

Advancing Trade Digitalization in times of crisis: legal challenges and responses

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Legal challenges in readiness assessment

Covid19 did not change the challenges, it made them more urgent.

What “law” affects electronic commerce (and thus needs review)?

- **Laws governing transacting parties: buyer, seller, manufacturer, supplier, importer/exporter**
- **Laws governing the border: customs (taxes and permissions); health measures; banned imports or exports**
- **Laws governing information: privacy, security, computer abuse**
- **Laws governing ideas: intellectual property**
- **Laws governing business conduct: fairness, anti-monopoly rules, consumer protection**

SOME OF THESE NEED MORE ATTENTION THAN OTHERS BECAUSE OF PAPERLESS TRADE.

- **“Laws” may include statutes, regulations, ordinances, decrees, judicial and administrative decisions, rulings, plus other statements with mandatory effect.**
- **What happens to them when you take the paper away?**



Legal challenges in readiness assessment (2)

Law in theory vs e-commerce in practice

- **It is important to understand what actually happens in trade, beyond what the law says should happen**
 - **The law may allow practices and communications that do not happen**
 - **So businesses may have opportunities they do not know about**
 - **Promoting e-commerce may require cultural changes**
 - **The law may not allow (or may forbid) practices and communications that do happen**
 - **So law reform may be required to support such activities**
 - **Some activities may be allowed to occur in the silence of formal laws**
 - **Do parties have a tradition of getting legal advice before acting?**



Legal challenges in readiness assessment (3)

Other legal challenges:

- **E-payments**: Can payments be made electronically? The Central Bank usually prescribes the framework.
- **Data ownership**: Who owns the voluminous and potentially valuable data created in e-trading relations? A broader question than just Intellectual Property.
- **Liability for mistakes**: Who is liable when things go wrong? The threat of liability may encourage prudent conduct.
- **Dispute resolution**: How can disputes be resolved fairly and cheaply? Are standard international rules (e.g. the Model Law on International Commercial Arbitration) and treaties (e.g. the New York Convention on Foreign Arbitral Awards) in place? Are the courts trusted?
- **Access to fair markets**: Is abuse of monopoly or market power controlled by law? Do in foreigners have good access to markets?



Legal challenges in recommending reform (1)

A key domestic consideration in e-commerce law reform that comes up in every country: how strong should authentication be?

Should the law require particular technology for electronic signatures?

in all cases

in specially sensitive cases (high value, public bodies)

- UNCITRAL and ESCAP say to be ‘technology neutral’ but a lot of places want to be more prescriptive/detailed/cautious
- Factors in deciding such a question:
 - Risk assessment – by state and by businesses
 - Cultural/social attitudes to central control or freedom to choose
- Many national examples of choices at all levels of strictness



Legal challenges in recommending reform (2)

In cross-border paperless trade, achieving harmonization & mutual recognition is important but can be difficult

- Use of international agreements and standards:
 - May be global, regional, bilateral
 - Directed at e-communications (e.g. UN E-Communications Convention)
 - Directed at commercial actions (e.g. modern free trade agreements; CISG)
 - Directed at particular fields of commerce (e.g. phytosanitary certificates, road transport agreements)
 - May permit actions that domestic law does not
 - So if domestic law reform lags, may provide authority to do e-co anyway



Ways forward

- First recourse: internationally accepted legal texts, adapted as required – but no more than required – to local culture and circumstances.
- Second recourse: become party to international instruments
 - Global texts – treaties and standards - are important: UNCITRAL, WTO (TFA), WCO (Kyoto) etc.
 - Regional arrangements can also be very helpful.
 - E.g. ESCAP Framework Agreement for the Facilitation of Cross-Border Paperless Trade in Asia and the Pacific. Provides opportunities for member discussions.
 - E.g. ASEAN Single Window law.
 - Bilateral treaties can also ensure cooperation, e.g. in investigations and in permitting cross-border respect for privacy.
- Third recourse: published guidance – e.g. ESCAP Legal Readiness Assessment Guide by which countries can evaluate their legal readiness for cross-border paperless trade. The assessment would largely work for wholly domestic laws too. The Legal Guide has many examples making from ESCAP member countries.



Conclusions

- Creating a legal framework for e-communications is not a matter of first impression. The first UNCITRAL Model Law is over 25 years old.
- Technology keeps evolving, but many solutions have been proposed that are still valid and effective.
- Collaboration is vital to create and maintain as much harmonization as possible.

