

Electronic Commerce: Globalization of Domestic Law or Domestication of Globalized Law?

Amelia H. Boss*

Background. Although it was as early as 1985 that the United Nations Commission on International Trade Law first recognized the need to address domestically and internationally the legal issues surrounding electronic commerce, the first UNCITRAL instrument affirmatively providing rules for electronic commerce did not emerge until 1996 with the adoption of the UNCITRAL Model Law on Electronic Commerce. This model law was followed by a second, the Model Law on Electronic Signatures, in 2001; additionally, at its upcoming meeting in July 2005 UNCITRAL will be considering a proposed Draft Convention on the Use of Electronic Communications in International Contracts. Of the three instruments, the Model Law on Electronic Commerce (which is now nine years old) has had the most significant impact, having been adopted in whole or in part Australia (1999), Colombia (1999), Dominican Republic (2002), Ecuador (2002), France (2000), India (2000), Ireland (2000), Jordan (2001), Mauritius (2000), Mexico (2000), New Zealand (2002), Pakistan (2002), Panama (2001), Peoples Republic of China (2004), Philippines (2000), Republic of Korea (1999), Singapore (1998), Slovenia (2000), South Africa (2002), Thailand (2002) and Venezuela (2001); the Bailiwick of Guernsey (2000), the Bailiwick of Jersey (2000) and the Isle of Man (2000), all Crown Dependencies of the United Kingdom of Great Britain and Northern Ireland; in Bermuda (1999), Cayman Islands (2000), and the Turks and Caicos Islands (2000), overseas territories of the United Kingdom of Great Britain and Northern Ireland; and in the Hong Kong Special Administrative Region of China (2000). In the United States, The Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law, which is based in large part on the

* Professor of Law, Temple University School of Law; Co-Director, Institute for International Law and Public Policy. Professor Boss served on the US delegation to the United Nations Commission of International Trade Law during the negotiations on the United Nations Model Law on Electronic Commerce and on the United Nations Model Law on Electronic Signatures; she also served as the American Bar Association Advisor to the Drafting Committee that produced the Uniform Electronic Transactions Act in the United States, and as an ALI member of several of the Uniform Commercial Code Committees that considered electronic commerce issues.

UNCITRAL Model Law, has been enacted by 46 states as well as the District of Columbia and the Virgin Islands. Similarly, Canada has adopted uniform legislation, the Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada, that has been enacted in a number of Provinces and Territories.

Initial Underlying Philosophy. In the initial phases, the focus of most of the electronic commerce drafting efforts was on the removal of legal barriers to the conduct of commerce through electronic means. Unlike other law making efforts (secured transactions, sales, negotiable instruments), there was no attempt to structure a comprehensive body of substantive law governing a specific area of the law, but rather to support and encourage the development of electronic commerce. There were a number of general principles that guided these initial efforts:

- *Minimalism.* A minimalistic approach (as opposed to a fundamental reconstruction of the existing legal framework) makes only those changes absolutely necessary to accommodate electronic commerce, thereby preserving flexibility and permitting the development of new technologies and implementations.
- *Non-substantive.* These initial attempts were not seen as attempts to draft substantive rules governing transactions conducted through electronic commerce, but rather to develop rules that dealt solely with the use of electronic means in conducting trade. In effect, the drafters wanted to leave intact existing substantive legal framework (e.g. contracts, sales, etc.), and to “provide essential procedures and principles for facilitating” electronic commerce through a framework law that would be supplemented by other bodies of law.
- *Functional equivalence.* A main goal of these initial efforts was to establish the functional equivalence between the use of paper and the use of electronic technologies. A related and fundamental principle is that of *non-discrimination*, that there should be no disparity of treatment between electronic messages and paper documents.
- *Technology and implementation neutrality.* An important principal of the early drafting efforts was that there should be no discrimination made in the statutory

provisions between the types of technology used, or the in manner in which those technologies are implemented. Instead, any legislative product should retain sufficient flexibility to accommodate new types of technology and new business practices.

- *Party Autonomy.* Parties should be able to vary their rights and responsibilities by agreement.

Prior authority. In many international drafting exercises in the commercial context, international codification of commercial law built upon the domestic laws of the nation states (and their differences) in the preparation of international instruments, or upon the domestic laws of those nation states that had already developed sophisticated legal systems in those areas. For example, most countries had a body of sales law prior to the drafting of the Convention on the International Sale of Goods; all international efforts in the secured transaction field hearken back (in some way) to UCC Article 9, and efforts in the insolvency area must take into account insolvency laws that are well established in many countries. By contrast, in the electronic commerce area (at least initially), international drafting efforts had no strong domestic precedents on which to base their products. The primary work that had been done previously took the form of model trading partner (or electronic data interchange) agreements; the early work on the UNCITRAL Model Law on Electronic Commerce drew heavily from these model agreements.

More importantly, because there was no developed body of domestic electronic commerce law, many countries (such as the US) were looking at these issues at the same time they were being considered by these international bodies. As a result, there developed a “symbiotic relationship” between the domestic and international drafting efforts: each drew up and influenced the other.

Form of International Instrument. The first two UNCITRAL products took the form of “Model Laws”; the third is to take the form of a convention. In each case the choice was deliberate. A Model Law is just that: a model. It has no binding impact on nation states, each of whom retains the authority to determine whether and to what extent

to adopt the model law into its own law. It is expected that a country will take the model law and adapt its provisions as appropriate. By contrast, with a uniform law, the expectation is that the state will enact it without changes. There are important limitations with respect to a model law as a result. First, because each state may enact the model law in a differing manner with substantive and not just stylistic changes, there will be less uniformity between states than there would be in the case of a uniform law or a convention (where each country agrees to the same set of principles). This raises questions concerning the relevance of interpretations and applications of one state's version of the Model Law with respect to the interpretation and application of the law of another state. Second, once adopted by a state, the model law provisions would only apply to the extent the state has made them applicable; they would not necessarily have any impact on international transactions (unless conflicts principals lead to the application of the law of the enacting state). Third, the model law provisions would have no impact on existing international instruments. The draft UNCITRAL Convention on the Use of Electronic Communications in International Contracts is intended to address some of those limitations.

Evolution of electronic commerce. Electronic commerce has continued to evolve, and with its evolution, lawmakers throughout the world have continued to wrestle with the question of whether and to what extent to address perceived problems in electronic commerce through legislation. Over the past ten years, a number of developments have occurred that have fundamentally altered the legal landscape against which the initial international electronic commerce drafting efforts occurred, developments which may call into question the feasibility of any future electronic commerce drafting efforts. First, more and more states (or regional lawmakers such as the EU) have begun to adopt instruments dealing with electronic commerce; as a result, any future international efforts will not be on a clean slate, but will have to take these existing instruments into account. Second, and more importantly, states are beginning to harden their positions and attitudes towards electronic commerce. While some (such as the United States) continue to take the approach that any regulation should be minimal, and that the marketplace will to a great extent provide sufficient controls, other states have taken a

more hands-on regulatory approach. The result is a form of polarization that may make future law reform efforts more difficult.

Sphere of application. One of the biggest issues in the formulation of the Model Law was its sphere of application. This in turn raised two problems: whether the provisions of the Model Law should be limited to transactions that had international characteristics, and second, whether the Model Law should apply to consumer as well as commercial transactions. Unlike traditional international commercial transactions where the nature, nationality and location of the parties is evident during the contracting process, electronic commerce raises the possibility of transactions being entered into without prior knowledge of whether the transaction is “international”, “commercial” or “consumer.” As a result, the Model Law itself was not limited to international transactions, nor to commercial as opposed to consumer transactions. The theory was that nation states were free to adopt their own consumer protection legislation for application in an electronic environment.

International Electronic Commerce Bibliography

Completed UNCTRAL Electronic Commerce Products

- UNCITRAL Model Law on Electronic Signatures (2001)
 - *The Model Law, adopted in 2001, is intended to bring additional legal certainty regarding the use of electronic signatures. Building on the flexible principle contained in article 7 of the UNCITRAL Model Law on Electronic Commerce, it establishes a presumption that, where they meet certain criteria of technical reliability, electronic signatures shall be treated as equivalent to hand-written signatures. In establishing that presumption, the Model Law follows a technology-neutral approach and avoids favoring the use of any-specific technical product. In addition, the Model Law establishes basic rules of conduct that may serve as guidelines for assessing possible responsibilities and liabilities that might bind upon the various parties involved in the electronic signature process: the signatory, the relying party and trusted third parties that might intervene in the signature process.*
 - www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf
 - 26 Hous. J. Int'l L. 63 (2002)

- UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), with additional article 5 *bis* as adopted in 1998
 - *The Model Law, adopted in 1996, is intended to facilitate the use of modern means of communications and storage of information, such as electronic data interchange (EDI), electronic mail and telecopy, with or without the use of such support as the Internet. It is based on the establishment of a functional equivalent for paper-based concepts such as "writing", "signature" and "original". By providing standards by which the legal value of electronic messages can be assessed, the Model Law should play a significant role in enhancing the use of paperless communication. In addition to general norms, the Model Law also contains rules for electronic commerce in specific areas, such as carriage of goods. With a view to assisting executive branches of Governments, legislative bodies and courts in enacting and interpreting the Model Law, the Commission has produced a Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce.*
 - <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>
 - 7 TUL. J. INT'L & COMP. L. 237

- *Recommendation on the Value of Computer Records (1985)*

- First UNICTRAL Product in area of electronic commerce urging member states to examine their laws and to eliminate barriers to electronic commerce such as writing and signature requirements.
- <http://www.uncitral.org/english/texts/electcom/computerrecords.htm>

UNCITRAL Works in Progress

- An index to the deliberations of Working Group IV (Electronic Commerce) from 1997 to the present may be found at
 - http://www.uncitral.org/english/workinggroups/wg_ec/index.htm.
- The most recent version of the proposed Draft Convention on the Use of Electronic Communications in International Contracts may be found in the Annex to the Report of the Working Group on Electronic Commerce on the Work of its Forty-Fourth Session (October 2004).
 - www.uncitral.org

SCHOLARLY DISCUSSIONS OF INTERNATIONAL ELECTRONIC COMMERCE AND THE UNCITRAL DRAFTING PROCESS

ABA Electronic Messaging Task Force *The Commercial Use Of Electronic Data Interchange: A Report and Model Form of Electronic Data Interchange Trading Partner Agreement and Commentary*, 46 Bus. Law. 1645 (1990).

John R. Austin, *The Law of Electronic Commerce and Digital Signatures: An Annotated Bibliography*, 17 J. Marshall J. Computer & Info. L. 1043 (1999) (listing references--periodical articles, books and book chapters, World Wide Web sites, and government documents--that examine the law of electronic commerce and digital signatures).

Martin I. Behn, *The Illinois Electronic Commerce Security Act: Too Much Too Soon or Too Little Too Late?*, 24 S. Ill. U. L.J. 201 (2000)

Michael Joachim Bonell, *Do We Need A Global Commercial Code?* 106 DICK. L. REV. 87 (2001)

Amelia H. Boss, *The Uniform Electronic Transactions Act In A Global Environment*, 37 IDAHO L. REV. 275 (2001) (examining UETA and comparing UNCITRAL with UETA).

Amelia H. Boss, *Searching For Security In The Law Of Electronic Commerce*, 23 Nova L. Rev. 585 (1999)

Amelia H. Boss, *Electronic Commerce And The Symbiotic Relationship Between International And Domestic Law Reform*, 72 TUL. L. REV. 1931 (1998)

Amelia H. Boss and Jane Kaufman, *The Emerging Law Of Electronic Commerce*, 52 Bus. Law. 1469 (1997)

Amelia H. Boss, *The Emerging Law Of International Electronic Commerce*, 6 Temp. Int'l & Comp. L.J. 293 (1992)

Susanna Frederick Fischer, *Saving Rosencrantz And Guildenstern In A Virtual World? A Comparative Look At Recent Global Electronic Signature Legislation*, 7 B.U. J. Sci. & Tech. L. 229 (2001)

Henry D. Gabriel, *The Fear Of The Unknown: The Need To Provide Special Procedural Protections In International Electronic Commerce*, 50 LOY. L. REV. 307 (2004)

Judith Y. Gliniecki & Ceda G. Ogada, *The Legal Acceptance of Electronic Documents, Writings, Signatures, and Notices in International Transportation Conventions: A Challenge in the Age of Global Electronic Commerce*, 13 Nw. J. Int'l L. & Bus. 117 (1992)

Daniel J. Greenwood & Ray A. Campbell, *Electronic Commerce Legislation: From Written on Paper and Signed in Ink to Electronic Records and Online Authentication*, 53 Bus. Law. 307, 307-09 (1997) (comparing provisions of the UNCITRAL Model Law with domestic legislation).

John D. Gregory, *The UETA And The UECA - Canadian Reflections*, 37 IDAHO L. REV. 441 (2001) (giving an in-depth, insightful analysis of the Canadian version of the Model Law).

John D. Gregory, *The Proposed UNCITRAL Convention On Electronic Contracts*, 59 Bus. Law. 313 (2003)

A. Brooke Overby, *Will Cyberlaw Be Uniform? An Introduction To The UNCITRAL Model Law On Electronic Commerce*, 7 TUL. J. INT'L & COMP. L. 219 (1999)

Roberto Rosas, *Comparative Study Of The Formation Of Electronic Contracts In American Law With References To International And Mexican Law*, 26 HOUS. J. INT'L L. 63 (2003)

Thomas J. Smedinghoff and Ruth Hill Bro, *Moving With Change: Electronic Signature Legislation As A Vehicle For Advancing E-Commerce*, 17 J. MARSHALL J. COMPUTER & INFO. L. 723 (1999)