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The United Nations Convention on the Use of Electronic Communications in International Contracts (ECC) – Part II – Transport Documents

The UNCITRAL Working Group on Electronic Communications decided that the ECC should not apply to negotiable instruments or documents of title (such as bills of lading), as special rules would be required to overcome difficulties of creating an electronic equivalent of paper-based negotiability. Any such rules might require specific treatment in the context of the activity to be governed, so it would not be appropriate to address difficulties in the context of a general law such as the ECC.

Special rules can be found in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (also known as The Rotterdam Rules) a new UNCITRAL Convention now in the process of ratification. The Rotterdam Rules define negotiable and non-negotiable electronic transport records and contain numerous provisions covering topics such as signature, transfer of rights “incorporated” in these records and replacement of electronic records by paper transport documents.

Prior to adoption of the final text of The Rotterdam Rules, these provisions were the subject of discussion between the UNCITRAL Working Groups on Transport Law and Electronic Communications. These Working Groups noted that the ECC establishes functional equivalence for electronic communications in connection with the formation or performance of a contract but does not affect the substantive legal questions governed by either Convention. So, while bills of lading were excluded from the application of the ECC, electronic communications relating to bills of lading fell within its scope.

If Canada ratifies and implements the Rotterdam Rules, its provisions applicable to electronic records will probably, in Canadian constitutional terms, “occupy the field” for international ocean transport, displacing Part III of the Uniform Electronic Commerce Act (UECA) that applies to contracts of carriage.

Would Canada’s ratification of The Rotterdam Rules assist electronic commerce?

Part III of the UECA provides basic guidelines for negotiable transport documents, leaving the parties considerable freedom to choose procedures to implement these documents in electronic form using different information technologies.

The Rotterdam Rules are much more specific than Part III, covering issues that go beyond the status of electronic communications, yet allowing parties to adopt procedures that are appropriate. The starting point for equivalency between paper transport documents and electronic records in The Rotterdam Rules is Article 9, entitled:

Procedures for use of negotiable electronic transport records or the electronic equivalent of a non-negotiable transport document that requires surrender”, which provides:

- “1. The use of a negotiable electronic transport record or the electronic equivalent of a non-negotiable transport document that requires surrender shall be subject to procedures that provide for:
 - (a) The method for the issuance and the transfer of that record to an intended holder;
 - (b) an assurance that the negotiable electronic transport record retains its integrity;
 - (c) the manner in which the holder or the consignee is able to demonstrate that it is the holder or the consignee; and
 - (d) The manner of providing confirmation that delivery to the holder or the consignee has been effected, or that, . . . the electronic transport record has ceased to have any effect or validity.
2. The procedures in paragraph 1 must be referred to in the contract particulars and be readily ascertainable.”

At the level of principle, there is no conflict between The Rotterdam Rules and Part III of the UECA: both allow for the use of technological solutions provided the recipient of an electronic record is or can readily become aware of these procedures. The difference is that The Rotterdam Rules particularize substantive issues that must be addressed in the procedures.

Conclusion:

The advantages, such as they are, of The Rotterdam Rules as a facilitator of international electronic commerce are probably not of great significance in the assessment of all policy issues raised by these Rules. At least Canadian policy makers can be assured that the principles of these Rules do not conflict with either the EEC or the UCEA.