Workshop: Cross-border Legal Recognition and Technical Interoperability of Trust Services

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Legal mechanisms for cross-border recognition of electronic signatures and other trust services

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Which laws are relevant for digital trade?

- Digital trade law is made of various components:
  - E-transactions and e-signatures
  - Data privacy and protection
  - Cybercrime
  - Consumer protection
- Payments and intellectual property rights are also relevant
- Treaties and model laws promote legal harmonisation

E-transactions and e-signatures law

- Foundational law that provides legal recognition to electronic transactions and removes obstacles to their use
- Applies to all types of electronic transactions, such as: e-mails; instant messaging; SMS; websites
- Does not require any enforcing authority
- More than 80% of the States have it
    - Source: UNCTAD cyberlaw tracker
- Global model: UNCITRAL
  - Technology-neutral to promote interoperability
  - Does not amend existing law
  - Favors integration

UNCITRAL and digital trade law

- UNCITRAL is the core legal body of the United Nations system in the field of commercial law
- It is tasked with modernizing and harmonizing international business rules by drafting treaties and model laws
- Has operated for 50+ years based on universal membership
- UNCITRAL started working on legal aspects of electronic commerce already in the 1980s
- UNCITRAL texts on digital trade (e-commerce) have been enacted in more than 100 States
- Texts, status, preparatory and explanatory materials are available on the UNCITRAL website

UNCITRAL texts on electronic commerce

- UNCITRAL Model Law on Electronic Commerce, 1996 (MLEC)
  - Enacted in over 80 States
- UNCITRAL Model Law on Electronic Signatures, 2001 (MLES)
  - Enacted in about 40 States
- United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (ECC or Electronic Communications Convention)
  - 18 States parties
  - 20+ States have enacted domestically its provisions
- UNCITRAL Model Law on Electronic Transferable Records, 2017 (MLETR)
  - Enacted in 7 jurisdictions
- UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services, 2022 (MLIT)

UNCITRAL approaches to cross-border recognition

- In UNCITRAL texts, legal effect is attributed to the use of reliable methods in achieving certain functions
- The determination of the reliability of the method depends on technical means and standards
  - It does not need to change with the location where the method is used
  - This paves the way to cross-border recognition
  - However, some States prefer to require reciprocity

UNCITRAL approaches to cross-border recognition

- The reliability of the method may be assessed before (ex ante) or after (ex post) its use
- Ex ante gives more predictability as the legal effect of listed methods and services is set in the law
  - However, it may limit the choice of methods and services, and violate technological neutrality
- Ex post gives more flexibility
  - However, it may delay confirmation of legal effect until after litigation
- In practice, B2B exchanges are mostly assessed ex post, while B2G and G2G exchanges are often assessed ex ante
- If a State requires exclusively the use of national methods (ex ante), cross-border recognition is impossible

The UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services

- Adopted in July 2022
- Gives legal effect to identity management and trust services, including across borders
- Refers on use in commercial activities and trade-related services
  - May be used also in non-commercial contexts
- Has enabling, not regulatory nature
  - Use of IdM and trust services is voluntary
  - No new obligation to identify or to use a particular IdM or trust service
- Does not affect any other law, including data privacy and protection law

The MLIT: Identity Management (IdM)

- Identity is a set of attributes that uniquely distinguishes aphysical or legal person in a particular context
- Identity management is made of identity proofing and electronic identification
  - Identity proofing is “the process of collecting, verifying, and validating sufficient attributes to define and confirm the identity of a person within a particular context”
  - Electronic identification is “a process used to achieve sufficient assurance in the binding between a person and an identity”
- Legal recognition of the result of electronic identification

The MLIT: reliability in IdM methods

- The method used for electronic identification must be reliable
- Two-tier approach to determine reliability:
  - Ex post (after use):
    - Open-ended list of relevant circumstances
  - Ex ante (before use)
    - Designation of reliable IdM services

The MLIT: trust services

- A trust service is an electronic service that provides assurance of certain qualities of a data message
  - "who, what, when, where, and why of data"
  - List of trust services is open-ended
    - Named trust services: electronic signatures, electronic seals, electronic time stamps, website authentication, electronic archiving and electronic registered delivery services (same as eIDAS)
- Provision on legal recognition (non-discrimination) of the result of the use of trust services

The MLIT: trust services (continued)

- Same “two tier” approach as for IdM
  - ex ante designation + ex post assessment
- List of obligations of trust service providers
- Liability of trust service providers

The MLIT: cross-border aspects

- Geographic-neutral rules on the assessment of reliability of the method used and on the designation of reliable services
  - Apply to both IdM and trust services
- Dedicated provisions on cross-border recognition and on international cooperation
  - Compatible with a centrally-managed mutual recognition mechanism
  - May be a template for plurilateral and bilateral agreements

To sum up

- Enabling data flows is essential for digital trade
- This goal calls for adoption of an adequate legal environment
- Enabling legal texts should balance regulation
- UNCITRAL texts have been adopted in more than 100 States
  - Many of them are developing and least developed countries
  - Often referenced in RTAs and DEAs

Next steps

- The CPTA calls for the adoption of a legal framework for paperless trade
- Dedicated tools have been developed to identify legal gaps
- UNCITRAL may help with:
  - Drafting and adopting legislation on e-transactions and trust services
  - Ensuring coordination of digital trade laws
  - Raising awareness of legal and business actors to support implementation
- Need to dedicate adequate resources to law reform and implementation