

PHILIPPINE ELECTRONIC CONTRACTING

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I. INTRODUCTION

Cyberspace has evolved to such an extent that it is now widely accepted as a virtual marketplace. Online transactions have changed the way private individuals and businesses enter into contracts. Offers and advertisements, acceptance, and payment can be completed via keystroke or a click of the mouse.

Although the Philippines has passed the Electronic Commerce Act of 2000 (“E-Commerce Act”), the primary governing law in the Philippines for contracts is still the Civil Code of the Philippines (“Civil Code”), whose drafters never contemplated online transactions.¹ Without more specific and current legislation, there is a need to “translate” the Civil Code in the context of online transactions. Further, the E-Commerce Act by itself remains unable to fully address all the issues raised by the practice of electronic contracts or commercial communications. This latter point is better illustrated by examining international instruments such as the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures, and the United Nations (UN) Convention on the Use of Electronic Communication in International Contracts.

II. E-COMMERCE ACT

A. Philippine Contract Law

It has been said that the objective of the E-Commerce Act is to legalize electronic contracts and transactions. However, as explained below, electronic contracts were never invalid under Philippine law in the first place; these already would have been accommodated under the Civil Code.

The Civil Code adheres to the spiritual system where contracts are valid if made in any way that indicates the party wished to be bound. Article 1356 of the Civil Code states that a “[c]ontract shall be obligatory, in whatever form they may have been

¹ The Civil Code of the Philippines (also known as Republic Act No. 386) was enacted in 1949.

entered into, provided all the essential requisites for their validity are present.” On the basis of the foregoing, the Supreme Court of the Philippines (“Supreme Court”) has repeatedly upheld the validity of contracts proven solely by testimonial evidence.² Hence, as a general rule, a contract under Philippine law will be valid in whatever form it may be found, whether it be oral, paper-based or for that matter, electronic.

B. Recognition of Electronic Contracts

There is also some basis to say that Philippine law also recognized electronic contracts that were validly executed overseas even before the passage of the E-Commerce Act. Article 17 of the Civil Code provides that the forms and solemnities of contracts shall be governed by the laws of the country where the contract was executed. By this express codal provision, the Philippines follows the *lex loci contractus* rule insofar as the formal validity of contracts is concerned. In this regard, the Supreme Court has had occasion to rule that a power of attorney executed in Germany must be tested as to its formal validity by the laws of Germany, and not the Civil Code.³

Such a case is an example of a situation when extrinsic validity and intrinsic validity may be governed by different legal regimes. Extrinsic validity of a contract refers to formalities and solemnities which must be followed under the law, while intrinsic validity refers to the legality of the contract. Thus, pursuant to Article 17 of the Civil Code, if the law where the electronic contract was entered into recognizes such form of agreements, those electronic agreements are extrinsically valid in the Philippines. Assuming further that such agreements are also intrinsically valid under Philippine law, then those electronic contracts would be valid in all respects under Philippine law.

In light of this conclusion, as well as the argument that electronic contracts executed in the Philippines were not prohibited under prior law, some were of the view that Philippine law did not need any new legislation to accommodate electronic commerce. Any issue respecting the applicability of existing law to electronic documents and signatures could be properly resolved by the courts, as cases on electronic commerce come before them. However, the limitations of the judicial system, if taken into account, would not have been able to create a stable legal environment necessary for the growth of electronic commerce. In fact, inconsistent or irrational rulings may even have a destabilizing effect and inadvertently lead to a

² J.M. DISINI, JR., *THE ELECTRONIC COMMERCE ACT/THE RULES ON ELECTRONIC EVIDENCE: COMMENTS AND ANNOTATIONS* (2nd ed., 2001) 78; *citing* Thunga Chui v. Que Bentec, 2 Phil. 561; Alcantara v. Alineo, 8 Phil. 111; Peterson v. Azada, 8 Phil. 432.

³ *Id.* at 78; *citing* German & Co. v. Donaldson, Sim & Co., 1 Phil. 63 (1901).

decline in electronic commerce. These issues have, of course, become moot and academic with the passage of the Act.

C. Validity of Electronic Contracts

The statutory recognition and definition of “electronic contracts” under the E-Commerce Act are established by Section 16(1), which states:

Except as otherwise agreed by the parties, an offer, the acceptance of an offer and such other elements required under existing laws for the formation of contracts may be expressed in, demonstrated and proved by means of electronic data messages or electronic documents and no contract shall be denied validity or enforceability on the sole ground that it is in the form of an electronic data message or electronic document, or that any or all of the elements required under existing laws for the formation of contracts is expressed, demonstrated and proved by means of electronic data messages or electronic documents.

Section 16(1) explicitly validates electronic contracts under Philippine law without supplanting substantive rules on contracting. The E-Commerce Act does not amend the law on contracts but merely allows the requisite elements of offer and acceptance, or its external manifestations, to be expressed in electronic form. It should be emphasized that the E-Commerce Act covers not merely the cases in which both the offer and acceptance are communicated orally, but also cases in which only the offer or only the acceptance is electronically communicated.⁴ For example, based on this provision, e-mail acceptance to a handwritten offer can be used as basis to prove the existence of a contract.

D. Freedom to Opt Out

The opening phrase used in Section 16(1)—“[e]xcept otherwise agreed by the parties”—is intended to reinforce party autonomy and to make it clear that the law is not intended to impose electronic contracting upon those who insist upon paper-based communications if they so stipulate. This idea is also expressed in Section 9 of the Implementing Rules to the E-Commerce Act (“IRR”).⁵

⁴ DISINI, *supra* note 3, at 79, citing ¶ 78, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment. As such, common forms of e-commerce contracting mechanisms such as clickwrap agreements would be covered under Section 16(1).

⁵ § 9 of the Implementing Rules to the E-Commerce Act states: “Section 9. Use Not Mandatory. - Without prejudice to the application of Section 27 of the Act and Section 37 of these Rules, nothing in the Act or these Rules requires a person to use or accept information contained in electronic data messages,

E. Contract Law – Intrinsic Validity

As earlier explained, nothing in the provisions of the E-Commerce Act or its IRR should be deemed to have amended the law on contracts insofar as intrinsic validity is concerned. Contracts are either valid or invalid based on the existing Civil Code provisions on Obligations and Contracts, as well as other related statutes. In addition, illegal stipulations such as *pactum commissorium*,⁶ and other covenants contrary to law, morals, public order or public policy will receive equal treatment even though appearing in an electronic document. Again, the E-Commerce Act intends only to amend the law with respect to the form of documents and transactions, not their intrinsic validity.

III. INTERNATIONAL MODELS AND INSTRUMENTS

The UNCITRAL has drafted two model laws on e-commerce. This section will explain whether the E-Commerce Act is consistent with these model laws, how they differ from each other, and how this may affect electronic contracts in the Philippines.

Model laws provide a uniform set of rules in order to facilitate efficiency in transactions among the members of United Nations. Model laws constitute a new step in a series of international instruments adopted by UNCITRAL, which are either specifically focused on the needs of electronic commerce or were prepared bearing in mind the needs of modern means of communication. However, although model laws are entered into to bind signatory member countries, their persuasiveness and binding authority are also limited, as they might conflict with local laws.

A. UNCITRAL Model Law on Electronic Commerce 1996

Date of adoption: June 12, 1996

Date of amendment: June 1998

The Model Law on Electronic Commerce (“MLEC”) was enacted in order to enable and facilitate commerce with the use of electronic means by providing legislators with a set of internationally acceptable rules that remove legal obstacles and provide legal stability.⁷

electronic documents, or electronic signatures, but a person's consent to do so may be inferred from the person's conduct.”

⁶ The automatic appropriation by the creditor of a thing, mortgaged upon the failure of the debtor to pay the principal obligation. See Art. 2088, Civil Code of the Philippines.

⁷ See UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998, available at http://www.uncitral.org/pdf/english/texts/electcom/V1504118_Ebook.pdf (last accessed Oct. 1, 2018).

The MLEC embodies three fundamental principles of modern electronic commerce law.⁸ First, the principle of non-discrimination, which provides that an electronic document will not be denied legal effect, validity, and enforcement based solely on the fact that it was executed through electronic means. This principle is seen in Articles 5, 9(1)(a), 11(1), and 12.

Second, the principle of technological neutrality requires that States should adopt provisions that are neutral to the technology used in order to maintain the statutes' relevance despite the rapid change in technology.

Third, the principle of functional equivalence provides for the standards that would allow electronic communications to be considered equivalent to paper-based communications. Article 8(1) of MLEC requires that an electronic message be presented as the original form if there is a reliable assurance as to the integrity of the information stored in said message, and that a person to whom it is to be presented would be able to identify the information. For the assurance of the integrity of the information, Article 8(3)(a) requires that the information must remain complete and unaltered. Meanwhile, for the standard of reliability, Article 8(3)(b) provides that the purpose for which the information was generated and all relevant circumstances be taken into consideration.

Aside from the embodied principles discussed above, MLEC also provides rules for the formation, validity, enforcement, and interpretation of electronic contracts, and for admissibility and evidentiary weight. These rules help facilitate international commerce by providing a common ground among the states.

B. UNCITRAL Model Law on Electronic Signatures 2001

Date of adoption: July 5, 2001

The Model Law on Electronic Signatures (“MLES”) was enacted to address the increased use of electronic authentication techniques used in place of handwritten signatures and other traditional authentication methods. The former can lead to uncertainty as to the legal effect that may result from it, thus a specific legal framework was needed. MLES aims to enable and facilitate the use of electronic signatures by establishing criteria of technical reliability for the equivalence between electronic and handwritten signatures, specifically those used in commercial transactions. This may

⁸ “The MLEC was the first legislative text to adopt the fundamental principles of non-discrimination, technological neutrality and functional equivalence that are widely regarded as the founding elements of modern electronic commerce law.” UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998, *available at* https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce (last accessed Nov. 11, 2019).

assist states in addressing the issue as to the legal treatment and status of electronic signatures. MLES also establishes basic rules of conduct which may serve as a guide in assessing duties and liabilities for the signatory, the relying party, and third parties involved in the signature process.⁹ It also favors the recognition of foreign certificates and electronic signatures based on the principle of substantive equivalence, regardless of the place of origin of the foreign signature.¹⁰

IV. COMPARISON WITH THE E-COMMERCE ACT

The very purpose of the MLEC and MLES is to promote commerce through electronic means and to facilitate the use of electronic signatures. This is why they put in place a set of standards and criteria which may universally govern electronic commercial transactions. However, the E-Commerce Act expands their scope of application and imposes additional requirements and standards which may impede e-commerce rather than uphold the purpose of the Model Laws. A comparison of pertinent provisions in the Model Laws and the E-Commerce Act is provided below.

A. Scope of Application

Many believe that the E-Commerce Act is intended to apply only to commercial transactions between private persons. However, unlike the MLEC and MLES, the E-Commerce Act also applies to electronic data messages or electronic documents used in non-commercial activities.¹¹

B. Definition of Electronic Signatures

In order not to suggest any technical limitation regarding the method that could be used by a signatory to perform the functional equivalent of a handwritten signature, flexible wording under the MLES was used, thus:

“Electronic Signature” means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory’s approval of the information contained in the data message.¹²

⁹ UNCITRAL Model Law on Electronic Signatures, arts. 8 and 9.

¹⁰ UNCITRAL Model Law on Electronic Signatures, art. 12.

¹¹ Rep. Act No. 8792 (2000), § 4.

¹² UNCITRAL Model Law on Electronic Signatures, art. 2(a).

The definition under the E-Commerce Act, however, is less clear:

Any distinctive mark, characteristic and/or sound in electronic form, representing the identity of a person and attached to or logically associated with the electronic data message or any methodology or procedures employed by a person and executed or adopted by such person with the intention of authenticating or approving an electronic document.¹³

From the text of the provision alone, the “methodology” or the “procedure” is not qualified by the phrase “in electronic form,” giving the impression that other kinds of signatures need not be in electronic form. The definition under the E-Commerce Act should then be simplified, preferably aligned with (if not incorporating in whole) the definition adopted under the subsequently enacted MLES, as to align the E-Commerce Act with the more widely-adopted classification.

C. Recognition of Electronic Signature

One of the requirements of recognizing electronic signatures is that a method is used to identify the signing party and to indicate his approval to the information contained in the electronic message. Both the MLES and the E-Commerce Act state that such method must be reliable and appropriate for the purpose for which the electronic data message or document was executed.¹⁴ But the E-Commerce Act adds the following in its provisions:

- (c) It is necessary for the party sought to be bound, in or order to proceed further with the transaction, to have executed or provided the electronic signature; and
- (d) The other party is authorized and enabled to verify the electronic signature and to make the decision to proceed with the transaction authenticated by the same.¹⁵

D. Formation and Validity of Contracts

The following is embodied in Article 11 of the MLEC regarding the communication of data messages in relation to the formation and validity of contracts:

¹³ Rep. Act No. 8792 (2000), § 5(d).

¹⁴ UNCITRAL Model Law on Electronic Commerce, art. 6; *See also* Rep. Act No. 8792 (2000), § 8.

¹⁵ Rep. Act No. 8792 (2000), § 8.

In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

A similar provision is found in the E-Commerce Act. However, the coverage is expanded under the E-Commerce Act. Section 16 of the E-Commerce Act:

Except as otherwise agreed by the parties, an offer, the acceptance of an offer and such other elements required under existing laws for the formation of contracts may be expressed in, demonstrated and proved by means of electronic data messages or electronic documents and no contract shall be denied validity or enforceability on the sole ground that it is in the form of an electronic data message or electronic document, or that any or all of the elements required under existing laws for the formation of contracts is expressed, demonstrated and proved by means of electronic data messages or electronic documents.¹⁶

E. Acknowledgement and Time of Receipt

As regards the acknowledgment of receipt of the electronic documents, Section 20 of the E-Commerce Act essentially reproduced Article 14, paragraphs (1) to (4) of the MLEC, but omitted paragraphs (5) to (7).

On the time of receipt of electronic documents, Article 15(2)(a)(i) of the MLEC provides that:

Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

- (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
 - (i) at the time when the data message enters the designated information system.

On the other hand, Sec. 22(a) of the E-Commerce Act qualifies such provision, stating that:

¹⁶ Rep. Act No. 8792 (2000), § 16.

Unless otherwise agreed between the originator and the addressee, the time of receipt of an electronic data message or electronic document is as follows:

- a.) If the addressee has designated an information system for the purpose of receiving electronic data message or electronic document, receipt occurs at the time when the electronic data message or electronic document enters the designated information system: Provided, however, that if the originator and the addressee are both participants in the designated information system, receipt occurs at the time when the electronic data message or electronic document is retrieved by the addressee[.]

Due to this provision, the time of receipt of the document shall be placed when the electronic document is retrieved by the addressee, but only when both parties use the designated information system.

V. UNCITRAL CONVENTION ON ELECTRONIC CONTRACTING

As discussed in Philippine jurisprudence, international agreements¹⁷ may take different forms including treaty, act, protocol, agreement, covenant, declaration, exchange of notes, and memorandum of agreement, to name a few.¹⁸ Regardless of form, however, all international agreements, once properly ratified, either through congressional or presidential action,¹⁹ becomes valid and binding in the Philippines following the principle of *pacta sunt servanda*. Unlike the Model Laws which could, at most, only have persuasive effect, international agreements bind the contracting parties ensuring the implementation of the provisions under these agreements.

A. United Nations Convention on the Use of Electronic Communication in International Contracts

Date of adoption: November 23, 2005

Entry into force: March 1, 2013

The United Nations Convention on the Use of Electronic Communication on International Contracts is one of the more important international agreements related

¹⁷ Please note that the term “international agreements” are being used loosely to include all kinds of agreements between countries. This should not be confused with “international agreements” as used in Section 21, Article VII of the 1987 Philippine Constitution. It should be noted that the said term as used in Section 21, based on the discussion found in the case of Rene A.V. Saguisag, et al. vs. Executive Secretary Paquito N. Ochoa, Jr., et al. (G.R. No. 212426, January 12, 2016), does not include executive agreements.

¹⁸ Saguisag v. Executive Secretary, G.R. No. 212426, January 12, 2016.

¹⁹ See Executive Order No. 459, November 25, 1997.

to electronic contracting which the Philippines has signed. However, although the Philippines signed the Convention on September 25, 2007, it has not yet expressed its ratification, accession, approval, acceptance, or succession of such; thus, it is not a party to the convention. Currently, there are 15 Contracting Parties, namely, Azerbaijan, Bahrain, Benin, Cameroon, Congo, Dominican Republic, Fiji, Honduras, Kiribati, Mongolia, Montenegro, Paraguay, Russian Federation, Singapore, and Sri Lanka.²¹

At this point, it is useful to inquire whether the Convention contains provisions that may ultimately enhance the implementation of the E-Commerce Act, especially in areas where the E-Commerce Act is seemingly inconsistent with the UNCITRAL Model Laws.

B. Scope of Application

The Convention does not explicitly state that it only applies to commercial transactions in contrast with the Model Laws. Instead, it states that it is applicable to the use of electronic communications, in connection with the formation or performance of contracts between parties whose places of business are in different States.²³ In a similar vein, the E-Commerce Act applies to “any kind of data message and electronic document used in the context of commercial and non-commercial activities[,]”²⁴ instead of being confined only to commercial transactions. It should be noted, however, that unlike in the E-Commerce Act, the Convention also excludes from its scope contracts concluded for personal purposes and transactions on a regulated exchange.²⁵ Simply put, despite the fact that the scope of application of the Convention is greater than the Model Laws, the E-Commerce Act still has a wider scope compared to the Convention.

C. Electronic Signatures

The Convention does not have any provision regarding electronic signatures, and the authentication or recognition thereof. Despite this, it provides similar provisions on the method of recognition of electronic signatures contained in the

²¹ See Status: United Nations Convention on the Use of Electronic Communication in International Contracts, available at https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications/status (last accessed May 4, 2021).

²³ UNCITRAL Convention on the Use of Electronic Communication in International Contracts, art. 1,

²⁴ Rep. Act No. 8792 (2000), § 4.

²⁵ UNCITRAL Convention on the Use of Electronic Communication in International Contracts, art. 2.

Model Laws, but in the context of form requirements in electronic communications or contracts. This is found in Article 9(3):

3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:
 - (a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and
 - (b) The method used is either:
 - (i) 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; or
 - (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

Subparagraphs (a) and (b)(i) are likewise found in Section 8 of the E-Commerce Act, likely owing to their shared provenance under the Model Laws. However, the E-Commerce Act additionally requires that electronic signature be recognized that “it is necessary for the party sought to be bound [...] to have executed or provided the electronic signature,” and that “the other party is authorized and enabled to verify the electronic signature and to make the decision to proceed with the transaction authenticated by the same.” These additional requisites provide more opportunities to dispute an electronic signature under the E-Commerce Act than they would under the Convention.

D. Formation and Validity of Contracts

There are also no provisions similar to those provided for in the Model Laws with respect to offer and acceptance in the context of the formation of contracts; but the Convention defines “communication” as “any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract.”²⁶

²⁶ UNCITRAL Convention on the Use of Electronic Communication in International Contracts, art. 4(a).

E. Time of Receipt of Electronic Communications

Article 10(2) of the Convention states that:

The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

As stated, due to Section 22 of the E-Commerce Act, the time of receipt of the document shall be placed when the electronic document is retrieved by the addressee, but only when both parties use the designated information system. The said provision has an additional qualification when compared with the provision of the Convention.

VI. CONCLUSION

A review of the applicable laws governing Philippine Electronic Contracting shows that even before the enactment of the E-Commerce Act, electronic contracts can already be considered as valid and binding. However, as noted, the benefits of the E-Commerce Act is that its enactment was able to provide a foundation for the creation of a stable legal environment necessary for the growth of electronic commerce - something that would have been difficult without a law which focuses on it.

Although admittedly we are now reaping the benefits of the enactment of the E-Commerce Act, comparing the provisions of the E-Commerce Act with the international instruments, like the Model laws and the UN Convention on the Use of Electronic Communication in International Contracts, shows that the E-Commerce Act has more requirements or qualifications, if not more stringent, than the former. Although this does not mean that the E-Commerce Act provisions are completely in conflict with its international counterparts, the legal regime that the E-Commerce Act results in could be improved to be more consistent with international practice. It remains possible that the Philippines would update the E-Commerce Act itself to the extent of textually adopting specific provisions of the Convention or other international instruments as part of the updated statute. Yet, the same legislative process could also integrate additional requisites or decline to incorporate other provisions, thus possibly negating the "efficiency through uniformity" that the Convention, and other international instruments, had sought to achieve.