

E-Commerce in the CAREC Region: Laws and Policies

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Overview

- ▶ Nature of electronic communications
- ▶ Global solutions
 - ▶ Removing the barriers: UNCITRAL
 - ▶ Regulating the rest
- ▶ Role of private sector in e-commerce: does it need law reform?
- ▶ International commercial and trade initiatives
- ▶ Agendas for CAREC member states

Electronic communications in general

- ▶ What is the problem with electronic communications?
 - ▶ Results are subject to manipulation and deterioration
 - ▶ Everything is done by bits and bytes, codes
 - ▶ Altered states may be hard to distinguish from originals
 - ▶ Information requires computing device to display - risk of error
- ▶ Traditional laws use words that do not readily apply to information in digital form, e.g. writing, signature, original
 - ▶ These laws are barriers to use of e-communications

Law reform - phase 1

- ▶ Removing the barriers - UN Commission on International Trade Law (UNCITRAL)
 - ▶ Model Law on Electronic Commerce - MLEC (1996)
 - ▶ Model Law on Electronic Signatures - MLES (2001)
 - ▶ UN Convention on the use of Electronic Communications in International Contracts (**Electronic Communications Convention, or ECC**) (2005)
 - ▶ Model Law on Transferable Electronic Records - MLETR (2017)
- ▶ Nearly 80 countries have implemented all or part of the MLEC
- ▶ Fewer have implemented all or part of the MLES
- ▶ Some CAREC members have implemented some parts of MLEC
- ▶ One CAREC member has adopted the ECC (AZE)

UNCITRAL principles

- ▶ The UNCITRAL texts are all built on the same principles:
 - ▶ **Functional equivalence:** electronic information is not the same as information on paper but should be legally effective if it can perform the same policy function as its paper equivalent.
 - ▶ **Technology neutrality:** the law should not specify what technology e-communications must use to serve as functionally equivalent to paper-based information.
 - ▶ **Media neutrality/non-discrimination:** the law should give equal effect to information on paper and in electronic form.
 - ▶ **Minimalism:** law reform deals only with the impact of new media and does not otherwise affect substantive legal rules.

Law Reform phase 2

- ▶ More than minimal change is desirable.
- ▶ **Privacy** - the key principle is informed consent of the individual
 - ▶ The global standard is Organization on Economic Cooperation and Development (OECD) Guidelines and Council of Europe Convention to implement the Guidelines
- ▶ **Cybercrime** - the key principles ban unauthorized access to data and harming data (malware)
 - ▶ The global standard is the Council of Europe (Budapest) Convention
- ▶ **Consumer protection** - the key principles are timely information about e-transactions and the ability to remedy error or wrongdoing.
 - ▶ The global standard is UN Guidelines for online consumer protection

A CAREC Agenda - Background

- ▶ **Legislation and regulations are only one element of electronic commerce:**
 - ▶ Economic development: computers, infrastructure, innovation & rewards
 - ▶ Cultural views: risk tolerance, doing business with strangers, comfort with immaterial things
- ▶ **Self-regulation vs state regulation**
 - ▶ Initiative vs need to control
 - ▶ Competence to choose vs hand-holding
 - ▶ Private interests vs public policy
- ▶ **State capacity to regulate**
 - ▶ Accrediting and disciplining certification service providers
 - ▶ Overseeing best privacy practices, enforcement
 - ▶ Investigating and prosecuting cyber-crime (domestic & international)
 - ▶ Offering consumer protection directly, creating liability regime, dispute resolution

Law Reform and the Private Sector

- ▶ To some extent, businesses can make their own rules:
 - ▶ Through B2B contracts (“trading partner agreements”)
 - ▶ Through flexible interpretation of existing laws
- ▶ Law reform needs to fill gaps, protect parties or non-parties from new risks
 - ▶ Risk to the parties themselves - ability to make good decisions in novel areas - competence? freedom to fail?
 - ▶ Risk to others - exposing others (B2B, B2C) to fraud or mistake - competence and honesty
 - ▶ Risk to public policy - how much uncertainty can government tolerate? How much business failure should be allowed? Cost to the economy? To the state?

Note on risk: Different parties and different states will have different tolerance for risk. Risk tolerance is a policy question, not a technical one.

Law reform is risk management.

The law should leave room for uses of devices, codes, platforms

Law reform: the key issues

- ▶ **Electronic transactions**
- ▶ Do e-documents need to be validated by e-signatures?
- ▶ Do all e-signatures need to be “secure”, generated by cryptography and supported by certificate?
 - ▶ And state role in certificate issue and management?
- ▶ Best practice: maximize room for private choice for transactions.
- ▶ **Privacy:** maintain the best, bring others up to standard
 - ▶ Need to decide how much state enforcement is possible
- ▶ **Cybercrime:** Most CAREC states seem to have the essential provisions
 - ▶ Enforcement? International cooperation
- ▶ **Consumer protection:** Helpful if legislation builds consumer trust
 - ▶ Enforcement can include international cooperation

Recommendations: domestic

Reform needed	Countries	Discussion
Adopt UN ECC for domestic law	All	Models of domestic ECC laws in Singapore, Australia, Canada (Uniform Act)
Maximize and harmonize ability to use simple e-signatures	All	Some have some flexibility but none enough.
Harmonize certification process for digital signatures	All	Is one country's model working best? State supervision needed but not necessarily state monopoly.
Harmonize cybercrime legislation with international standards	All	CAREC members are largely consistent on this point. Consider the states' capacity to enforce.

Recommendations: domestic (2)

Reform needed	Countries	Discussion
Enact modern privacy legislation	PAK, TKM	Consider the states' capacity to enforce.
Enact modern consumer protection legislation	GEO, KAZ, KGZ, MON, PAK, TAJ, TKM	Consider the states' capacity to enforce.
Establish framework for electronic payments.	PAK,UZB	All members have something in place, with exception of PAK and UZB .

International Instruments

Law reform may have recourse to international texts of different kinds

- ▶ as inspiration for domestic legislation
- ▶ to govern cross-border trade

- ▶ **Agreements to facilitate e-communications**
 - ▶ ESCAP Framework Agreement on Facilitation of Cross-border Paperless Trade (no standard to meet to join; can come in at any level)
 - ▶ World Trade Organization Trade Facilitation Agreement

- ▶ **Agreements on substantial law that expressly or impliedly allows e-comms**
 - ▶ Convention on the International Sale of Goods (CISG)
 - ▶ CMR Convention (on the contract for the international carriage of goods by road), similar convention on rail transport

International Instruments (2)

- ▶ **Instruments of general application**
 - ▶ UNCITRAL texts
 - ▶ UN Centre for Trade Facilitation (CEFACT) guidelines
 - ▶ International Standards Organization (ISO) standards

- ▶ **Regional trade agreements (European Union, Eurasian Economic Union)**

- ▶ **Bilateral or multilateral special purpose agreements**

International instruments in CAREC

Instrument	Type/scope	CAREC members as parties
UNCITRAL Electronic Communications Convention (ECC)	Global	AZE (Recommend: ALL for domestic & international)
ESCAP Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia-Pacific (FA CPT)	Regional	AZE, PRC (Recommend: ALL)
Convention on the International Sale of Goods (CISG)	Global	AZE, GEO, KGZ, MON, PRC, UZB (Recommend: ALL)
World Trade Organization Trade Facilitation Agreement (WTO TFA)	Global	AFG, GEO, KAZ, KGZ, MON, PAK, PRC, TAJ
Revised Kyoto Customs Convention	Global	AZE, KAZ, MON, PRC (UZB upcoming)
Council of Europe (Budapest) Cybercrime Convention	Global	AZE, GEO
TIR Convention (has an electronic supplement)	Global	AFG, AZE, GEO, KAZ, KGZ, MON, PAK, PRC, TAJ, TKM, UZB
others for specific areas of trade	Global/ regional	See draft report. Some may authorize e-documents even if general law does not.

General law reform advice

- ▶ Facilitating law reform - advice for all countries:
 - ▶ Dedicated multi-ministry task force with support at the highest levels
 - ▶ Some variant of this group should have private-sector representation
 - ▶ Need for coordination of legal advice across government
 - ▶ All parts of government and other players need the right and capacity to communicate electronically
 - ▶ Replicate national work on international plane, and coordinate the two levels.
 - ▶ Work closely with ESCAP technical and legal working groups, if not already doing so.

Appendix: technology neutrality

IN FAVOUR OF TECHNOLOGY NEUTRALITY

- ▶ E-signatures can be flexible, serving the commercial and security needs of the transacting parties.
- ▶ The state need not be involved in prescribing technology that is bound to change over time (or have laws that require outdated technology.)

IN FAVOUR OF TECHNOLOGY SPECIFICITY (DIGITAL SIGNATURES)

- ▶ Many transacting parties, whether businesses or individuals, do not have the capacity to judge the reliability of an e-signing technology or e-document, so having the law prescribe how to do it gives them more trust in the system.
- ▶ The business operations and best practices of a certification service provider are by now well-known and can be put into legislation or regulation in consistent ways.

Appendix: technology neutrality (2)

IN FAVOUR OF A “HYBRID” LAW WITH ELEMENTS OF BOTH SYSTEMS

- ▶ Some parties do not need the full PKI (public key infrastructure) treatment and find it expensive and difficult.
- ▶ Some transactions do not justify the expense of using digital signature technology and the services of a trusted third party.
- ▶ On the other hand, some communications are particularly important (those with public officials, for example, or those in very high-value transactions) and require more assurance of authenticity than a routine commercial deal.

See Q. Abbas, “E-commerce Research Findings and Feasible Policy Options for CAREC Countries” *Virtual Policy Workshop on “Regulatory Framework for E-Commerce Development in CAREC”* (May 28, 2020)

Questions?

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