, unless another party

EXHIBIT CD

- demonstrates that the party making the indication does not have a place of business at that location.
2. If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.
 3. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.
 4. A location is not a place of business merely because that is:
 - (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or
 - (b) where the information system may be accessed by other parties.
 5. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

COMMENT

E-Sign has no similar provision setting forth default rules for party location. The Convention allows parties to designate a place of business so long as the party actually has a place of business in that location and the other party does not object. The UETA ~~only~~ addresses the location of the parties in the context of sending and receipt of Electronic Records in §15(d). ~~Although the Convention in Article 6(1) provides a presumption of a party's location, that presumption can be altered by agreement consistent with party autonomy. Similarly,~~ §15(d) allows the parties to establish the place of sending and receipt and only provides default rules in the absence of such agreement See §15, Comment 4. The rules for determining a party's location under the UETA in the absence of agreement are ~~the same as~~ consistent with the default rules for party location found in Article 6 of the Convention.

Article 7. Information requirements

EXHIBIT CD

Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate, incomplete or false statements in that regard.

COMMENT

This provision preserves domestic law requirements for information disclosure. It is consistent with UETA Section 5(e) which similarly refers to law outside the UETA as supplementing the provisions of UETA in determining the legal effect of electronic records and signatures.

CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS
IN INTERNATIONAL CONTRACTS

Article 8. Legal recognition of electronic communications

1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.
2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.

COMMENT

Article 8(1) is the statement of the principle of functional equivalence between paper and electronic media that goes to the heart of the Convention. It is entirely consistent with the same provision found in Domestic Legislation (UETA §7 and E-Sign §7001(a)). Article 8(2) is consistent with the requirements of UETA §5(a and b) and requires a party's agreement to conduct transactions electronically (see Convention Explanatory Notes Paragraphs 131 and 132).

Article 9. Form requirements

1. Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.
2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that

EXHIBIT CD

requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:
 - (a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and
 - (b) The method used is either:
 - (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
 - (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.
4. Where the law requires that a communication or a contract should be made available or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:
 - (a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and
 - (b) Where it is required that the information it contains be made available,

EXHIBIT CD

that information is capable of being displayed to the person to whom it is to be made available.

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

(*a*) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display; and

(*b*) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

COMMENT

Article 9(1) is consistent with Domestic Legislation (UETA §5(a) and E-Sign §7001(b))

Article 9(2) is consistent with UETA §7(c) and the definition of Record and Electronic Record. The key to Article 9(2) functional equivalency is that the electronic communication be accessible and available for later use. The concepts of Record and Electronic Record require that information be retrievable (i.e., accessible) in perceivable form, and that the information be inscribed on a tangible medium or stored electronically (i.e., available) for later use. In neither the Convention nor Domestic Legislation is a party required to keep the information – the question is whether the information is capable of retention.

Article 9(3) sets forth the requirements to establish a signature equivalent in the electronic medium. Article 9(3) requires that a method be used that will identify the person and indicate the party's intention with regard to the communication. Both of these requirements must be present under the definition of electronic signature in Domestic Legislation, as well as the rules for attribution of an electronic record or signature to a party under UETA §9. As the explanatory note in paragraph 156 states, "The provisions of Article 9, paragraph 3, are only intended to remove obstacles to the use of electronic signatures, and do not affect other requirements for the validity of the electronic communication to which the electronic signature relates."

EXHIBIT CD

Article 9(4 and 5) with regard to the use of electronic communications as originals is consistent with E-Sign §§7001(d)(1 and 3) and UETA §12. In all cases the electronic communication/record must be available to the party and the integrity of the information in the communication must be assured.

Article 10. Time and place of dispatch and receipt of electronic communications

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

EXHIBIT CD

where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.

COMMENT

~~Under Implementation Alternative 1 or 2 the provisions of Article 10 will apply to contracts governed by the Convention. If UETA amendments are determined to be appropriate, UETA Amendment No. 3 clarifies the timing of receipt of an electronic communication sent to an email address other than one designated by the party. Otherwise the~~ This Article is not inconsistent with the UETA §15(d). It is likely that the United States will include an Understanding that Article 10(2) creates a presumption of receipt.

Article 11. Invitations to make offers

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

COMMENT

The substance of this Article does not appear in Domestic Legislation. It is consistent with the law of contract offer in the United States. See, Restatement §26, Comment b

Article 12. Use of automated message systems for contract formation

A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

EXHIBIT CD

COMMENT

This Article is consistent with the provisions of UETA §14 and E-Sign §7001(h).

Article 13. Availability of contract terms

Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other party those electronic communications which contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.

COMMENT

This is a saving provision to assure the continued application of domestic law imposing requirements for the provision of contract terms. See also UETA §8

Article 14. Error in electronic communications

1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:
 - (a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and
 - (b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or

EXHIBIT CD

services, if any, received from the other party.

2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.

COMMENT

This Article is consistent with UETA §10, except to the extent that its provisions may be altered as a matter of party autonomy. Accordingly, Implementation Alternative 2 provides that any limitation on party autonomy under the UETA and similar state law applies only in transactions to which the Convention would not apply.

THE FINAL PROVISIONS IN CHAPTER IV. ARE PROVIDED FOR INFORMATION.

~~THESE PROVISIONS ARE NOT IMPLICATED IN DOMESTIC LEGISLATION~~ THERE IS NO ULC COMMENTARY RELATIVE TO THESE PROVISIONS.

CHAPTER IV. FINAL PROVISIONS

Article 15. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 16. Signature, ratification, acceptance or approval

1. This Convention is open for signature by all States at United Nations Headquarters in New York from 16 January 2006 to 16 January 2008.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

EXHIBIT CD

Article 17. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the regional economic integration organization shall not count as a Contracting State in addition to its member States that are Contracting States.
2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.
3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization where the context so requires.
4. This Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in States members of any such organization, as set out by declaration made in accordance with article 21.

EXHIBIT CD

Article 18. Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.
4. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 19. Declarations on the scope of application

1. Any Contracting State may declare, in accordance with article 21, that it will apply this Convention only:
 - (a) When the States referred to in article 1, paragraph 1, are Contracting States to this Convention; or
 - (b) When the parties have agreed that it applies.
2. Any Contracting State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in

EXHIBIT CD

accordance with article 21.

Article 20. Communications exchanged under other international conventions

1. The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:
 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);
 - Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980);
 - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980);
 - United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991);
 - United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995);
 - United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).
2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies,

EXHIBIT CD

unless the State has declared, in accordance with article 21, that it will not be bound by this paragraph.

3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of any contract to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.
4. Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 21.

Article 21. Procedure and effects of declarations

1. Declarations under article 17, paragraph 4, article 19, paragraphs 1 and 2, and article 20, paragraphs 2, 3 and 4, may be made at any time. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.
2. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.
3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration

EXHIBIT CD

of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. Any State that makes a declaration under this Convention may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 22. Reservations

No reservations may be made under this Convention.

Article 23. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.
2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 24. Time of application

This Convention and any declaration apply only to electronic communications that are made after the date when the Convention or the declaration enters into force or takes effect in respect of each Contracting State.

Article 25. Denunciations

EXHIBIT CD

1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary.
2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York this twenty-third day of November two thousand and five, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.