

Comparative Analysis of the *United Nations Convention on the Use of Electronic Communications in International Contracts* and the Civil Law of Quebec

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Table of Contents

I. Introduction	1
II. Preliminary Comparison of the Instruments	2
1 – Brief Introduction to the Instruments in Issue	2
<i>1.1 – Introduction to the Quebec Law relating to Electronic Documents</i>	<i>2</i>
<i>1.2 – Introduction to the Convention</i>	<i>3</i>
2 – Brief Introduction to the Comparison	4
<i>2.1 – Common Principles.....</i>	<i>4</i>
<i>2.2 – Differences in Application</i>	<i>5</i>
III. Methods of Forming Electronic Contracts.....	7
1 – Rules Governing Form.....	7
<i>1.1 – Writing</i>	<i>7</i>
<i>1.2– Signature</i>	<i>10</i>
<i>1.3 – Original.....</i>	<i>11</i>
2 – Other Methods of Forming Electronic Contracts.....	13
<i>2.1 – Place and time of dispatch and receipt of electronic documents.....</i>	<i>14</i>
<i>2.2 – Automated contract.....</i>	<i>15</i>
IV. How the Convention is Applied	17
1 – Irreconcilability of Quebec Law and the Convention.....	17
<i>1.2 – Inflexibility of the Convention.....</i>	<i>21</i>
2 – Recommendation not Accede to the Convention.....	22

Comparative Analysis of the *United Nations Convention on the Use of Electronic Communications in International Contracts* and the Civil Law of Quebec

I. Introduction

[1] The main purpose of this document is to present a comparison between the *United Nations Convention on the Use of Electronic Communications in International Contracts* (the Convention) and Quebec's *Act to establish a legal framework for information technology* (the LFIT Act) which effected far-reaching changes in the legal management of documents using information technology, and in particular the *Civil Code of Québec* (the C.C.Q.).

A – Terms of Reference for this Document

[2] The Department of Justice Canada instructed us to investigate whether it would be appropriate for Canada to accede to the Convention, having regard to Quebec law. This question is particularly sensitive from the standpoint of Quebec in that the LFIT Act contains a number of elements that distinguish it from equivalent legislation in the other provinces,¹ this difference being particularly sensitive in that the other Canadian provinces have opted for a relatively uniform approach.

[3] We would also note that these instructions were clear in stressing that the opinion to be stated in this document, in particular with respect to whether it would be appropriate to proceed toward accession to the Convention by Canada, is solely the opinion of the author, who is currently a professor in the Faculty of Law of the Université de Montréal and has studied the legal aspects of electronic documents, and specifically electronic contracts, for the last 15 years.²

[4] We would also point out that the comments in this document reflect a much more practical than theoretical viewpoint, the purpose of this study being to provide a clear, concrete response regarding the recommended approach of whether to accede to the Convention. Based on these instructions, a document of about 25 double-spaced pages was requested; the document is instead 36 pages long, with in addition an appendix containing a table comparing the Convention and the Quebec law.

B – Outline of the Document

[5] In order to carry out the instructions in the best manner possible, we thought it wise to provide a general discussion, in the **Preliminary Comments**, of the instruments in question, the Quebec legislation (LFIT Act and C.C.Q.) and, of course, the

Convention, and also to provide an outline of the comparison, including both the similarities and differences between the two that are immediately apparent. Then, in **Part One**, we set out the substance of the comparison, as instructed, examining the Convention from the perspective of Quebec law relating to the formation of international electronic contracts. These issues in relation to the formation of contracts must be considered from the standpoint both of the formal rules provided in both cases and of more specific concerns (such as the place and time of receipt and dispatch of the documents required for contracts, electronic agents, errors in long-distance contracts, etc.), since each instrument contains specific provisions in that regard. Lastly, and most importantly, **Part Two** contains more personal opinion, with the results of our analysis and recommendations, as requested.

II. Preliminary Comparison of the Instruments

[6] As noted earlier in describing the outline, this Part will discuss the instruments in issue (Section 1) and sketch the broad outlines of the comparison (Section 2).

1 – Brief Introduction to the Instruments in Issue

1.1 – Introduction to the Quebec Law relating to Electronic Documents

[7] The most important enactments to refer to in Quebec law relating to electronic documents are the LFIT Act and the C.C.Q. These two enactments are in fact closely related, in that, **first**, the LFIT Act influenced the C.C.Q. when it led to the complete and thorough amendment of Divisions VI and VII of Book 7, Title Two, Chapter 1 of the C.C.Q., entitled, respectively, “Media for writings and technological neutrality”³ and “Copies and documents resulting from a transfer”.⁴ **Second**, these two divisions of the C.C.Q. also refer expressly to the LFIT Act on several occasions, that Act being regarded as the interpretive framework for these articles of the C.C.Q. **Third**, there were other articles of the C.C.Q. that were also amended by the LFIT Act: articles 2827, 2855, 2860 and 2874, which address certain specific aspects of the law of evidence.

A – LFIT Act

[8] The LFIT Act was adopted in June 2001 and came into force on November 1 of that year. Although it was adopted after most of the laws of the other Canadian provinces, it is generally acknowledged that its treatment contrasts with that of the latter. In our view, and as we shall see in Section 2, while the **form** of the law is in fact different, and indeed not always very accessible, its **substance** is not inconsistent, subject

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

to one exception. Again of the issue of substance, the reach of this legislation is very broad; for example, it deals with matters that fall outside the Convention and other Canadian legislation. The matters addressed in the LFIT Act include:

- rules relating to the liability of electronic actors;
- provisions relating to the security of documents;
- provisions relating to the management of electronic documents;
- measures relating to digital certification;
- rules governing the use of biometrics;
- the development of technical standards;
- etc.

These are all matters addressed in the LFIT Act that are not found in the legislation of other Canadian provinces or in the Convention.

[9] While the form of the LFIT Act is sometimes criticized, it performs three fundamental functions. **First**, it attempts to eliminate the legal barriers to the use of information technology.⁵ **Second**, it provides actors with a guide in respect of the security of electronic documents.⁶ And **third**, it resolves a number of issues relating to fundamental freedoms.⁷ These are three very ambitious functions, rather more ambitious, in fact, than the functions performed by the Convention, which, as we shall see, is primarily limited to the first function.

B – C.C.Q.

[10] In the area of electronic documents, the C.C.Q. was overturned by the LFIT Act, which did away with the former provisions entitled “Computerized records” and replaced them with new provisions referring to “technology-based documents”. Given the direct influence the LFIT Act has had on the C.C.Q., there is no need to say more about it.

1.2 – Introduction to the Convention

[11] In order to establish parallels for comparison, we will first say a few brief words about the Convention, even though it is a familiar document that has been analyzed in the past. The Convention is the product of lengthy discussion going back to the 1980s⁸

that included the decisive step taken when the *Model Law on Electronic Commerce* (the 1996 Model Law) was adopted in 1996. More often than not, the clauses of the Convention amount to the “lowest common denominator” on the subject matter, the Convention being the product of intense negotiations among the States involved. This helps to explain some of the differences from the Quebec law. As well, although the Convention sometimes diverges from the UNCITRAL *Model Law on Electronic Signatures* (2001), it was inspired by that document.⁹

2 – Brief Introduction to the Comparison

[12] As will be seen later, it seems to us that apart from what is commonly said to be the case, while there are differences in terms of application (2), the Convention and Quebec law are governed by identical principles (1).

2.1 – Common Principles

[13] At first blush, as we said, a hurried commentator will tend to say that the two bodies of rules, the Convention and the Quebec law, are fundamentally different. This is **untrue**. Notwithstanding comments in the literature criticising the isolated view taken in the Quebec law,¹⁰ it seems to us that while there are dissimilarities, they relate only (1) to the formal aspects, that is, the appearance of the two instruments, which are indeed not at all similar in their construction. As well, where the difference is in substance, it exists only (2) in respect of relatively narrow points and not the basic principles, as we shall see in the next paragraph dealing with their application. As we have noted, (3) the LFIT Act is much more ambitious than the Convention, and it therefore contains more provisions which, while they are not inconsistent with the Convention (except on the issue of the writing, to which we will return), go beyond the scope of the Convention. In fact, as may be seen in the appendix to this document, the provisions of the two documents can be compared in a single table, and it can be seen that both the substance and the matters addressed are very similar. Over and above the differences, obvious similarities can be identified.

[14] **First**, the two sets of legal rules are intended, first and foremost, to serve a fundamental function: **to eliminate the legal barriers** to the use of electronic documents;¹¹ this purpose is expressed in the two instruments, for example, in the expressions “legal certainty” (in the Convention) and “legal security” (in the LFTI). This is expressly stated as a principle in the annex to the Convention¹² and in section 1.1 of the LFIT Act;¹³ it is also expressed in comparable manner when the Convention states, in article 8, entitled “Legal recognition of electronic communications”:

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

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.

That article is in fact very like section 5, para. 1, of the LFIT Act.¹⁴

[15] **Second**, the **freedom of the parties**, which is a guiding factor in several UNCITRAL conventions and various other international conventions, such as the *Vienna Convention on Contracts for the International Sale of Goods*¹⁵ (the Vienna Convention), is also a pervasive theme in the two sets of legal rules. The Convention recognizes it both in the annex¹⁶ with respect to the general principles and more specifically in respect of the parties' choice regarding one of the available technologies;¹⁷ the LFIT Act also affirms this principle in sections 2¹⁸ and 29,¹⁹ the latter section dealing specifically with the transmission technology.

[16] **Third** and most importantly, the Convention and the LFIT Act, and the C.C.Q. as a result of the LFIT Act, incorporate the twin principles of “**technological neutrality**” and “**functional equivalence**”, two fundamental principles that have very often been regarded as the tools that provide for a legal rule not to become rapidly obsolete as change proceeds apace in information technology. While the purpose of the first is to ensure that a law does not favour one technology over another, the second ensures that it is possible to identify the essential functions of a legal concept such as a writing, a signature, the original, and so on, without reference to a particular medium (paper or electronic). These principles are recognized either expressly or by implication in both the Convention²⁰ and Quebec law.²¹

2.2 – Differences in Application

[17] That being said, and as noted earlier, there are a number of dissimilarities in comparing the Convention and Quebec law, in terms of application; some of these have no effect, while others are more problematic. The dissimilarities that do not create problems include, **first**, the **vocabulary** and **definitions** used in the two sets of rules. The LFIT Act uses, in several places, terms that are unique to that Act and that are not necessarily found in other legislation. In fact, that Act seems to be designed to be very much “in sync” with the vocabulary used in either library science or computer science. For example, the expression “technology-based document” used in the LFIT Act refers to

“information technology”, while the Convention instead uses the term “electronic document”. The LFIT Act takes the approach that “electronic document” refers too narrowly to one particular technology and excludes others; on the other hand, the term “electronic” is widely understood and generally has a generic meaning that does not generally create problems. In any event, we believe that there are no notable differences between article 4(b)²² and (c)²³ of the Convention, which define “electronic communication” and “data message”, respectively, and section 1, paragraphs 2²⁴ and 4,²⁵ of the LFIT Act, which use the term “technology-based document”. In both cases, **both instruments attempt to be as inclusive as possible** and a distinction is generally made between the document and its medium.²⁶ In addition to the term “automated message system”, defined in article 4(g) of the Convention, which we will consider later,²⁷ the other definitions are not likely to present any problems in terms of incompatibility with the Quebec law.

[18] **Another distinction** is that the **scope** of the Convention is necessarily different from the scope of the LFIT Act; in fact, it is considerably narrower. The Convention provides for relatively major and uniform exclusions, as set out in article 2. **First**, the Convention does not apply to (1) personal and national transactions; (2) a series of other matters expressly listed in article 2 relating to business transactions, and notably terms of payment; and (3) bearer documents such as bills of lading. These three exclusions are in fact significant, and relate to matters in respect of which it is more difficult to achieve an international consensus. The Convention has thus omitted subjects (such as consumer contracts) in respect of which it was foreseeable that differences of opinion would emerge. The LFIT Act, on the other hand, applies to all documents and there are very rare matters that are exempted. For example, the LFIT Act amended the *Consumer Protection Act* to provide that certain formal contracts specifically identified in the Act, and not all consumer contracts, may be made only in the form of a paper contract.²⁸ Apart from these rare exceptions, the LFIT Act is intended to apply in all circumstances. **Second**, the Convention applies only to (1) contracts, and specifically (2) contracts that are international and (3) do not involve the substantive rules of the law of contracts.²⁹ These two limits (exceptions and kinds of contracts) mean that its scope is relatively circumscribed. In fact, this difference in scope should not present any difficulties since accession to the Convention by Canada would not operate to sweep away the LFIT Act, which applies much more broadly. Given that the scope of the Convention is much narrower, the risk of conflict is even lower. The more problematic dissimilarities relate incidently to the original and, most importantly, the writing, as we shall see in greater detail.

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

III. Methods of Forming Electronic Contracts

[19] Part 1, which we will now begin, consists of an examination of the nub of the Convention: a discussion of the reasons why the Convention should be considered. The purpose of the Convention is to perform two essential functions, identified earlier: **first**, it seeks to incorporate greater legal certainty by defining major concepts in the law of contracts in order for contracts not be connected with paper alone, such as writing, signature and original (Section 1). **Second**, it offers a guide regarding certain more specific elements relating to the formation of electronic contracts (Section 2).

1 – Rules Governing Form

[20] The functional equivalence referred to above is not merely a theoretical principle. Its objective is, first and foremost, to allow for concepts to be defined without reference to the medium, including, most importantly, writing, signature and original, as set out in article 9 of the Convention.

1.1 – Writing

[21] The concept of writing is undoubtedly the main source of differences between the Convention and the Quebec law. I would even say the only true opposition; a divergence that is even more problematic given that it refers to a central element of the two instruments. In article 9(2), the Convention provides that a writing exists if

the information contained [in the electronic communication] is accessible **so as to be usable for subsequent reference**. (Emphasis added)

The test of “subsequent reference” is not included in the LFIT Act,³⁰ which instead opts for the test of **integrity**, as set out in article 2838 C.C.Q.

In addition to meeting all other legal requirements, the **integrity** of a copy of a statute, an authentic writing, a semi-authentic writing or a private writing drawn up in a medium based on information technology **must be ensured** for it to be used to **adduce proof** in the same way as a

UNIFORM LAW CONFERENCE OF CANADA

writing of the same kind drawn up as a paper document.
(Emphasis added)

[22] In Canada, therefore, we are faced with a very simple situation. On the one hand, most of the provinces have enacted legislation that incorporates the test of “**subsequent reference**”, taken from the 1996 *Model Law*. This was the case in Alberta (section 11), British Columbia (section 6), Prince Edward Island (section 7), New Brunswick (section 7), Nova Scotia (section 8), Ontario (section 6), Saskatchewan (section 9), Newfoundland (section 8) and Yukon (section 7). Manitoba alone does not seem to have followed the definition of writing in relation to this criterion, or by any other, in fact.³¹ On the other hand, Quebec law has relied on the criterion of “**integrity**”.

[23] In this report, our preference for one of the criterion over the other will be discussed in Part 2. Before we do however, it is important to note the following two factors.

[24] **First**, in technical terms, these criteria are met in very different ways. An Internet page that is accessible after a contract is signed could meet the “subsequent reference” requirement, but could have been altered by the author; it would therefore be accessible, but its integrity would not be ensured. A “pdf” file, on the other hand, could meet the integrity criterion, but, without that function being added, it would not necessarily meet the “subsequent reference” criterion.

[25] **Second**, these criteria both derive from the principle of functional equivalence. What are these functions of a writing? Historically, one of the very first studies of this subject is quite simply the Guide to Enactment of the 1996 Model Law, which identified 11 functions that could be associated with a writing.

In the preparation of the Model Law, particular attention was paid to the functions traditionally performed by various kinds of “writings” in a paper-based environment. For example, the following non-exhaustive list indicates reasons why national laws require the use of “writings”: (1) to ensure that there would be **tangible evidence** of the existence and nature of the intent of the parties to bind themselves; (2) to help the parties **be aware of** the consequences of their entering into a contract; (3) to provide that a document would be legible by all; (4) to provide that a document would remain unaltered over time

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

and provide a permanent record of a transaction; (5) to allow for the reproduction of a document so that each party would hold a copy of the same data; (6) to allow for the authentication of data by means of a signature; (7) to provide that a document would be in a form acceptable to public authorities and courts; (8) to finalize the intent of the author of the “writing” and provide a record of that intent; (9) to allow for the easy storage of data in a tangible form; (10) to facilitate control and subsequent audit for accounting, tax or regulatory purposes; and (11) to bring legal rights and obligations into existence in those cases where a “writing” was required for validity purposes.³² (Emphases added)

[26] Under the Convention and the 1996 Model Law before it, those functions can be met if the document intended to perform the role of a writing is accessible and permits “subsequent reference”. It was also provided that the criterion selected should not be too stringent, and that the requirement for a writing should be considered

as the lowest layer in a hierarchy of form requirements,
which provide distinct levels of reliability, traceability and
unalterability with respect to paper documents. ³³
(Emphasis added)

[27] The LFIT Act, and consequently the C.C.Q., opted instead for integrity. Under the functional equivalence criterion, the idea was that the function of a document as evidence, regardless of the medium, had to meet that requirement. We would note that the LFIT Act seems to consider only the *ad probationem* function³⁴ and not the *ad validatem* function, a distinction not found in the Convention. The symbolic aspect that may attach to a writing – what the Guide to Enactment of the 1996 Model Law calls helping the parties to “be aware” – is absolutely not conveyed by the criterion of accessibility and “subsequent reference”.

[28] There are therefore two conflicting approaches, both of which are found in other countries. “Subsequent reference” is found, for example, in Australia,³⁵ and in one case in the United States.³⁶ The “integrity” test is used in France, among others.³⁷ Given these difficulties, it is noteworthy that some Canadian jurisdictions have tried to avoid the

problem by combining requirements.³⁸ While that is certainly possible, it is not an approach that we would think appropriate to recommend, having regard to the additional workload it would generate.

1.2– Signature

[29] Signature, in our view, does not cause as much problems. Although the definition has changed since 1996 and the Model Law, the Convention is based on two groups of elements identified in article 9(3). The first relates to the two cumulative functions of a signature, under the principle of functional equivalence: **(1)** the identity of the signer and **(2)** the intention in respect of “the information contained in the electronic communication”. The second also relates to a level of reliability proportionate to the circumstances.

[30] If we compare that language to the Quebec law, we can see that only the first group is formally required. Article 2827 C.C.Q., which was left almost intact by the LFIT Act,³⁹ deals with signature as follows:

2827. A signature is the affixing by a person, to a writing, of his name or the distinctive mark which he regularly uses to signify his intention.

[31] That article refers expressly to the two functions cited above. Two functions are set out in the C.C.Q., even though there is a change that distinguishes the Convention from the 1996 Model Law. While the Model Law refers to the approval of the content of the information by the person who signed, the Convention instead uses the expression “that party’s intention in respect of the information”. That more neutral expression, which is doubtless farther removed from contract law, does not seem to us to present any problems in terms of the Quebec definition, which uses the term “intention” [*consentement* in the French version of art. 2827 – Tr.].

[32] On the other hand, there is nothing in the C.C.Q. regarding the reliability requirement set out in article **9(3)b(i)** of the Convention. Nonetheless, while it is not express, that condition is certainly implicit for any method of signature. Technique has in fact never been disregarded in assessing a signature, whether handwritten or not. Simply put, paper as a technology has become so common, widely known and socially understood that any reference to the support as a technology has become identical to the concept of signature itself – identical, but not disregarded. As well, in analyzing the paper medium when a signature is to be disproved, examination of the signature generally

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

called for an expert in “technology” (such as a graphologist) who relied on technological data to support his or her position.⁴⁰

[33] The fact that there is no conflict between the Quebec law and the Convention in respect of signature is particularly apparent when article 9(3)b(ii) introduces greater flexibility by moving away from the criterion of reliability. That requirement is significantly diminished by the introduction of that article, which treats signature as being fully achieved if the two requirements in the first group have been met.

1.3 – Original

[34] On the question of the original, here again there are certain dissimilarities between the Convention and Quebec law, more specifically **section 12 of the LFIT Act** which defines “original”. This is particularly understandable in that the original has a connection with the writing, which, as we have seen, is dealt with differently in the two sets of rules. The main difference lies in the fact that the LFIT Act has identified the functions an original may serve more precisely. Three functions are cited expressly:

12. A technology-based document may fulfil the functions of an original. To that end, the **integrity** of the document must be ensured and, where the desired function is to establish

1) that the document is the **source document from which copies are made**, the components of the source document must be retained **so that they may subsequently be used as a reference**;

2) that the document is **unique**, its components or its medium must be structured by a **process** that makes it possible to verify that the document is unique, in particular through the inclusion of an exclusive or distinctive component or the exclusion of any form of reproduction;

3) that the document is the **first form of a document linked to a person**, its components or its medium must be structured by a **process** that makes it possible to verify that

UNIFORM LAW CONFERENCE OF CANADA

the document is unique, to identify the person with whom the document is linked and to maintain the link throughout the life cycle of the document.⁴¹ (Emphases added)

[35] The first function is the most common, and could refer, for example, to a contract between two parties. An example of the second is a bearer bond or bill of lading. The third could be a will or digital certificate.

[36] The Convention stops short of this; **article 9(4)** appears to provide for the first scenario in the Quebec statute, but not for the other two.

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

[37] Here again, functional equivalence is used in both cases to determine the criteria, which take almost the same form in this instance. The two texts have the common features of **(1)** the necessary integrity, which is further defined very similarly in section 6, para. 2 of the LFIT Act and article 9(5) of the Convention,⁴² throughout the life cycle of the document, and also both require **(2)** that the original be accessible: while the Convention uses the term “available”, the LFIT Act requires that it be kept for “subsequent reference”, the two being very similar.

[38] No major conflict arises in respect of how the criteria for the first function of the original are met. On the other hand, as we noted earlier, the Convention is silent regarding the **unique** nature sometimes associated with certain originals - even though this function was discussed at length at the UNCITRAL meetings - and on the **connection between the original and a person**. The first function is undoubtedly the

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

most common in the area to which the Convention applies – international contracts. As well, the unique nature function is largely secondary in international commerce, as a result of the exclusion in article 2(2) of numerous scenarios associated with that function,⁴³ and the function involving connection with a person is also considerably diminished when article 2(1)(a) excludes “[c]ontracts concluded for personal, family or household purposes”.

[39] Once again, when the Convention opts for defining only the lowest common denominator, it is potentially in conflict with Quebec law. This time, the problem lies not in the criteria used, which are very similar, but in identifying the functions that an original could serve. In the event that a court were to have to interpret the conflict between the two instruments, it might well conclude by saying that the Convention will not apply where the Quebec law is more precise than the Convention. It might also find that the Quebec law will not apply where the Convention did not think it wise to define criteria for an original intended to fulfil certain functions. Nonetheless, this situation is difficult to predict, and the applicable law could change, depending on the function that the original is meant to fulfil, particularly given that it is not a simple matter to identify the functions of an original. In a very small number of cases a risk of discrepancy between the two instruments might arise.

2 – Other Methods of Forming Electronic Contracts

[40] In addition to the rules governing form for the trilogy of writing, signature and original, the Convention is meant to clarify other incidental elements, two of which seem to us to be more important than the others. First, there is the question of the place and time of receipt and sending of the electronic document (1); and second, there is the recurring debate about the use of automated tools as substitutes for human intervention, at widely differing levels of sophistication (from software making decisions in the place of people to simple forms available on an Internet page) (2). However, we will not go into the question of the quality of an electronic offer in great depth, that being the subject of article 11 of the Convention.⁴⁴ This seems to us to be a secondary issue, and in fact is consistent with what the C.C.Q. has always provided on the question, by defining an offer as unequivocal.⁴⁵

2.1 – Place and time of dispatch and receipt of electronic documents

[41] On this point, we can see a fairly strong parallel between the provisions of the Convention and the provisions of the LFIT Act. The only distinctions to note relate to (1) terminological differences involving expressions that are sometimes exact synonyms, and (2) the fact that the Convention refers to the familiar concept of “establishment”, which is of obvious relevance when it comes to international contracts.

[42] **First**, with respect to vocabulary, the resemblances between the two instruments, and more specifically between article 10 of the Convention and section 31 of the LFIT Act, are striking. The **time of** dispatch, under the Convention, is

the time when it **leaves** an information system **under the control of the originator**

The LFIT Act, on the other hand, provides that it may be identified,

where the action required to send it to the active address of the recipient has been accomplished by or on the instructions of the **sender**, and the transmission cannot be **stopped**

In both cases, we see that **loss of control by the sender** is the determining factor.

[43] The Convention provides that the **time of receipt** corresponds to

the time when it becomes capable of being **retrieved** by the addressee at an electronic address designated by the addressee.

The LFIT Act uses, instead, the expression **accessibility**, and provides that a document

is presumed received or delivered where it becomes **accessible** at the address indicated by the recipient as the address where the recipient accepts the receipt of documents from the sender

[44] Here again, there are a few minor differences that can be noted, but no conflict arises between the two instruments. First, the Convention is careful to provide for

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

situations in which the recipient's address is not designated, which the LFIT Act does not formally do. In that case, it is when the recipient "becomes aware" that comprises the time of receipt. Because the LFIT Act provides a presumption of receipt only in the event that the address is designated, it can be "presumed" that the solution will be the same in Quebec law. Second, the LFIT Act establishes a presumption that the document is intelligible, which the Convention does not do. This is a very minor difference, however.

[45] **Second**, article 10 of the Convention provides for a presumption that both documents received and documents dispatched are attached to the "**place of business**" of the originator and addressee, respectively. The article also refers to article 6 of the Convention, entitled "Location of the parties", which specifies what is a place of business in an electronic environment. This is a common concept, regularly used in the law of international contracts, such as the Vienna Convention; however, it was not required in the purely "local" context of the C.C.Q. It is therefore entirely reasonable for the C.C.Q. not to refer to it. Here again, there is no conflict; on the contrary, the Convention supplements what the Quebec law provides, in a purely local context, for the international context.

[46] We would also note that the Convention did not think it useful to revisit the unending question of the place and time of formation of international contracts. This question is already dealt with by the 1980 Vienna Convention,⁴⁶ and it may bear repeating that that convention deals with it in a manner that is similar overall to what is provided in the C.C.Q., which also applies the theory of receipt.⁴⁷

2.2 – Automated contract

[47] Most legislation intended to govern electronic commerce is careful to ensure that a judge cannot invalidate a transaction simply because one or both parties has used an electronic agent, as can be done using information technology. The Convention is no exception; it uses the expression "**automated message system**", which it defines as follows in article 4(g):

(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;

[48] This definition seems to be perfectly compatible with the concept of “**pre-programmed document**” used in section 35 of LFIT Act, and is even more compatible given that the LFIT Act does not define what that is. Based on the definition in article 4(g), and in a minimum of words, the Convention provides only, in article 12:

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.

[49] Thus rather than regulating what is done, the rule is that it is possible to form contracts through an electronic agent, leaving aside the debate about the possible risk of legal uncertainty associated with the fact that a “machine” might not have the legal capacity to act – an argument that, to the best of my knowledge, has in fact never been cited by a judge. However, it would have been quite insufficient merely to refer to this element. As well, both the Convention, in article 14,⁴⁸ and the LFIT Act, in section 35,⁴⁹ draw a line between the obligations of the person we will call the “**user**” (the person who uses the electronic agent) and the person we will call the “**manager**” of the electronic agent (the person who created it) – a dividing line in the two instruments which must then be compared, and of which it is then possible to say that, far from being in conflict, the provisions in issue really differ in the details.

[50] The Convention introduces a **right to withdraw** for the user of the electronic agent where the manager has not established a procedure for correcting errors. Taking a “negative” approach, a manager that has not established such a procedure is penalized. The LFIT Act takes a more “positive” approach, by requiring that there be such a procedure, but the effect is identical: “on pain of non-enforceability of the communication or cancellation of the transaction”. In both cases, the provisions establish a kind of **compromise** between introducing a measure of legal certainty, to prevent cancellation by the user of the electronic agent on a “pretext”, and the obligation of the manager of tools of this nature to (1) take responsibility by allowing the user to correct any errors and (2) not shift the consequences of the choice of using an electronic agent onto the shoulders of the user. This division of obligations is therefore motivated by

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

“plain common sense” and that is undoubtedly why there is no major distinction between the two sets of legal rules.

[51] On the other hand, and again in terms of application, there are two very slight distinctions to be noted. **First**, the Convention refers to two cumulative requirements that must be met in order for the user to be able to exercise the right to withdraw: **(1)** diligently inform the manager of the error and **(2)** not have received any benefit from the situation. Those requirements are not formally included in the section of the LFIT Act. Nonetheless, I am not certain that they are lacking, in that they are self-evident. **Second**, in addition to the correction procedure, the LFIT Act requires that **(1)** instructions for that purpose be given and **(2)** that users be allowed to do it “promptly”. The first point seems to us to be a consequence of the “positive” approach taken in the LFIT Act and referred to above; the second was intentionally left out of the Convention, thus leaving the question up to individual States. These are thus minor differences that are not likely, in our view, to present major problems.

IV. How the Convention is Applied

[52] The Preliminary Part and especially Part 1 sought primarily to identify and analyse the differences and similarities between the two bodies of rules. **Now it is important to determine the consequences** of this situation for Quebec. We can say at once that, despite the similarities mentioned, the differences related to writings are major and present a problem that is all the more “exasperating” since it is the only one that is truly difficult to solve and since the Convention adopts a “take it or leave it” approach by not allowing reservations to be made (article 22). We will therefore deal with these two aspects in Section 1 of this second part. In Section 2, we will then discuss the recommendation itself.

1 – Irreconcilability of Quebec Law and the Convention

[53] Reconciliation therefore appears to be difficult for the concept of “writing” and only for this concept, since, without having to say much more about it, we believe that the distinctions that may arise with regard to the concept of “original” can be tolerated. First of all, the basic criterion in both cases is integrity. Next, it may be thought that, in the very rare cases that involve functions 2 and 3 described in section 12 of the LFIT Act – for which we have been unable to find any examples in international

documents outside the fields excluded by article 2 of the Convention – the specificity of the LFIT Act will remain applicable in light of the general nature of the Convention.

1.1 – Irreconcilable “Writing”

[54] We have already seen that a writing materializes differently in the two sets of legal rules. The two materializations find different expressions even though the same principles are applied, namely technological neutrality and functional equivalence. This distinction can be explained in two ways. **First**, these instruments do not have the same function. While the Convention seeks to harmonize various national legal rules, the LFIT Act understands the concept more from the standpoint of the civil law. While the first instrument is focused outward, the second is more introspective and considers the question in light of all the writings provided for in the C.C.Q. **Second**, the Convention seeks to manage and, incidentally, to facilitate the transition from paper to electronic media; although the LFIT Act also has this objective, it is focused more on finding a “universal” criterion that will be applicable no matter what medium is used, whether paper or electronic. These two approaches undoubtedly explain why the respective drafters were not in the same frame of mind.

[55] Therefore, faced with the difficulty of reconciling the two definitions, we cannot avoid choosing between them, contrary to what we thought in Part 1. The lines that follow seek to show that, in our opinion, the integrity criterion is perfectly justified in the context of Quebec law and that adopting the “subsequent reference” criterion would impair the consistency of that law. This is justified both by the criticisms that can be made of the criterion in the Convention and by the virtues associated with the criterion in the LFIT Act.

A – Criticism of the “subsequent reference” criterion

[56] Apart from the fact that the Convention is sometimes said to have been inspired by common law principles,⁵⁰ several characteristics of the “subsequent reference” criterion are themselves capable of causing problems. **First**, the Convention interprets the concept of “writing” very narrowly and takes care to distinguish the formality associated with a “simple writing” or a writing *stricto sensu* from that required for a “signed writing” or “original writing”.

The requirement of written form is often combined with other concepts distinct from writing, such as signature and original. Thus, the requirement of a “writing” should be

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

considered as the lowest layer in a hierarchy of form requirements, which provides distinct levels of reliability, traceability and integrity with respect to paper documents. The requirement that data be presented in written form (which can be described as a “threshold requirement”) should thus not be confused with more stringent requirements such as “signed writing”, “signed original” or “authenticated legal act”.⁵¹

[57] However, such an interpretation strips all meaning from a writing *stricto sensu*, which, on its own, is liable to be rarely associated with a writing found in an international instrument. The Convention therefore takes great care to limit its scope. Moreover, when the existence of a writing must be determined, it will have to be ascertained whether the writing provided for in an international convention, for example, refers to a “simple writing”, “signed writing” or “original writing”. While the Convention has the virtue of providing criteria to rationalize and objectify the transition from paper to electronic media, we fear that, on the contrary, the exercise will be as ambiguous as determining “how many angels can dance on the head of a pin”.

[58] **Second**, while the concept of “writing” is narrow, the criterion for applying it, namely “subsequent reference”, is quite broad, and deliberately so, as we have already seen. It is meant to be inclusive to ensure that the largest possible number of states can become parties to the broadest possible Convention and that no particular technology is precluded from being characterized as a writing. However, in our opinion, making it too easy to create a writing is not necessarily a good thing, since this formality will have no reason to exist if it is completely distorted. This criterion might be met through a hyperlink, for example, without the link being underlined when the writing is formed.

[59] This brings us to a **third problem** with the “subsequent reference” criterion, namely that, while it undoubtedly fulfils the evidentiary function of a document, in no way does it satisfy the requirement of a formality *ad validitatem*, which was referred to as “being aware” during UNCITRAL’s preparatory work.⁵² A writing is often required to slow down the process and highlight the importance of a clause or an action. Even though the other contracting party can consult the contract after it is entered into, the writing requirement will not have fulfilled its formal protective function with such a criterion.

[60] **Finally**, we believe that the “subsequent reference” criterion is relatively new. To the best of our knowledge, it was thought up during the discussions under UNCITRAL. Therefore, this criterion has not existed for a meaningful length of time, and it is difficult for me to say whether it can stand the test of time. Being rather suspicious of new legal constructs is thus not pointless. It is necessary to “legislate tremulously”, a statement generally attributed to Professor Carbonnier. With all due respect, international documents, and particularly the six named in article 20 of the Convention, are quite unstable in the formal requirements they impose for writings, which include a signed writing,⁵³ documents that include a telegram or telex,⁵⁴ a “complete record . . . [that] provides authentication of its source”,⁵⁵ the absence of any form⁵⁶ and, finally, “subsequent reference”.⁵⁷ This instability is especially apparent in the new version of the *UNCITRAL Model Law on International Commercial Arbitration*,⁵⁸ which does not manage to identify a single solution but rather two optional ones, the first of which even raises the possibility of an “oral writing”, which will no doubt cause some interpretation problems for judges.

B – Appropriateness of the Integrity Criterion in the Quebec Context

[61] On the other hand, the criterion of integrity, as it is dubbed in the LFIT Act, has several advantages. **First**, we believe that this criterion is not specific to information technologies but will apply to paper in the same way. In our opinion, as already noted, the LFIT Act does not take the same “tinkering” approach taken by the Convention. Specifically, in addition to the Convention’s desired function of reconciling paper and electronic media, the Quebec statute seeks a more “universal” criterion that can apply no matter what the medium used. **Next**, this criterion as described in article 2838 C.C.Q. applies only for the evidentiary function and not for the *ad validitatem* function.⁵⁹ **As well**, it should be noted that the integrity criterion is most likely consistent with academic writing and court decisions concerning paper documents, except that the term “authenticity” was used more frequently than “integrity”, which we do not consider problematic.⁶⁰ **Finally**, the criticism of inalterability in the comments on the Convention does not apply to integrity. Paragraph 145 states the following:

the concept of writing does not necessarily denote inalterability since a “writing” in pencil might still be considered a “writing” under certain existing legal definitions.⁶¹

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

So be it. But inalterability is not integrity, since a paper document written in pencil can certainly have integrity, just like an e-mail, whose inalterability is the same as in the previous example.

[62] On the other hand, neither the LFIT Act nor the C.C.Q. expressly defines a writing. And although article 2838 C.C.Q. specifically establishes the integrity criterion for four of the five categories of writings provided for in the C.C.Q., the “other writings” category does not seem clearly subject to that criterion, except perhaps through section 5, para. 3 of the LFIT Act, which also seems to choose the integrity criterion⁶² for all documents.⁶³ In any event, if some doubt remains about the criterion applicable to “other writings”, that criterion can never be “subsequent reference”, which is foreign in every way to the LFIT Act and the C.C.Q.

1.2 – Inflexibility of the Convention

[63] To begin with, it is important to note that the procedures for becoming a party to the Convention discussed in this paragraph are not part of our field of expertise. Having said this, it seems quite clear to us that reconciling the two concepts of “writing” is difficult, since article 22 of the Convention adopts a firm tone by formally prohibiting reservations:

No reservations may be made under this Convention.

[64] This firmness is all the more surprising given that it seems quite rare.⁶⁴ The term is firmer than “declaration” insofar as it creates a very structured scheme set out, *inter alia*, in articles 19, 20, 21 and 23 of the *Vienna Convention on the Law of Treaties*. On the other hand, the Convention prefers the “declaration” system, a tool that seems less structured even though its effects are comparable in several respects.⁶⁵ A state that uses such declarations cannot challenge another state’s declaration in any way.

[65] It seems possible to make a declaration in seven circumstances. While those related to articles **17(4)** (regional economic integration organizations), **19(1)** (the Convention’s date of application) and **20(2), (3) and (4)** (the specific case of certain conventions) are clearly not applicable to our “writing” problem, two points can be made here. **First**, with regard to **domestic territorial units**, article **18(1)** provides as follows:

UNIFORM LAW CONFERENCE OF CANADA

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.

[66] To the best of our knowledge and understanding, it will be important for Canada to assess the possibility of such a declaration for the province of Quebec. We do not think we have to make a decision on this, since it is outside our terms of reference. In either case (signing the Convention with a declaration excluding Quebec or not signing the Convention), Quebec law will not be subject to the Convention. As well, this subject remains outside our area of authority; nonetheless, it seems that this possibility applies mainly where there is a subsequent change in the law of a province, which, as we have seen, does not seem possible here.⁶⁶

[67] **Second**, still seeking flexibility as authorized by the Convention, article 19(2) provides as follows:

2. Any Contracting State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 21.

[68] Unfortunately, the way this article is understood and the way it is interpreted in the explanatory notes⁶⁷ do not lead us to believe that it can be used in our case.

2 – Recommendation not Accede to the Convention

[69] The application of the Convention by Canada is a somewhat more complex question in relation to Quebec law as it now stands than it is in relation to the law of most of the common law provinces. Those provinces have generally adopted substantive and formal approaches that are modeled closely on the *Model Law of 1996*, on which the Convention also draws extensively. Nonetheless, in spite of differences that are not necessarily major, our analysis suggests that **it would be difficult for Canada to accede to the Convention without impairing the consistency of Quebec law**. In our opinion, this statement is justified both by the reasons already mentioned and also by several observations which we will now make.

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

[70] **First**, it is difficult for Quebec to change the integrity criterion without upsetting its own consistency. It is hard to accept that Quebec could use a writing criterion for its international transactions that differs both conceptually and in its application from the criterion used for its internal acts.

[71] **Next**, as of February 2008, 18 states have signed the Convention,⁶⁸ the closing date indicated in the Convention being January 16, 2008 (article 16(1)). With all due respect, aside from Russia and China, none of these states seems to be a determinative partner for Canada. While the situation in the United States is no doubt more favourable to signing the Convention, the European countries seem more reluctant.⁶⁹ Therefore, for the moment, it would seem that UNCITRAL has not been fully capable of achieving the desired consensus.

[72] **As well**, we have seen a tendency – which is fairly recent, by and large – in some international documents to try to simplify or even eliminate manifestations of form. In our opinion, this is reflected in the extreme formal simplicity required by the Convention for writings. However, absence of form cannot mean absence of proof, and I am not sure that formal simplicity must be associated with progress, especially in an electronic context in which more form may in fact be needed to counterbalance the absence of physical materials.⁷⁰

[73] **Finally**, there is a very active debate about this in the field of arbitration, among others, where the opposition between advocates of “strong” writing and those of “weak” or no writing has prevented any formal changes to the New York Convention of 1958. Changes have been achieved only through informal standards (soft law), which are quite unclear and which involve optional clauses, a fact which I believe is unique.⁷¹ The Convention gives the impression that it will try to find a general solution to a problem that could not be solved in the specific context of arbitration. The concept of “writing” may therefore be more complex and variable than the very simple or even simplistic definition the Convention seeks to impose.

ANNEX 1

COMPARATIVE TABLE		
	CONVENTION	QUEBEC
REMOVE OBSTACLE	<p>ANNEX, where as clause 4 : Convinced that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes,</p>	<p>1. The object of this Act is to ensure 1) the legal security of documentary communications between persons, associations, partnerships and the State, regardless of the medium used;</p>
FUNCTIONAL EQUIVALENCE	<p>ANNEX, where as clause 5 : Being of the opinion that uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological neutrality and functional equivalence, to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law,</p>	<p>1 (3) The object of this Act is to ensure ...) the functional equivalence and legal value of documents, regardless of the medium used, and the interchangeability of media and technologies;</p>

**UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC**

FREEDOM	<p>ANNEX, where as clause 5 : <i>supra</i>.</p> <p>8 (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.</p>	<p>2. Except where a document is required by law to be in a specific medium or technology, any medium or technology may be used, provided the medium or technology chosen is in compliance with legal rules, in particular those contained in the Civil Code.</p> <p>29. A person may not be required to acquire a specific medium or technology to transmit or receive a document, unless such requirement is expressly provided by law or by an agreement.</p> <p>Similarly, no person may be required to receive a document in a medium other than paper, or by means of technology that is not at the person's disposal.</p> <p>A product or service, or information on a product or service, that is available in more than one medium, may be obtained in any such medium, at the option of the recipient of the product or service.</p>
REGOGNITION	<p>8 (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.</p>	<p>5 para. 1. The legal value of a document, particularly its capacity to produce legal effects and its admissibility as evidence, is neither increased nor diminished solely because of the medium or technology chosen.</p>

<p>DEFINITIONS</p>	<p>“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;</p>	<p>3. Information inscribed on a medium constitutes a document. The information is delimited and structured, according to the medium used, by tangible or logical features and is intelligible in the form of words, sounds or images. The information may be rendered using any type of writing, including a system of symbols that may be transcribed into words, sounds or images or another system of symbols. For the purposes of this Act, a database whose structuring elements allow the creation of documents by delimiting and structuring the information contained in the database is considered to be a document. A record may comprise one or more documents.</p> <p>In this Act, a technology-based document is a document in any medium based on any information technology referred to in paragraph 2 of section 1.</p> <p>4. A technology-based document, even when the information it contains is fragmented and dispersed in one or more media at one or more locations, is considered to form a whole if its logical structuring elements allow the fragments to be connected, directly or by reference, and if such elements ensure both the integrity of each fragment and the integrity of the document reconstituted as it existed prior to its fragmentation and dispersal.</p>
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**UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC**

SCOPE	<p>2 (1) This Convention does not apply to electronic communications relating to any of the following:</p> <p>(a) Contracts concluded for personal, family or household purposes;</p> <p>(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, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary.</p> <p>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.</p>	
WRITING	<p>9 (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 requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.</p>	<p>2838 CCQ. In addition to meeting all other legal requirements, the integrity of a copy of a statute, an authentic writing, a semi-authentic writing or a private writing drawn up in a medium based on information technology must be ensured for it to be used to adduce proof in the same way as a writing of the same kind drawn up as a paper document.</p>

<p>SIGNATURE</p>	<p>9 (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:</p> <p>(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</p> <p>(b) The method used is either:</p> <p>(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</p> <p>(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.</p>	<p>2827 CCQ. A signature is the affixing by a person, to a writing, of his name or the distinctive mark which he regularly uses to signify his intention [<i>sic</i>].</p>
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*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

ORIGINAL	<p>9 (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:</p> <p>(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</p> <p>(b) Where it is required that the information it contains be made available, that information is capable of being displayed to the person to whom it is to be made available.</p> <p>9 (5) For the purposes of paragraph 4 (a):</p> <p>(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</p> <p>(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.</p>	<p>12 LFIT Act. A technology-based document may fulfil the functions of an original. To that end, the integrity of the document must be ensured and, where the desired function is to establish</p> <p>1) that the document is the source document from which copies are made, the components of the source document must be retained so that they may subsequently be used as a reference;</p> <p>2) that the document is unique, its components or its medium must be structured by a process that makes it possible to verify that the document is unique, in particular through the inclusion of an exclusive or distinctive component or the exclusion of any form of reproduction ;</p> <p>3) that the document is the first form of a document linked to a person, its components or its medium must be structured by a process that makes it possible to verify that the document is unique, to identify the person with whom the document is linked and to maintain the link throughout the life cycle of the document.</p>
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<p>TIME AND PLACE</p>	<p>10 (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.</p> <p>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.</p> <p>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.</p> <p>4. Paragraph 2 of this article applies notwithstanding that the place 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.</p>	<p>31. A technology-based document is presumed transmitted, sent or forwarded where the action required to send it to the active address of the recipient has been accomplished by or on the instructions of the sender, and the transmission cannot be stopped or, although it can be stopped, is not stopped by or on the instructions of the sender.</p> <p>A technology-based document is presumed received or delivered where it becomes accessible at the address indicated by the recipient as the address where the recipient accepts the receipt of documents from the sender, or at the address that the recipient publicly represents as the address where the recipient accepts the receipt of documents, provided the address is active at the time of sending. The document received is presumed intelligible, unless notice to the contrary is sent to the sender as soon as the document is accessed.</p> <p>The time of sending or of receipt of a document may be established by producing a transmission slip or an acknowledgement of receipt or the information kept with the document providing it guarantees the date, hour, minute and second of sending or receipt and indicates the source and destination of the document, or by any other agreed method that provides the same guarantees.</p>
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*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

AUTOMATED CONTRACT	<p>12. 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.</p> <p>14 (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:</p> <p>(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</p> <p>(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 services, if any, received from the other party.</p> <p>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.</p>	<p>35. A party that offers a product or service by means of a pre-programmed document must, on pain of non-enforceability of the communication or cancellation of the transaction, see to it that the document provides instructions that allow users to promptly advise the party of any errors or contains means that allow users to avoid or correct errors. Similarly, users must be provided instructions or means to avoid receiving unwanted products or services because of an ordering error, or instructions for the return or destruction of unwanted products.</p>
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¹ There are statutes in Alberta, *Electronic Transaction Act*, <http://www.ijcan.org/ab/laws/sta/e-5.5/20060115/whole.html>; British Columbia, *Electronic Transaction Act*, http://www.qp.gov.bc.ca/statreg/stat/E/01010_01.htm; Prince Edward Island, *Electronic Commerce Act*, <http://www.ijcan.org/pe/laws/sta/e-4.1/20060115/whole.html>; Manitoba, *Electronic Commerce and Information Act*, <http://www.ijcan.org/mb/legis/loi/e-55/20060115/tout.html>; New Brunswick, *Electronic Transactions Act*, <http://www.canlii.org/nb/legis/loi/e-5.5/20050801/tout.html>; Nova Scotia, *Electronic Commerce Act*, <http://www.canlii.org/ns/laws/sta/2000c.26/20060115/whole.html>; Ontario, *Electronic Commerce Act, 2000*, <http://www.canlii.org/on/legis/loi/2000c.17/20050801/tout.html>; Saskatchewan, *Electronic Information and Document Act*, <http://www.ijcan.org/sk/laws/sta/e-7.22/20060115/whole.html>; Newfoundland, *Electronic Commerce Act*, <http://www.ijcan.org/nl/laws/sta/e-5.2/20051121/whole.html> and Yukon, *Electronic Commerce Act*, <http://www.canlii.org/yk/legis/loi/66/20041124/tout.html>.

² See, *inter alia*, Vincent GAUTRAIS, *Le contrat électronique international*, Bruxelles, Bruylant Academia / Bruylant, 2002, 430 pp.

³ Articles 2837 to 2840 CCQ.

⁴ Articles 2841 to 2842 CCQ.

⁵ *Inter alia*, by establishing, as in the Convention, definitions of writing, signature and original that are separate from paper medium.

⁶ The LFIT Act provides, for example, for the minimum legal requirements that a document must meet for purposes of retaining, transmitting, transferring and accessing a document.

⁷ The Act regulates and applies stringent rules to the use of “sensitive” methods of identification such as biometrics. As well, unless otherwise provided by law, the LFIT Act prohibits any person, whether natural or legal and whether public or private, from imposing one technology rather than another on an individual.

⁸ Recommendation by UNCITRAL on the Legal Value of Computer Records (1985), available at <http://www.uncitral.org/pdf/english/texts/electcom/computerrecords-e.pdf>.

⁹ The text is available at <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>.

¹⁰ See, for example, BARREAU DU QUÉBEC, “Mémoire sur la Loi sur la normalisation juridique des nouvelles technologies de l’information” (2000), <http://www.barreau.qc.ca/fr/positions/opinions/memoires/2000/normalisationtic.pdf>.

¹¹ See, *inter alia*, Vincent GAUTRAIS, *Afin d’y voir clair – Guide relatif à la gestion des documents technologiques*, Fondation du Barreau du Québec, 2005, p. 6.

¹² Annex to the Convention, whereas 4: “Convinced that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes”.

¹³ Section 1, para. 1, of the LFIT Act provides: “The object of this Act is to ensure 1) the legal security of documentary communications between persons, associations, partnerships and the State, regardless of the medium used”.

¹⁴ Section 5, para. 1, of the LFIT Act provides: “The legal value of a document, particularly its capacity to produce legal effects and its admissibility as evidence, is neither increased nor diminished solely because of the medium or technology chosen.”

¹⁵ See, *inter alia*, article 11, which provides: “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”

¹⁶ Annex to the Convention, whereas 5: “Being of the opinion that uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

neutrality and functional equivalence, to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law”.

¹⁷ Article 8, paragraph 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.”

¹⁸ “2. Except where a document is required by law to be in a specific medium or technology, any medium or technology may be used, provided the medium or technology chosen is in compliance with legal rules, in particular those contained in the Civil Code.”

¹⁹ “29. A person may not be required to acquire a specific medium or technology to transmit or receive a document, unless such requirement is expressly provided by law or by an agreement.

Similarly, no person may be required to receive a document in a medium other than paper, or by means of technology that is not at the person's disposal.

A product or service, or information on a product or service, that is available in more than one medium, may be obtained in any such medium, at the option of the recipient of the product or service.”

²⁰ See, *inter alia*, whereas 5 in the Annex, *supra*.

²¹ Functional equivalence is referred to, for example, in section 1(3), which provides: “The object of this Act is to ensure: ... 3) the functional equivalence and legal value of documents, regardless of the medium used, and the interchangeability of media and technologies”. Technological neutrality, as noted earlier, is referred to in the C.C.Q., in Division 6 of Book 7, Title 2, Chapter 1, entitled “Media for writings and technological neutrality”.

²² “‘Electronic communication’ means any communication that the parties make by means of data messages; ...”

²³ “‘Data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy; ...”

²⁴ “The object of this Act is to ensure ... the coherence of legal rules and their application to documentary communications using media based on information technology, whether electronic, magnetic, optical, wireless or other, or based on a combination of technologies; ...”

²⁵ “A technology-based document, even when the information it contains is fragmented and dispersed in one or more media at one or more locations, is considered to form a whole if its logical structuring elements allow the fragments to be connected, directly or by reference, and if such elements ensure both the integrity of each fragment and the integrity of the document reconstituted as it existed prior to its fragmentation and dispersal.”

²⁶ This distinction is evident in, for example, the definition of “information system” in the Convention (article 4(f)) and section 3 of the LFIT Act which provides, *inter alia*: “[i]nformation inscribed on a medium constitutes a document.”

²⁷ *Infra*, Part 1, Section 2, paragraphs 47 to 51.

²⁸ Section 25 of the *Consumer Protection Act* provides: “The contract must be drawn up clearly and legibly, and at least in duplicate **and in paper form.**”

²⁹ As articles 7, 13 and 14(2) of the Convention, *inter alia*, explain.

³⁰ The concept of “subsequent reference” is found only in section 12 of the LFIT Act in relation to the original.

³¹ See the references to all these provincial statutes in note 1.

³² UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, 1999, page 35, paragraph 48, available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf. UNCITRAL

Convention on the Use of Electronic Communications in International Contracts, Text and Explanatory Note, 2007, p. 50, paragraph 144.

³³ *Id.*, paragraph 49.

³⁴ This is apparent from, *inter alia*, the fact that the amendments made by the LFIT Act to the C.C.Q. were incorporated in the Book On Evidence. As well, article 2838 C.C.Q. refers expressly to that one function.

³⁵ For example, Australia, *Electronic Transactions Act*, section 9, available at http://www.austlii.edu.au/au/legis/cth/consol_act/eta1999256/. See also the list of some 20 countries that have adopted the 1996 Model Law. Nonetheless, we would note that France, one of those countries, has since then provided a definition of writing based on the criterion of integrity.

³⁶ The US E-Sign Act, available at http://caselaw.lp.findlaw.com/casecode/uscodes/15/chapters/96/subchapters/i/sections/section_7001.html, refers in section 7001 to the concept of “electronic record” in very similar terms.

³⁷ *Loi n° 2000-230 du 13 mars 2000 portant adaptation du droit de la preuve aux technologies de l'information et relative à la signature électronique*, article 1, amending article 1316-1 of the French Civil Code, provides: “[TRANSLATION] A writing in electronic form is admissible in evidence on the same basis as a writing on paper medium, provided that the person by whom it is issued can be duly identified and that it is established and retained under conditions such as to guarantee its integrity.”

³⁸ *Avis 11-201 relatif à la transmission de documents par voie électronique*, available at <http://egc.lautorite.qc.ca/userfiles/File/reglementation/valeurs-mobilieres/Normes/A-XXXIII-03b.pdf>, achieved a compromise by not opting for either of the solutions, but combining them in article 4.2: “[TRANSLATION] (1) forms for power of attorney, powers of attorney and voting instructions in electronic format (including electronic format using a telephone) will meet the requirements of recording in **writing** if the format used (a) guarantees the **integrity** of the information contained in the forms for power of attorney and powers of attorney, and (b) enables the recipient to retain the information for **future consultation**.” (Emphases added)

³⁹ The LFIT Act simply changes “**on** a writing” to “**to** a writing”, the first being properly thought to be too closely associated with paper medium.

⁴⁰ See, for example, *Bolduc v. Talbot* (2001) (Court of Québec), available at <http://www.canlii.org/qc/jug/qccq/2001/2001qccq1827.html>; *Armand v. Checotel Finance*, [1985] C.S. 1154.

⁴¹ Section 12 LFIT Act (emphases added).

⁴² In a very similar manner, section 6, para. 2 of the LFIT Act provides that “[t]he integrity of a document must be maintained throughout its life cycle, from creation, in the course of transfer, consultation and transmission, during retention and until archiving or destruction”, while article 9(5) of the Convention provides that “[t]he 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”.

⁴³ “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.”

⁴⁴ “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.”

⁴⁵ Article 1388 C.C.Q. To be more precise, there is a difference between article 1388 C.C.Q. and article 11 of the Convention, the first referring to “offer” and the second to “invitation to make offers”. That said, the debate between these both concepts was already done under the *Vienna Convention on Contracts for the International Sale of Goods*, Convention that was signed by both jurisdictions.

⁴⁶ *Vienna Convention on Contracts for the International Sale of Goods*, articles 1, 10, 12.

*UNIFORM LAW CONFERENCE OF CANADA COMPARATIVE ANALYSIS OF THE
UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC
COMMUNICATIONS IN INTERNATIONAL CONTRACTS AND THE CIVIL LAW
OF QUEBEC*

⁴⁷ Article 1387 C.C.Q.

⁴⁸ “**14(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 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.”

⁴⁹ “35. A party that offers a product or service by means of a pre-programmed document must, on pain of non-enforceability of the communication or cancellation of the transaction, see to it that the document provides instructions that allow users to promptly advise the party of any errors or contains means that allow users to avoid or correct errors. Similarly, users must be provided instructions or means to avoid receiving unwanted products or services because of an ordering error, or instructions for the return or destruction of unwanted products.”

⁵⁰ Éric A. CAPRIOLI, *Droit international de l'économie numérique*, 2nd ed. (Paris: Litec, 2007), pp. 91 *et seq.*

⁵¹ UNCITRAL, *United Nations Convention on the Use of Electronic Communications in International Contracts, Text and Explanatory Note* (2007), p. 51, para. 145.

⁵² *Supra*, in Part 1, paragraph 25.

⁵³ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, June 10, 1958), article 2.

⁵⁴ *Convention on the Limitation Period in the International Sale of Goods* (New York, June 14, 1974) and Protocol thereto (Vienna, April 11, 1980), article 1(g).

⁵⁵ *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* (New York, December 11, 1995), article 7(2).

⁵⁶ *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, April 11, 1980); *United Nations Convention on the Liability of Operators of Transport Terminals in International Trade* (Vienna, April 19, 1991).

⁵⁷ *United Nations Convention on the Assignment of Receivables in International Trade* (New York, December 12, 2001), article 5(c).

⁵⁸ *UNCITRAL Model Law on International Commercial Arbitration* (amended by the United Nations Commission on International Trade Law on July 7, 2006), article 7.

⁵⁹ Even though some doubt remains about section 5, which uses the term “legal value”. On the other hand, article 2838 C.C.Q., which reaffirms the previous one, is unequivocal.

⁶⁰ Vincent GAUTRAIS, “Le contrat électronique au regard de la Loi relative à l’encadrement des technologies de l’information”, in Vincent GAUTRAIS, ed., *Le droit du commerce électronique* (Montreal: Thémis, 2002), pp. 3-56, at pp. 24 *et seq.* The author quotes, *inter alia*, Léo DUCHARME, *L’administration de la preuve*, Collection Bleue, 2nd ed. (Montreal: Wilson & Lafleur, 1995), p. 195: [TRANSLATION] “For a written instrument to be proof of its content, its authenticity must be established.”

⁶¹ UNCITRAL, *United Nations Convention on the Use of Electronic Communications in International Contracts, Text and Explanatory Note* (2007), p. 51, para. 145.

⁶² Section 5, para. 4 of the LFIT Act: “Where the law requires the use of a document, the requirement may be met by a technology-based document whose integrity is ensured.”

⁶³ The term “document” is defined in section 71 of the LFIT Act as including the concept of “writing”: “71. The concept of document, as used in this Act, is applicable to all documents referred to in legislative texts whether by the term ‘document’ or by terms such as act, deed, record, annals, schedule, directory, order, order in council, ticket, directory, licence, bulletin, notebook, map, catalogue, certificate, charter, cheque, statement of offence, decree, leaflet, drawing, diagram, **writ**ing, electrocardiogram, audio, video or electronic recording, bill, sheet, film, form, graph, guide, illustration, printed matter, newspaper, book, booklet, computer program, manuscript, model, microfiche, microfilm, note, notice, pamphlet, parchment, papers, photograph, minute, program, prospectus, report, offence report, manual and debt security or title of indebtedness.” (Emphasis added)

⁶⁴ UNCITRAL, Tenth Report on Reservations to Treaties by Alain PELLET, A/CN.4/558, available at http://untreaty.un.org/ilc/documentation/english/a_cn4_558.pdf, at paragraph 27, explaining that there are relatively few examples of strict prohibitions against reservations. *Contra*: UNCITRAL, *United Nations Convention on the Use of Electronic Communications in International Contracts, Text and Explanatory Note* (2007), p. 97, para. 314.

⁶⁵ See, *inter alia*, the comments made in document A/CN.9/571 - *Report of the Working Group on Electronic Commerce on the work of its forty-fourth session* (Vienna, October 11-22, 2004), at <http://daccessdds.un.org/doc/UNDOC/GEN/V04/589/92/PDF/V0458992.pdf?OpenElement>, para. 30, pp. 9-10. *Contra*: UNCITRAL, *United Nations Convention on the Use of Electronic Communications in International Contracts, Text and Explanatory Note* (2007), p. 97, para. 314.

⁶⁶ UNCITRAL, *United Nations Convention on the Use of Electronic Communications in International Contracts, Text and Explanatory Note* (2007), p. 86, paras. 271 *et seq.*

⁶⁷ UNCITRAL, *United Nations Convention on the Use of Electronic Communications in International Contracts, Text and Explanatory Note* (2007), p. 90, paras. 284 *et seq.*

⁶⁸ In accordance with the comments published on the UNCITRAL site, available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html.

⁶⁹ Éric A. CAPRIOLI, *Droit international de l'économie numérique*, 2nd ed. (Paris: Litec, 2007), p. 94.

⁷⁰ Vincent GAUTRAIS, *Le contrat électronique international* (Brussels: Bruylant Academia / Bruylant, 2002), 430 p.

⁷¹ *UNCITRAL Model Law on International Commercial Arbitration* (amended by the United Nations Commission on International Trade Law on July 7, 2006), article 7; Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session.