



# The United Nations Electronic Communications Convention

**UNCTAD**

Regional Workshop on e-Commerce Legislation  
Harmonization in the Caribbean

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**John D. Gregory**

# Overview

- Legal challenges of electronic commerce
- Introduction to UNCITRAL
- Global harmonization: the UN Model Laws
  - Model Law on Electronic Commerce
  - Model Law on Electronic Signatures
- The Electronic Communications Convention
  - Provisions
  - Benefits
  - issues

# Legal Challenges of e-Commerce

- What happens to the law when we take the paper away?
- Do electronic communications satisfy traditional legal form requirements?
  - Written
  - Signed
  - Original
- When are e-communications sent and received?
- May government use e-communications?
  - Outgoing
  - Incoming
- Regulatory issues

# UNCITRAL

- United Nations Commission on International Trade Law (UNCITRAL)
- Established in 1966
- The core legal body in the United Nations system for international commercial law.
- It has the mandate to
  - unify
  - harmonize
  - modernizecommercial law worldwide

# UNCITRAL and e-Commerce

- Work on e-commerce issues started in the mid-1980s
- Few laws existed: UNCITRAL had to develop new law rather than compare and harmonize existing one
- First result: UNCITRAL Legal Guide on Electronic Funds Transfers (1987)
- Uniformity could be achieved through the adoption of UNCITRAL texts
- Electronic communications are a cross-cutting issue → need to coordinate UNCITRAL's work in other legal areas when dealing with electronic means

# UNCITRAL principles of e-com law

- “media neutral” - the law of electronic communications is the same as the law of any other medium; UNCITRAL texts merely accommodate the differences of media.
- “technology neutral” - the law does not favour one technology over another.
- “removes barriers” – UNCITRAL texts do not regulate e-communications or harmonize existing laws that already govern them (except for recognition).

# UNICTRAL principles (2)

- General rule: no discrimination based on medium
- General protection: only on consent (express or implied)
  - Q: do governments need special rules?
- “Functional equivalents”: what an electronic document has to be or do in order to work as a document on paper
  - Principle: e-document is not writing.
  - Still valid?
- **NOTE:** e-documents do not have to be more reliable than paper documents

# UN Model Law on E-Commerce

- The first legislative text (1996) to adopt the fundamental principles of
  - non-discrimination
  - technological neutrality and
  - functional equivalence.
- It establishes also rules for the formation and validity of contracts concluded by electronic means, for the attribution of data messages, for the acknowledgement of receipt and for determining the time and place of dispatch and receipt of data messages.
- Adopted in at least 60 States, including many in Caribbean region

# UN Model Law on E-Signatures

- The MLES (2001) establishes criteria for the equivalence between electronic and hand-written signatures based on a “two-tier” approach as well as liability rules for the parties involved in the signature process.
- Technology neutral in principle but may tend to favour one technology.
- The MLES contains provisions favoring the recognition of foreign electronic signatures based on a principle of substantive equivalence that does not take into account the place of origin.
- Adopted in at least 30 States.

# Limits of model laws\soft laws

- MLEC and MLES are model laws, i.e. “soft law”: States may modify their provisions as they deem fit
- Some areas (e.g. electronic signatures) have seen divergences in implementation
- A treaty (“hard law”) may reinforce the level of uniformity in e-commerce law
- Moreover, a model law cannot fully address how to comply with form requirements contained in treaties, i.e. a different level of legal barrier to e-communications
- UNCITRAL decided to prepare a convention

# Why a new treaty?

- **Facilitate the use of electronic communications across borders**
  - Eliminate formal requirements in treaties drafted before diffusion of electronic means, thus allowing trade partners to know in advance whether electronic contracts will be upheld abroad.
- **Promote further uniformity.**
  - Despite the success of the Model Laws, enactments have seen variations on the original texts, affecting predictability.
- **Update and complement the provisions of the Model Laws.**
  - New rules have emerged in recent years whose uniform adoption is desirable.
- **Provide core legislation for countries not having yet adopted any.**
  - Several countries have no or incomplete legislation on electronic commerce.

# Electronic Communications Convention (2005)

- Builds upon MLEC and MLES.
- Establishes functional equivalents for writing, original and e-signature across borders
- Contains rules on e-contracting
- Allows the use of e-communications to satisfy formal requirements in other treaties
- In practice, used both as a treaty and as a model law (i.e. for domestic law)

# Key features of ECC

- Cross-border recognition of e-signatures is a major obstacle to development of international electronic commerce
- Pursued in Free Trade Agreements
- Rules in MLES did not find full application
  - Challenge of technology rules: may be harder to prove compliance with technical standards than to prove attribution by other means
- Matter fully addressed in article 9(3) of the Electronic Communications Convention, based on principles of
  - technology neutrality
  - geography neutrality and
  - substantive equivalence
- Only existing international provision on this topic

# ECC on e-signatures

- Facilitates cross-border recognition of electronic signatures based on the “substantive equivalence” standards:
  - method used is 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;
    - i.e. reliable in theory
- Ensures effect of reliable electronic signature:
  - method used is proven in fact to have fulfilled the functions of identifying the party and proving the party’s intention in respect of the information contained in the message, by itself or together with further evidence.
  - i.e. reliable in practice

# ECC updates model laws

## Location of the parties (art. 6 ECC)

- Location of equipment, supporting technology;
- Place from where the information system is accessed;
- Use of country-specific domain name or email address;  
are not necessarily relevant for the determination of the party's place of business
- Party's "intention" in signing (art. 9(3)(a) ECC) better captures the various functions of signatures than the notion of "approval" (contained in art. 7(1)(a) MLEC)

# ECC updates model laws (2)

- Time and place of dispatch and receipt (art. 10 ECC):
  - Dispatch occurs when the communication leaves the information system of the originator
    - (amends art. 15(1) MLEC);
  - Receipt occurs when the communication may be retrieved and, for non-designated addresses, the addressee is aware that a communication was sent
    - (amends art. 15(2) MLEC).

# ECC complements model laws

- Invitations to make offers (art. 11 ECC):
  - A proposal not addressed to specific parties is considered an invitation to make offers
    - Gives flexibility to on-line traders in controlling stocks (see also art. 14(2) CISG: an invitation to the public is an invitation to make offers);
- Use of automated message systems (art. 12 ECC):
  - The contract is valid and enforceable also when no natural person reviewed or intervened in the actions carried out by the automated message system.

# ECC complements model laws (2)

## Input error (art. 14 ECC)

- An input error may be withdrawn if
  - The input error is made by a natural person dealing with an automated message system;
  - The automated message system does not provide an opportunity to correct the error;
  - The party in error notifies the other party as soon as possible of the error;
  - The party in error has not received any benefit from the transaction.

# ECC can interpret other treaties

- The ECC facilitates the use of electronic communications across borders, in particular in connection with treaties concluded before the wide diffusion of electronic means.
- An important benefit of the ECC for countries that already have modern e-commerce legislation.
- The ECC lists six other UNCITRAL conventions
- It allows contracting states to apply it to all its conventions, or some, or none except as listed
- Compare process of deciding which laws to include or exclude from operation of Model Laws: opt in or opt out?

# Some conventions of interest

- Facilitate the use of electronic communications across borders, in particular:
  - in connection with treaties concluded before the wide diffusion of electronic means; and
- Examples of treaties:
  - New York Convention on Foreign Arbitral Awards:
    - Art. II(2), “agreement in writing”;
    - Art. IV, “original or duly certified copy of the arbitral agreement [and of the arbitral award]”.
  - Contracts in the International Sale of Goods (CISG)
    - Written form requirement;
    - No Oral Modification clause;
    - Formation of contract.

Both treaties have a large number of State parties: the procedure for their amendment is cumbersome.

# The ECC as domestic law

- About 20% of the world's jurisdictions lack any form e-commerce legislation
- Many other jurisdictions have only partial and insufficient provisions
- The Convention provides core e-commerce legislation to those countries
- See UNCTAD Information Economy Report 2015, Chapter V and its Cyberlaw Tracker:
- [http://unctad.org/en/Pages/DTL/STI\\_and\\_ICTs/ICT4D-Legislation/eCom-Global-Legislation.aspx](http://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Global-Legislation.aspx)
- Some countries can adopt treaties more readily than they can enact domestic legislation.
- Some countries harmonize domestic and international rules when adopting the ECC (e.g. Singapore, Australia)

# Status of the ECC

- Convention is used both as a treaty and as a model law
- As a treaty:
  - 7 State parties (Congo, Dominican Republic, Honduras, Montenegro, Russia, Singapore, Sri Lanka)
  - 18 signatories (including China, Colombia, Panama, Paraguay, South Korea)
- Committed to accession: Australia, Thailand.
- As a model law, enacted domestically in about 15 States (including Trinidad and Tobago, and Guatemala)
- Must be adopted as a treaty to get full benefits, notably for interpretation of other treaties
- Regional endorsements: ASEAN, ESCAP, etc.

# ECC – some issues resolved

- Use an electronic document when something has to be in writing
- Sign with an e-signature a document that the law requires to be signed
- Use an electronic document as an original
  - Whether it starts on paper or in e-form
- Retain electronic records to satisfy a retention rule
- Enter into contracts electronically

# ECC – some issues not resolved

- Compel someone to deal electronically
- Create a unique electronic document
  - But see current UNCITRAL ETR project
- Avoid reading applicable law
  - Exceptions, mandatory rules, private agreements may prevail
- Seal a document
- Influence public law – ECC is about contracts only

# ECC – but proceed with caution

- Integrity of e-documents, security of e-signatures
  - What is legal is not necessarily prudent
  - Consent rule as a protection
- Rules of ‘providing’ information
- Proving receipt of messages
- Encouraging mistakes
- Form requirements in contracts

# Government Authority

- ECC applies to commercial contracts made by governments.
- The Crown (in common-law systems) has powers of a natural person
  - Therefore it can use electronic communications
- For greater certainty (and for public bodies with only statutory powers),
  - Legislation (e.g. Uniform Electronic Commerce Act, Canada)
    - So don't have to amend 300 statutes...
    - Maybe protection against incoming technology
  - Special statutes for special uses
    - Electronic registration, filing etc.

# Implementing the ECC

- Declarations:
  - Application to what parties?
  - Application to what other treaties?
  - Exceptions to application of the ECC itself (e.g. Sri Lanka, probably Australia)
- Harmonize domestic and international regimes?
  - Compatibility with existing law
  - Matching exclusions

# ECC etc: trade facilitation laws

- Trade facilitation aims at simplifying procedures and controls relating to movement of goods.
- The goal of trade facilitation is to reduce direct and indirect trade costs
  - benefits for professional end users and consumers
- At a policy level, more cross-border trade = economic development
- No prejudice to border control but mutual reinforcement
- Information and communication technology helps trade facilitation through concepts such as paperless trade and electronic single window facilities

# Policy, law and technology

- Paperless trade often understood as a technological process
  - This is not enough
- Paperless trade requires first a high-level consensus and policy decisions
- A sound legal framework is needed to enforce laws, regulations and contractual agreements
- The legal framework may include:
  - laws/statutes;
  - implementing decrees and regulations;
  - voluntary standards (co-regulation);
  - contractual provisions (e.g. on the terms of the Single Window service).

# An enabling legal environment

- Goal: no barrier to all electronic exchanges (B2B, B2G and G2G)
- Pre-existing law is not touched (contract law, customs code, etc.)
- Application of common legislation to private and public sector to the maximum extent possible
- Factors to take into account include:
  - Technological: single window architecture, e-signature/authentication methods
  - Cultural: prevailing economic model and legal tradition
  - Legal: legal tradition; attitude towards regulation vs. enabling laws

# Legal topics to consider

- General e-commerce laws:
  - E-transactions and e-contracting
  - Authentication / security (e-signatures, IdM)
  - Privacy and data protection
  - Data retention and archiving
  - Cybercrime, electronic evidence
- 
- Legislation specific to Single Window operations
  - Liability of SW facility operator
  - Service Level Agreements on SW operations
  - SW data sharing agreements

# Legal Foundation #1: E-transactions law

- Establishes general principles applicable to all electronic transactions:
  1. non-discrimination
  2. functional equivalence
  3. technological neutrality
    - Ideally, regardless of the nature of the subject involved (public or private)
- Often based on the UNCITRAL model laws and ECC
  - High degree of harmonisation across the world
- Limited number of provisions needed to address technology requirements

# Legal Foundation # 2: e-signatures

- Number of different approaches for electronic signatures
  - In various jurisdictions
  - In the same jurisdiction, private vs. public sector
- Choices often driven by security concerns, do not facilitate e-commerce and trade facilitation
- Excessive costs and redundancy of systems led to Identity Management projects
- Cross-border recognition of electronic signatures is rare
  - At the multilateral level, only article 9(3) e-CC for B2B exchanges

# Other priority legal issues

- Cyber-security: electronic systems can be more or less secure than paper-based ones, depending on architecture and operating standards
- Increasing attention for protection of databases, emerging common technical standards
- Additional concerns about taking of evidence in investigations and admissibility in criminal and other proceedings
  - especially in cross-border context
- SW is based on exchange of commercially-sensitive data
  - duty to keep confidentiality remains unchanged

# Regulation

## **“The cyberspace is not a no-law land”**

- But: where is anything?

### **Direct application – finding jurisdiction**

- May be different considerations for different subjects

### **Intermediaries**

- Financial
- Technological
- Other

### **Virtual communities**

### **Codes and standards**

- Legal and technical

# Legitimacy

- Besides the general criteria applicable to public and private sectors - security, authenticity, efficiency – the state faces additional demands:
  - Protection of personal information
  - Fair use of e-communications
  - Access to information
  - Truthfulness
  - History (archivability)
  - Public acceptability (model user)
- Responding to these demands will depend on local culture – legal, social, political

# Does size matter?

- Elements that may impact the content of e-commerce law include:
  - Legal tradition;
  - Level of governance / rule of law institutions.
- In general, e-commerce law is independent of:
  - Size (in territory or population) of enacting jurisdiction;
  - Level of ICT penetration.
- However, the level of development may have an impact on the ability to implement measures to build capacity and disseminate awareness in the private sector, civil service and the judiciary.

# Sources

UNCITRAL electronic commerce work

- [http://www.uncitral.org/uncitral/uncitral\\_t\\_exts/electronic\\_commerce.html](http://www.uncitral.org/uncitral/uncitral_t_exts/electronic_commerce.html)

Uniform Law Conference of Canada – studies on ECC and implementing statute

- <http://ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/680-uncitral-electronic-communications-convention>

# Questions?

John D. Gregory  
General Counsel  
Ministry of the Attorney General  
Ontario, Canada

[john.d.gregory@ontario.ca](mailto:john.d.gregory@ontario.ca)  
[www.euclid.ca](http://www.euclid.ca)

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