

The Uniform Electronic Commerce Act

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1. The Uniform Law Conference of Canada has adopted the *Uniform Electronic Commerce Act* as of September 30, 1999, and has recommended it for adoption by the member jurisdictions of the Conference - all the provinces and territories of Canada and the federal government[1]. Since the federal government has legislated in the field through Part 2 of the *Personal Information Protection and Electronic Documents Act*, it is unlikely to pick up the Uniform Act in its present form[2].
2. The *Uniform Electronic Commerce Act* was developed by a working group assembled on the Internet, representing private and public sectors in Canada and a handful of foreign contributors, which reached over 150 participants by the middle of 1999. The group also met in person about four times a year for three years, with up to 20 people present at those meetings. In addition the Act was debated at the annual meetings of the Uniform Law Conference in 1998 and again in 1999.
3. The Uniform Act can be considered a minimalist response to the quest for certainty about the legal status of electronic communications and electronic records. It is minimalist for several reasons. First, the current law - statutes and common law and private law based on contracts - is capable of resolving a good number of questions on its own. Electronic messages, even on the Internet, do not present radically new questions in every field. Second, the technology underlying electronic records is changing rapidly, so attempts to prescribe specifically how to conduct legally effective communications risk obsolescence even before they come into force. Third, e-commerce is global in scope, and we do not want to take a seriously different approach from our major partners. The international consensus today is to minimalism[3].
4. The minimalist consensus is expressed most clearly in the United Nations Model Law on Electronic Commerce, adopted in 1996 by the United Nations Commission on International Trade Law (*UNCITRAL*) [4]. The Model Law aims to remove the most flagrant legal barriers to electronic commerce and to lay out some basic rules for contracts and other electronic communications. It has been adopted in several countries [5] and several more are being influenced by it [6]. In particular it has influenced the American uniform statute, the *Uniform Electronic Transactions Act*,

adopted by the National Conference of Commissioners on Uniform State Laws in July, 1999 [7].

Scope

5. The Canadian Uniform Act applies not only to commercial transactions, but to all rules of law that are not excluded from it. That makes the list of exclusions important. Most of the list is itself a matter of international consensus, in that several of the laws that purport to enact the UN Model Law have similar exclusions. Wills and testamentary trusts and dealings in land are common exclusions, as are negotiable instruments. In Canada we have also excluded powers of attorney for personal care (sometimes known as advance health care directives) and for the financial affairs of an individual. The concern with these kinds of documents was that they are often created by unsophisticated people, often without legal or technical advice. It was thought that there was too much risk of undetectable fraud or loss of integrity of data unless more specific security measures were provided, more than a uniform and fairly generic statute could give. There is no implication that any document excluded from the Uniform Act should never be created electronically. In Ontario we have a detailed scheme for electronic land transfers and registration, for example, but it rests on a particular set of statutory and regulatory rules to ensure that it works properly[8].

6. The scope section also provides that the Uniform Act yields to any other statute that expressly regulates, permits or prohibits the use of electronic communication. The Conference thought it inappropriate to override legislated standards, even if the standards are out of date or inadequate. The point of the Model Law is to remove barriers, not to reform the law where the barriers have already been addressed. However, the Act provides that using words like “in writing” or “signed” does not constitute a prohibition against using electronic communications, since otherwise this exclusion would undermine the operation of the Act itself.

7. One purpose of the Uniform Act is to permit the use of electronic documents without individually amending all the statutes that could bar their use in some way. In case a government learns after enacting the Act that some unnoticed statutory provision should not be subject to the general permission, the Act allows the addition of exclusions by regulation.

Consent

8. The Uniform Act does not require anyone to use or accept electronic documents. Section 6 makes that clear. It is intended to remove barriers where people

want to use this technology. Since most electronic communications, and certainly most commercial transactions, will be on consent, this section does not undermine the Act, it simply confines it to where it should be. Consent to use electronic documents may be inferred from conduct, however; an express agreement is not needed. Otherwise there is too much risk of bad faith refusal.

Functional Equivalents

9. Many rules of law use language that requires, or appears to require, the use of documents on paper[9]. The UN Model Law and the Uniform Act expand these rules to cover documents in electronic form. They do so by creating “functional equivalents” to the paper documents. In other words, they do not simply define writing as including an electronic record, or define signature as including an electronic signature. This was thought too rigid an approach that risked including too many electronic records or allowing electronics in too many situations.

10. Rather, the law seeks to isolate the essential policy functions of the requirement and state how those functions can be achieved electronically. The basic form of the rule in the Act is therefore “*where the law requires [paper], that requirement may be satisfied by an electronic record if [certain standards are met]*”. The standards themselves vary but of course are stated in general terms[10].

11. The principal effect of this approach is to turn questions of capacity (“Can I do this electronically?”) into questions of proof (“Have I met the standard?”). Since meeting the standards is often a matter of agreement, this seems a useful contribution.

Writing

12. The basic function of writing is memory. The Uniform Act therefore says that a writing requirement can be satisfied by information in electronic form if the information is accessible so as to be usable for subsequent reference. This formulation rests on a fundamental principle of the Uniform Act: the electronic system does not have to be better than the paper system it replaces. Just as a paper document may last a long time or be destroyed quickly, so too the Uniform Act does not say how long the information has to be usable. If however there are other rules about the length of storage, for example in a record retention rule, then the electronic information would have to satisfy that rule too. That is dealt with expressly in section 13.

13. The Act deals with two other aspects of writing. If information has to be delivered, and not just be in writing, then section 8 requires that the information must be capable

of being retained by the addressee. Just as I cannot deliver a paper document to you by simply showing it to you, I cannot deliver an electronic document by putting it on a web site. It may be possible to have the main part of the information on a web site if I give direct notice, say by e-mail, that the information is there, if the person can download or print the information. The addressee must be able to decide how long to keep the information, without risk that the person providing it will alter or delete it.

14. Sometimes the law requires information to be provided in a particular form. An electronic document can satisfy this requirement if the information is laid out in substantially the same form. It is not the intention here to prevent the use of formatting codes, such as are common in electronic data interchange systems. Information can be transmitted as economically as possible by electronic means. However, the practical display of the information should be recognizable as being the form required by law.

15. If the law requires a form of display or communication, then the electronic document has to satisfy that. For example, the capacity of a public place may have to be posted conspicuously in that place. The landlord's address may have to be displayed in the entry to a rental building. Information may have to be delivered by registered mail. While information in electronic form can meet these requirements - for example one could deliver a diskette by registered mail - the Act does not allow people to avoid them by using electronic documents.

Signature

16. In all its functional equivalence rules, the Uniform Act does not intend to change the substance of the existing law. It intends only to make the law media neutral, equally applicable to paper and to electronic documents. The definition of "electronic signature" therefore does not create a new legal "thing" with this name. Rather it says what the essential functions of any signature are. The essence of a signature is the intention with which it was made. The definition says that the electronic information must be made or adopted "in order to sign a document". The existing law about the appropriate intention, and how one proves it, continues in effect.

17. The purpose of defining electronic signature is to make clear that the electronic version does not have to "look like" a signature when it is displayed. It may be code or sound or symbol of any kind, if the intention is present. Likewise, a signature may travel apart from the document it signs, if the association with the document is clear. The signature may be in the document but also may not be. Also, the wording of the definition would allow one to contemplate an electronic signature applied to a document on paper, if the connection between them were clear.

18. Section 10 provides that a signature requirement can be met by an electronic signature. Unlike the Model Law, it does not go on to require that the electronic signature must be as reliable as is appropriate in the circumstances. At common law, and arguably in the Civil Law of Quebec as well, a method of signature on paper does not have to meet any test of reliability. If the association with a person is demonstrated and the intent to sign is demonstrated, the signature will be valid. Those elements will have to be shown in order to meet the definition of electronic signature. As noted earlier, the Uniform Act is not trying to make the law better, just neutral.

19. However, it is possible that the authority that imposed the signature requirement in the first place did have some degree of reliability in mind. In that case, subsection 10(2) allows that authority to make a regulation imposing the reliability standards of the Model Law.

20. This discussion hints at another key principle of the Uniform Act: there is a distinction between basic legal requirements and prudent business practices. A pencilled X on paper may be a valid signature, but few people would accept it on a cheque. Likewise, a name typed on the bottom of an e-mail may be a valid signature, but it may not be trustworthy enough for many people to want to rely on it in practice. What people want in practice will depend on many factors, including the context, the course of dealings of the parties, the use to which the signed document is to be put, and so on.

Originals

21. When the law requires a document in original form, it is seeking assurance of the integrity of the document, that it has not been altered. The Uniform Act reproduces this function in section 11. The notion of “original” is hard to apply to electronic documents, because of the way they are generated. The rule in section 11 would apply whether the document was first created on paper and later became electronic, say by scanning or faxing to an e-mail system, or whether it was in electronic form at all times^[11].

Copies

22. Copying electronic documents can be very easy. However, it is harder to understand how to comply electronically with a requirement to furnish a number of copies of a document. First, it is very difficult, as noted above, to distinguish between an original and a copy. Next, there are a number of ways in which one could provide, say, three copies: send the same e-mail three times, attach the same text three times to one e-mail,

put three versions of the document onto a single diskette, remit three diskettes with one version of the document on each, and so on. To avoid this rather sterile discussion, section 14 of the Uniform Act provides that only a single version of the electronic document needs to be furnished to a single address, where the law requires copies. The recipient can decide how best to make the additional documents.

Government documents

23. The Uniform Act contains a number of special provisions about documents sent to government. The concern is that governments receive a lot of information from a lot of people, many of whom are communicating involuntarily and with many of whom the government has no contract by which the methods of communication could be agreed. To protect the government from an overwhelming variety of formats and hardware, therefore, the provisions on consent require express consent by government, rather than implied consent. Moreover, the rules on providing information, on forms, on signatures, and on originals say that governments may impose their own technical requirements in order to satisfy these sections. Documents originating with government, however, would have to meet the general standards of the Act^[12].

24. Government is defined to include core government departments and agencies, but not Crown corporations, thought to be more like commercial operations. Each enacting jurisdiction will have to decide on the appropriate scope for this definition. Likewise, municipal governments may need the same kind of protection against multiple formats, but it may be thought that the risk of hundreds of inconsistent technical standards from hundreds of municipalities may require a more centralized solution.

25. Section 17 allows governments to use electronic communications for all their purposes. Section 16 provides for electronic forms, whether or not forms on paper are already prescribed (and whether or not the forms are used to submit information to government or between private parties). Section 18 authorizes incoming and outgoing payments to be electronic, if the Receiver General consents.

Contracts

26. The Uniform Act follows the Model Law in providing some basic rules about electronic contracts. The volume of electronic commerce conducted under the present law may suggest that businesses are not much impeded by doubt about validity of such contracts. Nevertheless a few points are covered in the interests of greater certainty.

27. The main question about such contracts appears to be whether sending some kinds of electronic signals can show sufficient intent to be bound by contract. Section 20 says that an action in electronic form, including touching or clicking on an appropriately designed icon or place on a computer screen is sufficient to express any matter that is material to the formation or operation of a contract. A voice-activated response would also be effective.

28. Section 21 and 22 provide for the use of electronic agents. Electronic agents are defined as computer programs used to initiate an action or to respond to electronic documents without human intervention at the time of response or action. They have nothing to do with the law of agency, since they are machines that have no legal personality. The term is however widely accepted and not easily displaced by something clearer in law, such as “electronic device”. Section 21 makes it certain that contracts may be formed using electronic agents, on one side or on both sides.

29. Section 22 provides a solution for the “single keystroke error”, where a human being makes a mistake in communicating with an electronic agent. Often such agents are not programmed to recognize messages intended to correct an error, e.g. “I didn’t mean 100 widgets, I meant 10”. The section makes these mistakes unenforceable if the procedures set out there are followed, unless the owner of the agent provides a method of preventing or correcting errors. It is not the role of legislation to say exactly what method must be used, as there may be many acceptable ways. Restating an order before processing it, with a note like “This is what you are ordering. Are you sure?” would probably be enough.

Sending and receiving electronic documents

30. The Model Law has influenced the Uniform Act in determining where and when messages are sent and received. The location question is easier. The basic rule, subject to agreement of the parties, is that messages are sent from and received at the place of business of the sender or recipient. Subsidiary rules deal with multiple places of business or no place of business.

31. The rule helps separate the essence of the communication from the incidental aspects, such as the location of the server, or the location of the sender or recipient when he or she actually deals with the message. Thus someone with a business in Toronto who has an e-mail account or a web site with sympatico.ca does not have to worry about where sympatico’s server is, and does not change the law relating to a transaction by sending or picking up messages while travelling out of the province.

32. There may be cases where the location of the server or other indicia of location remain important, of course, such as in deciding if one has a permanent establishment for tax purposes. Jurisdictional questions in electronic commerce are tricky. The rules in the Uniform Act will resolve a few but far from all. One may have different considerations in civil disputes, regulatory actions and criminal prosecutions [13].

33. The rule on the time of sending is relatively simple: the message is deemed sent when it leaves the control of the sender. If the sender and the addressee are on the same system, then the message is sent when it becomes accessible to the addressee.

34. The somewhat more difficult issue is time of receipt. The Model Law deems a message received when it reaches an information system in the control of the addressee. The American uniform statute requires that the addressee have designated or used the system for the purpose of the kind of message in question, before that rule applies. The *UECA* picks up the designation or use point, but makes receipt a presumption not a rule. It was widely thought among the working group that the receipt of electronic messages is not reliable enough to support a rule that cannot be rebutted.

35. In the absence of a rule or presumption, the sender will have to demonstrate actual receipt [14]. If senders need to be sure of receipt before taking further steps, they may have to ask for acknowledgements.

Carriage of goods

36. One of the last things that *UNCITRAL* added to the Model Law was a section on special transactions, namely those dealing with the carriage of goods. It was thought that these are very often international transactions, and they are subject to a number of special legal regimes and conventions. In particular they often rest on negotiable documents of title such as bills of lading. The general principles of the Model Law on non-discrimination based on medium apply here too, but it was thought that particular rules were needed for negotiability and for the possibility that documents would be transferred from one medium to another when the document itself carried legal effect.

37. The Uniform Act has picked up these provisions. It has not spoken of “unique” documents, however, as it is not clear how to create a unique electronic document (though one can immobilize and time-stamp an electronic document). Instead, the Uniform Act speaks of a document intended for one person and no other. Representatives of transport organizations have favoured enacting these

provisions, even though it is not clear yet what technology may be able to satisfy the requirements.

Next steps

38. Adoption by the Uniform Law Conference does not of course make the Uniform Act law anywhere. It is up to the provincial and territorial legislatures to pass it into legislation, if they think those likely to benefit from the Act want it. A lobbying campaign may be needed, though the Conference by its nature is not suited to lead one. To date only Saskatchewan has introduced the Uniform Act into its legislature, in December 1999. In the US, enactment of their uniform act has begun[15]. The momentum there may also influence Canadians who seek a legal regime that gives the same kind of certainty as our neighbours enjoy.

39. Meanwhile *UNCITRAL* is working on more specific rules on electronic signatures, to support the reliability test in the Model Law and to set out the duties of the parties to such signatures, including those of intermediaries like suppliers of certification services[16]. Other jurisdictions as well are considering detailed legislation to support the use of digital signatures that depend on public key cryptography, or to govern electronic commerce generally. In Canada, it is arguable that we should first clear the barriers to electronic communications in our existing law, and let the market and technical developments help establish our priorities for future work.

Notes

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[1] The Uniform Act is at <<http://www.law.ualberta.ca/alri/ulc/>> under Electronic Commerce.

[2] Statutes of Canada 2000 c.5., <http://www.parl.gc.ca/36/2/parlbus/chambus/house/bills/government/C-6/C-6_4/C-6_cover-E.html>. This note updates my report on both the Uniform and the federal statutes in (1998), 2 I&T Law No. 4, December 1998.

[3] See <<http://www.pkilaw.com>> for a list of minimalist statutes from around the world, along with those classified as more interventionist.

[4] The Model Law is at <<http://www.uncitral.org/english/texts/electcom/ml-ec.htm>>.

[5] Notably Singapore, Australia, Argentina, Bermuda, Columbia.

[6] Notably France, Ireland, India, Hong Kong, several states in the United States, and Canada. Legislation and proposed legislation around the world can be tracked at several web sites, notably <<http://www.mbc.com/ecommerce.html>>, <<http://www.ilpf.org>>, and <<http://www.bmck.com/ecommerce>>.

[7] See <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm> for the drafts and the final version, and <<http://www.webcom.com/legaled/ETAForum>> for a record of the discussions leading up to its adoption.

[8] *Land Registration Reform Act* RSO 1990 c. L.4, as amended by S.O.1994 c.27 s. 85, and associated regulations. Operational details are at <<http://www.teranet.on.ca/>>.

[9] When the Act says “a requirement under [Ontario] law”, it covers not just statutes and regulations but any other source of law. It also covers permissions to use electronic documents. See section 4.

[10] For more discussion of this approach and its application to particular kinds of requirement, see the Guide to Enactment of the UN Model Law, which follows the Model Law itself at the site mentioned in footnote 4 above.

[11] The requirement for original documents under the “best evidence” rule is covered in the Uniform Electronic Evidence Act, a separate statute adopted in 1998. See <<http://www.law.ualberta.ca/alri/ulc/acts/eeeact.htm>>.

[12] A very similar structure is found in the Australian *Electronic Transactions Act*, <<http://www.law.gov.au/ecommerce/>>. The US uniform statute referred to in footnote 7 above also has special provisions on government documents. The Canadian federal statute, cited above in footnote 2, requires a central register of designations and regulations for the use of electronic documents under federal law. The Uniform Act has no set requirement for communicating government choices, except that consent must be notified to people likely to be affected by it. See section 6.

[13] See a discussion paper on jurisdiction on the Internet at the Uniform Law Conference website, the URL of which is given in footnote 1, above.

[14] The Ontario Court of Appeal has recently held that a fax is received only on actual receipt, in other words the mailbox rule that applies to postal mail and telegrams does not apply. It followed the House of Lords in *Brinkibon v. Stahag Stahl*, [1983] 2 A.C. 34, in saying that there is no general receipt rule for electronic communications. *Eastern Power v. Azienda Comunale Energia* (1999), 178 D.L.R. (4th) 409 (Ont.C.A.). The Uniform Act applies to all communications, not only to the acceptance of offers of contract.

[15] The text of the California statute can be traced most easily through the ETA Forum site mentioned in footnote 7, above. It was signed on September 16, 1999.

[16] See <http://www.uncitral.org/english/sessions/wg_ec/index.htm>.