PANEL II: ISSUES OF FORMALITIES: THE FORMATION AND VALIDITY OF ELECTRONIC AGREEMENTS

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Horacio Gutierrez

On behalf of Microsoft, I would like to thank The National Law Center for Inter-American Free Trade for organizing this Conference and the sponsors for their support. It is important to address the topic of formalities and the impact they will have on electronic commerce (e-commerce). There seems to be enough of a consensus among the Latin American countries that some degree of uniformity can be reached. These formalities may require removing obstacles to the already existing laws governing other types of commerce instead of drafting new ones. The need for immediacy in dealing with these formalities was stressed by the statistic that e-commerce has grown at a yearly rate of 144% over the last three years.

Mauricio Devoto

This presentation covers three areas. The first is the absence of a regional initiative in technological matters and cultural change. The second is the need for a new means of support and authentication mechanisms as well as the need to harmonize issues of information with private legal systems. Finally and most importantly, is the need to harmonize the obvious advantages of the new solutions with the general institutions and principles and the characteristic traditions of the Latin countries. Such harmony is possible and convenient.

There is a general lack of regional initiative regarding technology. Through the National Information Infrastructure in the United States and the Information Society in the European Union, some general guidelines have been established to try to attain the closely linked objectives of deregulation in the areas of telecommunications, universal access, development of e-commerce, privacy protection, intellectual property, security, employment, and education. Nevertheless, the lack of general initiatives at the national and regional level is leading to isolated efforts that lack points of reference and necessary links among the different objectives pointed out above. The development of digital economy will mostly fall in the realm of the private sector, but the involvement of

governments and academia is necessary because digital knowledge will affect education, privacy, and employment.

In general, the present regulations apply only to paper-based documents. The starting point for legal systems is the freedom of choice. At this time the effort to be made concerning electronic agreements should be of a dual nature. The existing legislation should be receptive to new concepts, such as the acceptance of non-written documents and of signatures that are made through mechanisms that identify the signatory and ensure that the information will not be altered in any way. At the same time, it is important that new methods be accepted gradually.

The most important task is to harmonize the obvious advantages of the new solutions with the general institutions, principles, and characteristic traditions of the Latin countries. In Latin countries where there is a body of public notaries, it will be necessary to resolve the question of the coexistence of the private sector certifying authorities and the traditional certifiers. It is therefore very important to establish the difference between the valid certification of a digital signature and the certification of a signature by a public notary. The certification by a notary does not turn a private instrument into a public one, but it can be said that the certification is in itself a public instrument, and, therefore, in it is embodied the public trust granted to public instruments. Any other type of certification, aside from that of the notary public, lacks the full trust of a notary certification. The valid verification, for example, ensures that the "signature" has been created with the private key corresponding to the public key used to verify the signature, but does not ensure that the owner of the two codes is the same person who created the signature.

The current state of the legislation in Argentina includes the Decreto Presidencial No. 427/1998 and the Firmas Digitales para la Administración Pública Nacional, Decreto 427/1997. · There is also a new Civil Code bill that establishes that the written form can take place in public or private instruments, signed or not signed, unless otherwise stipulated. Any means of support can acknowledge its validity as long as the text is legible, even if the reading requires technical means. As to the signature, the same bill establishes that it serves as proof of the parties' intent as expressed in the corresponding text. In electronic documents, the requirement of a signature is satisfied if a method is used to identify it and this method reasonably insures the authorship and inalterability of the instrument.

There is also a draft of the Law of Digital Signature that will establish three elements for a digital signature: a private key to sign digitally, the corresponding public key to verify the signature, and the certification of the public key that identifies its holder. Digital keys can only be created for the duration of the corresponding certified public key. The digital signature, with supporting documents and fulfilled exigencies, satisfies the legal requirements and can be considered as an alternative to the written signature.

Fernando Galindo

Spain is promoting an institution similar to the one that brought the delegates here together, with the purpose of establishing bridges between governments, enterprises and universities. E-commerce is used as a way to communicate by computers and telecommunication techniques. Communications can be between individuals, firms, and Public Administrations. Important to this panel are the concepts of signature and agreements.

A general law on electronic signatures is necessary. They must be the reference and starting point. Spanish law has a current draft proposal of the law on electronic signatures, Real Decreto de Ley de Firma Electrónica (RDLFE). Article 2 defines the electronic signature as the set of data formatted electronically attached to other electronic data or linked to it functionally that is used as means of formally identifying the author or authors of the document therein. Article 2 further defines an advanced electronic signature as the electronic signature that allows the identification of the signatory and that has been created by means that give the author exclusive control and in such a way that it is linked only to the data which it refers, which allows for any subsequent alteration to be detected. The advanced electronic signature is different from the electronic signature in that the first allows two-party self-generated agreements, whereas the latter requires third party intervention. The electronic signature substitutes to the written signature will preserve the original purpose of the contract. However certifying such signatures will pose problems.

RDLFE Article 2 also provides that the provisions contained in the law do not alter the relative norms as to conclusion, formalization, validity, and efficacy of agreements and other legal acts, nor as to the legal system applicable to organizations. As to capacity, there are providers of certification services (RDLFE, Articles 4-7, 11-15) whose function will be essential. At this time it is necessary to emphasize that there is always a need to rely on the provider of certification services. For the time being there will be no changes in legal concepts because there is protection for the parties and there are well organized certifying services that can adequately protect the contracting parties.

Telecommunication problems do exist and include the inability to guarantee the authenticity of the sender and the receiver, the date and the day of the emission and the reception, and the confidentiality and integrity of the message. The telecommunications infrastructure must be improved. It is necessary to enact international and local rules and deal with cultural issues.

The legal problems confronting e-commerce are found in the area of formalities such as: writing, document, signature, agreement, certification services; and in legal security, dignity, free trade, secrecy of communications, privacy, use of privileged information, defense of consumers, and prevention and prosecution of the infraction.

There should be no limits to electronic transactions, except those pertinent to the given specific transaction. The first step must be the recognition

that there are electronic signatures and the second will be to establish guidelines for electronic signatures and for providers of certification services. The validity of electronic agreements depends on the certificate of electronic signatures and its attributes performed by the corresponding certification services. The validity of authorization or capacity to act depends on the private attributes encompassed in the certificate by registration and certification services.

It is essential to establish a general law of communications to regulate e-commerce. This Law, already in existence in Spain as well as in Europe, has as its main function to regulate and watch over the use of electronic signatures and coding techniques. Once these laws are decreed, there must be designated institutions to watch over the established system. In Spain this is done through the Ministries (Secretaries) of Public Works and Justice. It is possible to synthesize from past judicial history and thus, prepare for the future taking into account the present and the past.

Francisco Reyes

Colombia presents an interesting scenario at this time in the sphere of e-commerce because on August 18th, 1999, it enacted Law 527, which comprises most of the provisions of the United Nations Commission of International Trade Law (UNCITRAL). The first part of this presentation addresses the most important issues related to general principles and legal provisions applicable in Colombia, which could prove to be the greater obstacle as related to e-commerce. The second part addresses particular issues regulated by the recently enacted law, which should be of great interest to the participants in this Conference.

The general areas covered in this part include source of law, the law of agency and representation, conflict of law rules, and current electronic commercial practices. Colombian law derives from a civil law tradition that relies mostly on written sources with custom used only as a subsidiary source. E-commerce is extensively governed by the recent legal statute Law 527.

Under the law of agency and representation, in corporate matters legal representation is established according to the documents registered in the Mercantile Registry and the capacity to contract of the corporate officers is limited according to such registration. The conflict in this area could result from the difficulty of people transacting the contract to determine if the person signing is the legal representative and if person is duly registered.

The conflict of law rules are a crucial issue in terms of e-commerce because the approach in Colombia is very traditional in terms of choice of law and forum. Nevertheless, Colombia enacted an Arbitration Convention in 1996 that provides for a choice of forum.

The current commercial practices are not of a very broad scope. However, since 1995 when Colombia enacted its law of corporations, a provision to that specific statute was embraced that allowed deliberations and decisions of

shareholders, boards of directors, and committees to be carried out by electronic means. Colombia also has dematerialized securities deposits by which a simple digital registry allows for certificates to be deposited without any accompanying documents.

Pre-contractual negotiations are also common. Usually the parties involved in a contract prefer to use a document form at the time of concluding or signing the contract, but most of the advance negotiations are generally done through electronic media. Some acts or contracts are required to be in written form whereas others have to be granted in a public deed. There are public documents and private documents, and there is an authenticity presumption on behalf of all public documents granted before notary publics.

Since the enactment of the Commercial Code thirty years ago, it is possible to sign documents by mechanical means, and this is an important precedent as related to e-commerce. The traditional concept of contract is not to be considered as an obstacle for the purpose of e-commerce, as its principles are very broad. Legal principles include self-ruling determination, evidence, and good faith. The self-ruling determination principle allows private parties to freely govern their contractual relationships provided that they do so within the boundaries of imperative law. Freedom of form grants parties autonomy to decide on the solemnities by which they will express their will. The evidence rules provide that a lack of document is considered as circumstantial evidence that there is no obligation. The principle of good faith demands that any contract should be performed in good faith.

The legal restrictions to e-commerce include public deeds, public registries, and negotiable instruments. Public deeds include conveyance of real estate and corporate law. Non-compliance with the requirement of public deed determines the non-existence of the act or contract. Public registries apply to bankruptcy proceedings, commercial establishments, corporate financial books and records, and conveyance of automobile property rights. In each case, non-fulfillment of registration determines the non-enforceability vis-à-vis third parties.

The second part of this presentation concerns Law 527. Congress did not intervene much in its drafting because it actually enacted almost all of the provisions contained in the UNCITRAL. In terms of harmonization, following the UNCITRAL Model Law is very desirable because it is the only way that countries throughout the region will be able to understand each other, by adopting measures that are similar in scope and that can be easily understood. It is not a perfect situation because there are conflicts with provisions in Colombia's Civil Code and Commercial Code, and although not ideal, it still brings enabling provisions that allow for the assimilation of documents and signatures into the electronic media.

Law 527 also embodies the following legal principles: authenticity, integrity, writing and signature, and non-repudiation. Authenticity should provide legal presumptions for determining the sender. Integrity presumes that the message is the one sent by the originator. Non-repudiation will allow parties to

validate an act according to instructions provided by data messages. Moreover, any data message that is used will be considered sufficient evidence, and no judge will be able to deny legal effects to a contract or any legal transaction based on the lack of documentary evidence.

It is important to refer to some provisions in Colombian Law that pertain to digital signatures and certification authorities. There is a two level system of certification authorities: the lower is at the municipal level and the higher at the national level. Furthermore, a digital signature is not required for a contract to be valid by electronic means. Finally, the role of the notary will gradually diminish as the overwhelming reality of e-commerce sets in.

Octavio Rivera Farber

Almost fifty years ago, a professor of Philosophy of Law said that there is only one incontrovertible fact, the progress of science. Since that comment was made the world has been transformed at an unimaginable velocity. Among these transformations. the development of electronics and telecommunications seem to be the spinal cord of our immediate future.

Of course, this transformation affects each country differently according to its level. In the geographical area that affects Mexico, a frontier clearly defined by the English speaking countries to the north and the Spanish speaking to the south, e-commerce is a matter of two cultures and two levels of development. The uneven development of e-commerce makes Mexico particularly prone to suffer a disproportionate influence that can eventually go against the traditional and solid established principles of its legal systems. Mexico must be open to the new techniques and ideas and must try to adapt to them while always maintaining its legal culture and idiosyncrasy.

The international nature of e-commerce is of special importance because the globalization of commerce is an indisputable fact that has not only transformed business, but culture and politics as well. A few years ago there was an armed uprising in the south of Mexico that the government initially repressed, with all the might of the State using tanks, jets, and rockets. However, the rebels, by making very clever use of the Internet, sensitized world public opinion and forced the authorities to stop their violent push and to initiate a dialogue.

Given the innate international nature of e-commerce, it is important to coordinate efforts globally. It is indispensable for countries to avoid attempts to be the first to be instantly the most advanced. Countries must collaborate in order to find a common solution that will facilitate the use of e-commerce. If every country continues to legislate separately, the necessary unity in criteria and principles will be harder to achieve.

The answers to the questionnaire sent to us by the NLCIFT illustrate that the use of the Internet is incipient for several reasons. Regardless of the limited number of personal computers and the relatively high cost of the necessary

services to access Internet, either through Internet Service Provider (ISP) or through the telephone, e-commerce is growing. Mexico has experienced a very fast growth of telemarketing, without any indication that consumers are reluctant to give the credit card number.

In most occurrences, parties complete contracts by merely agreeing to an item and price, even without delivery or payment. Mexico has no problem accepting the existence and solidity of electronic agreements, the same as it did with agreements over the telephone, telex, and fax. Nevertheless, given the non-material nature of the electronic agreement, it is obvious that the problems surrounding e-commerce become more acute. The urgency in matters of certification, sometimes referred to as a reliable third party, becomes evident. Latin American countries introduced a long time ago in traditional commerce, and mostly in cases of special relevance, the need for state intervention by sanctioning those transactions through the Notary Public, an officer to whom the State delegates its trust. The absence of a comparable officer in non-Latin countries complicates matters, and to overcome this difficulty "cybernotaries" or "cryptonotaries" may need to be created.

In traditional commerce there is generally no need for a certification entity or the intervention of a third party. Only in limited cases, especially when the parties live in different countries, should a qualified third party intervene. This aspect of the certifying entity or reliable third party is one of the most important points on which we must harmonize the different positions. This task will merit the creation of a study group to meet periodically.

Scattered legislative efforts must be stopped, bills proposed by UNCITRAL and the European Commission must be carefully studied, and Latin America must, in unison, reach consensus on a Model Law that can be applied throughout the region and that will allow us the most uniform possible legislation.

Andre Vanyi-Robin

"We are in the midst of a real revolution, a revolution resulting from numbers such as one hundred million current users of Internet in the United States and seven million users in Latin America." The Internet has become the modus operandi in all fields of endeavor including enterprise, government, and academia, and has thus created a new economy. What are some of the problems that need to be overcome? In Latin America, as in all countries, the economy functions at two levels; that of corporations and that of consumers, with each sphere requiring different laws and a different judicial fabric.

There are many obstacles to overcome in e-commerce. Very necessary to its growth are consumer protection laws, such as the Lemon Laws in the United States. These laws enable the consumer to appeal if a product bought through the Internet is not satisfactory. These types of laws hardly exist in Latin America. So

it is not only digital signatures that should be of concern, but also the enactment of laws that will facilitate e-commerce.

E-commerce presents security issues as well. The Secured Exchange Transaction (SET) has been favored in Latin America by banks and governments to protect e-commerce. This entity identifies both parties to the transaction, the buyer and the seller, and authenticates the legitimacy of the transaction. In the United States the Secure Sockets Layer (SSL) has given great impulse to e-commerce. It identifies neither the buyer nor the seller, but it guarantees the security of the transaction.

However, things are somewhat different at the corporate level. SET facilitates these transactions, as companies will generally do business with other companies they are already familiar with through previous telephone or other means of communication. Nevertheless, in order to expand in this sphere of e-commerce the need for digital signatures is important. This need does not necessarily call only for the technique of transposing the biometric signature to electronic media, but it can make use of the offices of notaries or attorneys to create electronic credentials or identifications. This offers a great opportunity for notaries in Latin America to become e-commerce corporate agents.

All of the logistical hindrances to e-commerce are tied to the national postal service of each country, which has resulted in the growth of the United Parcel Service, Federal Express, and many other private companies that help to overcome the difficulties arising from e-commerce. Laws must be enacted in order to assure honesty and confidence in e-commerce. All the judicial aspects must be studied in order to keep enhancing e-commerce. The United States is the best example because the laws that protect e-commerce continue to evolve without government intervention, at least until recently.

It is anticipated that there will be thirty million users of the Internet in Latin America by the year 2003. In spite of economic discrepancies, these thirty million individuals represent great buying power. There are many different ways to stimulate e-commerce. For example, Telmex in Mexico has provided access to the Internet to many middle class individuals by providing them with computers to be paid in installments to the telephone company during a period of two to three years.

As e-commerce continues to grow, notaries will continue to play a role in the new digital economy. They will either become digital third-party validators or their traditional role will be emulated. Electronic contracts will become final and enforceable when the parties validate identification, and when they expressly offer and accept. In cases where acknowledgment of receipt is required by the originator, the contract is not considered to exist until that acknowledgement has been received. Uniform and unilateral adoption is the key guideline for e-commerce regulations, and an international convention on e-commerce in Latin America with government participation is necessary and inevitable.

In order for Latin America to reap the full benefits of e-commerce their governments must work toward common standards for recognition of electronic

documents and digital signatures as commercially binding and legally valid. These standards must be homogeneous within the region and correspond with internationally recognized standards. The Argentine Congress explicitly recognized this fact in the August Digital Signatures Law.

Benjamin Wright

It is important to first identify legal formalities, as well as their purposes and methods by which similar formalities or objectives can be attained in an electronic setting. A signature is an example of a legal formality, which has traditionally been hand-written on paper, that serves three purposes. The first is to warn the parties that something important is happening and that they are signing, most likely, an important document. The signature warns the signatory of the gravity of the undertaking and ensures a fair opportunity to read the words of the undertaking.

How does this idea translate into an electronic environment? The original hand written signature is a sort of ceremony or ritual that is understood at the intellectual level. A similar experience can take place in the electronic media except that little thought has been given to it in this area. An example of one of several technologies that capture an electronic digital signature is called Penop.com. The example presents a sample contract set up at the point where the buyer is ready to sign the agreement. First buyer has to click a little red icon indicating he is ready to sign; in other words, he has to do something. Then a large box will open in front of him, dominating the screen; this box requests identification of buyer and his purpose. Finally, the person has to click on a box that says "sign." A larger box opens showing a signature line, a place traditionally used to sign, and this is where the buyer enters the signature. This, in effect, is a digital tablet attached to the person's computer where the buyer will enter his signature with a stylus (digital pen).

A second purpose of the signature as a legal formality is the creation of evidence that can be called upon later as a record of what took place. Evidence of identity and integrity is very important. Evidence of the context of the transaction can be just as important, and this can be recorded at the time that the electronic or digital signature is entered as well. The classic method of public key infrastructure (PKI) embraces the idea that the real purpose of an electronic signature is to confirm the identity of a person. It is therefore wrong to equate the PKI signature with the handwritten legal signature, as the first does not warn of the gravity of the document being signed or that the signer had a fair opportunity to review the words of the document. Signature systems that emphasize identification are a threat to privacy and there are possible ways in which PKI can be used to support signatures.

The third purpose that the signature performs is a legal formality to protect weaker parties against the power of stronger parties. A classic example

would be the need to protect a consumer against the power of a larger institution such as a bank or a corporation. In the United States, the Uniform Electronic Transaction's Act (UETA) was recently published. There is also federal legislation pending to promote the use of e-commerce.

The last few months have brought evidence that consumer advocates are starting to voice their concerns about methods by which electronic transactions will be enforced against consumers. An example is section 8C of the Uniform Electronic Transaction Act which establishes that when someone sends a transaction, if the institution to which it was sent makes it difficult for the consumer to store or record the transaction, the transaction cannot be forced against the consumer. This protection encourages the ability of weaker parties to be able to record and prove transactions later in court. This theme will become stronger and more elaborate, so that it will establish that when a consumer signs a transaction he should also be given his digital signature as a record; in other words, the equivalent to a written copy.

In conclusion, whatever type of technique will be used in electronic signatures there will always be a need for a signing ceremony warning the signer of what is occurring, providing a record or transcript, and finally a requirement ensuring that the consumer gets back a copy, either in paper or in electronic form, of the document that was signed with his signature. Policymakers should wait until theories on signature technology have actually been adopted in practice before enshrining them in new laws.

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