Regulating Electronic Contracts: Comparing the European and North American Approaches

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Abstract:

The development of on-line retailing (or e-tailing) is an essential element of the commercial development of Cyberspace and has provided the foundation of a flourishing online business community. The ability to enter into and perform contracts online is at the heart of this development. Without the certainty offered by a legal obligation to supply goods or services consumers may feel exposed, leading to fluctuating consumer confidence in electronic commerce with potentially harmful economic consequences. This paper compares how the two leading e-commerce trade blocs, the European Union and the United States have dealt with these challenges. It will highlight the advantages and disadvantages of each and will make recommendations which may benefit Latin American nations in developing an e-contracting regime.

1. Introduction: The UNCITRAL Model Law

On-line retailing, or e-tailing, is one of the fastest growing components of Western economies.¹ This growth is particularly important for Governments at a time when the rest of the retail economy is in a downturn. The way a Government chooses to regulate e-commerce is therefore of central importance to that country’s economic policy. If regulation is too heavy-handed they risk stifling entrepreneurial activity, causing a slow-down in the e-commerce sector. If regulation is too weak, they risk damage to consumer confidence, leading to an equally dangerous downturn. At the heart of the development of the e-tailing community is the ability for consumers to enter into and perform contracts online. Consumers require the certainty offered by a legal obligation before they will enter into an agreement proffered by a faceless entity which may be in a different jurisdiction and who may prove to be no more than a man of straw.

The need to provide a solid, and balanced, legal foundation upon which e-commerce may flourish persuaded the United Nations to provide a Model Law designed to afford certainty and security for all parties involved in electronic data transactions. This programme, long predates the development of modern Internet-based e-commerce. It began in 1984 as a proposal for a Model Law on Electronic Data Interchange (EDI) transactions, but with the speed of technological advancements, and the difficulty in finding agreement on standards, it was not ultimately finalised until 1996 as the UNCITRAL Model Law on Electronic Commerce. The Model Law is somewhat of a compromise. By 1996, electronic commerce meant different things to different people. In North America and Western Europe it was the name being attached to the fledgling economy in Web-based trading, whereas in many areas in Asia, the Far East and South America it was associated with EDI transactions (which of

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¹ Evidence that e-tailing is growing strongly can be found in the e-commerce reports of Forrester Research. Their third quarter 2003 report ‘Q3 2003 Online Sales: Surprisingly Strong Growth’ found that ‘online sales this past quarter grew 51%, to approximately $26 billion’ while their strategy briefing ‘US eCommerce Overview: 2003 To 2008’ predicts that ‘US eCommerce will grow at a 19% CAGR over the next five years. Most significant, online retail will reach nearly $230 billion and account for 10% of total US retail sales by 2008.’ There is evidence of similar trends elsewhere with the Interactive Media in Retail Group (IMRG) reporting that eCommerce revenues in the UK during October 2003 totalled £1.1bn. They reported that ‘October's sales were exactly 50% ahead of the same month last year at £1.1bn, a 36% increase on the September level.’ See: ‘Online retailers braced for record Christmas on back of a bumper October’.
course had been the source of the Model Law in the first place), while in some areas in Africa, the Asian sub-continent and even Eastern Europe it meant transactions carried out by facsimile transmission. The Model Law therefore requires to take a technologically neutral position in defining such provisions as data transmissions, electronic signatures, contractual terms and transmission protocols. Taking a neutral stance in a model law provides many benefits. Firstly it allows for promulgation by States whatever the current status of their e-commerce network. Secondly, it allows for easy of enactment whatever form the legal system takes, be it Civilian, Common-law or based in Religious Law. Thirdly, and most importantly it allows for functional equivalence. Functional equivalence is the recognition of another form of document or transaction as being in law the equivalent of a pre-existing form of document or transaction. It is an extremely important tool when transferring standard physical world transactions into Cyberspace or in transferring transactions which are in “atoms to bits” (Negroponte 1995: 13).

The Model Law begins by formally providing for the legal recognition of electronic data transmissions. By Article 5, States are required to ensure that: “Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.” From this foundation, the Model Law then goes on to ensure that all supporting principles required to provide for recognition of electronic contracts are in place. Firstly, it endows functional equivalence on electronic documentation by requiring in Article 6 that: “where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.” Then, through Article 7 States are required to give legal recognition to electronic signatures and finally and most importantly, Article 11 formally provides for the legal recognition of electronic contracts, stating: “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.” Collectively these four provisions, form the four pillars of the Model Law. These are: functional equivalence for electronic data, documents and signatures (formalities) and legal parity for electronic contracts (see Figure 1).

Figure 1 – The Four Pillars of Equivalence

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2 The definition of ‘data message’ is given in Article 2 and is defined as ‘information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.’

3 Article 7 states: ‘Where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.’
Two things are immediately clear about the provisions of the Model Law. Firstly, it remains throughout technology neutral. This is a reflection of the conflicting demands discussed above, but the neutrality contained within the Model Law brings distinct advantages also. It means that it remains one of the few international provisions on e-commerce not susceptible to obsolescence: whatever the future brings, whether it is biometric systems, wireless technology (so called mobile or m-commerce) or something not yet developed the neutrality of the Model Law means its provisions may be applied. Secondly, the Model Law is designed around functional equivalence. Again this is out of necessity, but it brings with it strong benefits. It allows easy and quick implementation of the provisions, whatever your level of technology and it provides a clear and simple frame of reference for consumers. If a consumer knows a written offer and acceptance would conclude a contract under their legal system, then if functional equivalence is applied they will know an e-mail will achieve the same result. For those without the benefit of legal training functional equivalence provides a degree of certainty.


The Model Law has been adopted, and adapted, by leading digital economies such as the European Union and the United States. These major trading blocs have both taken steps to legally recognise and enforce electronic contracts. They have done so by providing for recognition of the principles contained within the Model Law: not always by enacting the full range of provisions it contains.

2.1 The US Provisions

The United States, as may be expected of a country with the most developed e-tailing and e-commerce communities, has led the way through the enactment of several provisions designed to give effect to the Model Law. The US legislation which gives primary effect to the Model Law is the Uniform Electronic Transactions Act (UETA). The legal status of UETA is rather unusual. The US, as with all Federal States, regulates through a mixture of Federal and State Laws. The responsibility for the regulation of commerce falls to the States and therefore the Federal Government has no right to intervene. The requirements of interstate commerce though demand a uniform response from the state legislatures: this is the foundation of the Uniform Commercial Code (UCC) which provides a common code for sales and leases, commercial paper, bank deposits, letters of credit and more. From time to time the UCC must be updated to reflect new practices and technologies. UETA, though not part of the UCC, is part of this process. It was following a review of Article 2 of the UCC, as part of the Uniform Commercial Transactions Act (UCITA) process that the National Conference of Commissioners on Uniform State Laws decided to review the current provisions on electronic contracting. No doubt influenced by the Model Law they announced the review process in 1997 and following a “fast-tracking” of the proposal it was approved and recommended for enactment in all States by the NCCUSL at their 1999 Annual Conference in Denver, Colorado. UETA is thus neither a Federal or State Law, but is in fact simply another model law. It can only achieve authority through further enactment by State legislatures. Its legitimacy therefore rested with the States. At the time of writing (1 December 2003) UETA has been enacted by forty-three States, including California, Texas and Florida and is currently under legislative enactment in Alaska, Illinois and Massachusetts. In addition it has achieved a degree of Federal recognition in § 102(a) of the Electronic Signatures in Global and National Commerce Act (2000) (E-sign) which specifies that State Law may modify,

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4 The NCCUSL studies and reviews the law of the States to determine which areas of law should be uniform. As part of these duties itoversse changes to the UCC. For more information on the NCCUSL see the 'Lectric Law Library.

limit or supersede the electronic contracting provisions of E-Sign under limited conditions. Therefore despite its status as a Uniform Act it is reasonable to refer to UETA as the current law in regard of electronic contracting in the United States.

The equivalence principles found within the Model Law are all implemented through §.7 of UETA which provides for “Legal Recognition of Electronic Records, Electronic Signatures and Electronic Contracts.” In four very short, and quite innocuous sub-sections §.7 replicates all the necessary principles for electronic contracting, as contained in the Model Law. Firstly, Article 5 is recognised by §.7(a) which provides that, “A record or signature may not be denied legal effect or enforceability solely because it in electronic form.” With the principle of equivalence for electronic documentation established, the Act then quickly enacts the principles of Arts. 6, 7 and 11 in the remainder of §.7. Article 11 is recognised in §.7(b) by providing that, “a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation”; §.7(c) enacts Article 6 by requiring that “if the law requires a record to be in writing, an electronic record satisfies the law”, and Article 7 is recognised by §.7(d) which provides that, “if the law requires a signature, an electronic signature satisfies the law.”

The provisions contained within UETA therefore recognise and replicate the four pillars of the Model Law: functional equivalence for electronic data, documents and signatures and legal parity for electronic contracts. Equally importantly EUTA replicates the model of technological neutrality found in the Model Law. At no point does UETA attempt to define the technology to be used, except to say it is in “electronic form” which is defined expansively in §.2(5) as “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities”, the widest possible definition. A similar approach has been taken by the Federal Government in enacting the E-Sign Act. E-sign is intended to clarify the legal status of electronic records and electronic signatures in the context of writing and signing requirements imposed by law. An electronic record is broadly defined by §.106(4) as, “a contract or record created, generated, sent, communicated, received, or stored by electronic means” and an electronic signature is defined by §.106(5) as “an electronic sound, symbol, or process attached to or logically associated with a contract or record and executed or adopted by a person with the intent to sign the record”. Between these two provisions therefore the State and Federal Governments of the United States have implemented the key provisions of the Model Law. Equivalence is given, on a technologically neutral basis, to electronic data and documents. Electronic contracts are formally recognized and the mechanics of electronic signatures are provided for.

2.2 The EU Provisions

The European Union has set out to give recognition to the Model Law in two key Directives. The first of these is the Directive on Electronic Signatures, which although important to the formation of electronic contracts is of restricted value as it only comes to the fore when formality or proof is required. The second Directive is the E-Commerce Directive which lies at the heart of the discussion which follows.

The provisions of the E-commerce Directive which are relevant to electronic contracting may be found in Chapter II, Section 3: “Contracts Concluded by Electronic Means”. This Section contains three Articles intended not only to fulfil the key principle of equivalence already seen in the UNCITRAL Model Law and in UETA and E-Sign within the United States, but to go further and determine some basic rules for the formation of electronic contracts. The key provision is Article 9, which, subject to some exclusions found in Article 9(2) (which shall be examined below) provides for equivalence for electronic documentation. This mirrors both Article 6 of the Model Law and §§. 7(a) and (c) of UETA. The following provisions, Articles 10 & 11, are though quite unlike the provisions of the Model Law or

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6 An Electronic Signature is defined equally widely in §.2(8) as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”
UETA. Here the Directive attempts to harmonize some of the basic rules of contract formation as applied to electronic contracts. In Article 10 the Directive lays down minimum informational standards required for electronic business to consumer (B2C) contracts. It should be said it quickly becomes clear that Article 10 is not a formation of contract provision at all, but rather a consumer protection provision embedded into the contract formation rules. Finally, Article 11 sets out some assumptions to be applied in calculating the moment at which an electronic contract is concluded.

2.2.1 Adopting E-contracts in Europe: The E-Commerce Directive Dir.2000/31/EC

Articles 9-11 of the E-Commerce Directive were designed to fulfill three associated, yet separable functions of (1) equivalence, (2) consumer protection and (3) harmonization of contract formation rules. As we have seen, the key function is the equivalence function: without recognition of the equivalence of electronic documentation, electronic contracting proves impossible except in relation to simple informal contracts. As it is Article 9 which provides equivalence it is to this critical provision that we shall first turn.

Article 9(1) provides that: “Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.” At its most basic level this provision requires that Member States ensure their legal system “allows contracts to be concluded by electronic means”. Thus Article 9(1) deals with the issue of “form” required by Article 5 of the UNCITRAL Model Law. Along with Article 5 of the Electronic Signatures Directive, it creates a functional equivalence for e-documents in both informal and formal contracts.\(^7\) It requires that anything which can be achieved through written documents must be in law achievable through e-documents. Thus the E-commerce Directive appears to give effect to the four pillars of equivalence found in the Model Law in much the same manner as UETA, but as soon as equivalence is awarded some narrowing of the principles occur.

Firstly, concerns regarding formality and sensitivity of some contractual relationships, and the use of paper documentation in such as a badge of formality in such contractual relationships arise. Article 9(2) allows for certain types of contracts to be excluded from the equivalence principle of Article 9(1). Four particular types of contract are listed here and the reasons for their listing not always clear. The first is “contracts that create or transfer rights in real estate, except for rental rights.”\(^9\) The reason for the listing of such contracts is the badge of formality which the written document carries (Murray, Vick & Wortley 1999: 131-133). Individuals recognise the depth of responsibility they must take in entering into such a contract by the requirement that they follow a formal procedure. Some feared a removal of the solemnity attached to the formal rules would remove the cautionary effect attached to the badge. Secondly, by Article 9(2)(b), “contracts requiring by law the involvement of courts” may be excluded. Here it is not clear why this has been done. There is no need of a badge of formality as the involvement of the Court fulfils this function. Also it is difficult to imagine which types of contract are in mind in this provision. In earlier drafts of

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\(^7\) Article 9(2) lists 4 possible exemptions from the provisions of Article 9(1). It provides that ‘Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories (a) contracts that create or transfer rights in real estate, except for rental rights; (b) contracts requiring by law the involvement of courts, (c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession and (d) contracts governed by family law or by the law of succession.

\(^8\) Article 5(2) of the Electronic Signatures Directive states: “Member States shall ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is: (1) in electronic form, or (2) not based upon a qualified certificate, or (3) not based upon a qualified certificate issued by an accredited certification-service-provider, or (4) not created by a secure signature-creation device.

\(^9\) Article 9(2)(a).
the Directive this section was quite different. Originally it was intended to apply to “contracts which in order to be valid require to be registered with a public authority”. The reason for the original wording of Article 9(2)(b) was the potentially prohibitive costs of computerising all public registries within the European Union. The alteration in the wording in the final version of the Directive is therefore quite mystifying as with the removal of the public authority exemption governments will now be forced to computerize public records offices. The third exception allowed is for “contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession.” This was added following considerable lobbying from many in the consumer protection lobby as well as many in the financial services sector. There was concern that the digitisation of security agreements would remove from such agreements a degree of formality which is necessary to communicate to consumers the gravity of the agreement they are entering into, like the interest in land exception, the badge of formality was the key reason for allowing this exception. Finally, “contracts governed by family law or by the law of succession” are allowed to be excepted. This is a sensible proposal allowing states to remove sensitive family documents such as wills, adoption papers and divorce certificates from the equivalence principle. Again this may be seen as an application of the badge of formality principle, but equally it may be seen as a simple respect for family life and the family itself.

Following on from the basic equivalence principles found in Article 9, the focus of Article 10 is to provide transparency and consumer protection in on-line transactions. To achieve this Article 10 requires service providers to provide information regarding the technical steps which consumers are required to follow to conclude a contract, how to correct input errors, and to provide information about codes of conducts, contract terms and general conditions. The aim of this Article is to provide the consumer with adequate protection measures required to stand in place of the badge of formality previously associated with the written document. It reflects concerns that with digitisation: (1) formality in the contract-making process may be lost, meaning consumers may inadvertently enter into binding contacts without realising the gravity of the agreement into which they are entering; (2) familiarity with counterparties can be lost when there is a lack of physical interaction and (3) there is an increased risk of error in electronic documents due to the informal nature of the medium. The method chosen to alleviate these concerns is though problematic. The majority of contracts can be formed without any particular exchange of information regarding how the contract is to be formed. Such informal contracts rely upon default rules found in domestic rules of contract formation. Although it may be preferable that the parties to the contract have a common understanding rules of contract formation before they open negotiations, the provisions of Article 10 are not sufficiently flexible to meet the demands of the variety of contractual relationships and subject-matters encountered in e-commerce. As a result it will no doubt add a degree of resistance to the “frictionless economy”. As noted by Professor Ramberg, “Article 10 does not solve any practical problem. There are enough incentives in national general contract law for businesses to provide the information requested by the E-Commerce Directive. The implementation of Article 10 will only create confusion in the national laws of the Member States and contribute to a disharmony in law within EU.” (Hultmark Ramberg 2001: 13).

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10 Article 10: ‘Information to be provided:
(1) In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:
(a) the different technical steps to follow to conclude the contract;
(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
(c) the technical means for identifying and correcting input errors prior to the placing of the order;
(d) the languages offered for the conclusion of the contract.’
Finally, the E-commerce Directive provides, in the second indent of Article 11(1), that “the order and the acknowledgement of receipt are to be received when the parties to whom they are able to access them.” A crucial question of contractual formation is how exactly e-contracts fit the currently accepted models of contract formation: here the Directive answers this question. We now know that effective delivery (of an acceptance, and therefore consensus ad idem and conclusion of the contract) occurs when a party is able to access the communication. This means that the agency rule does not apply to e-mails but rather they are subject to the delivery rule it also confirms the delivery rule applies to on-line contracts as had been widely assumed.

The final underpinning provision of the new EU e-contracting regime is to be found in Article 5 of the Electronic Signatures Directive. This provides for the recognition of two varieties of electronic signature: the “Advanced Electronic Signature” (Article 5(1)) and the “Electronic Signature” (Article 5(2)). An Advanced Electronic Signature is defined in Article 1(2) as “an electronic signature which (a) is uniquely linked to the signatory; (b) is capable of identifying the signatory; (c) is created using means that the signatory can maintain under his sole control; and (d) is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.” In practice such a signature is an encryption technology based, dual-key signature which has been certified by a recognised Certification Authority. An Electronic Signature is more widely defined as “data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication”. Thus only signatures based on encryption technology may qualify as an Advanced Electronic Signature, while any form of electronic authentication such as biometric data qualifies as a standard Electronic Signature. Why is this important? There is real value in having an Advanced Electronic Signature as they qualify for greater protection under Article 5(1) which provides that Advanced Signatures are deemed to “satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data”. Thus an Advanced Signature is functionally equivalent to a manuscript signature. Standard Electronic Signatures are dealt with under Article 5(2) which provides that “an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form”. This is a much lower standard: while Advanced Electronic Signatures are the equivalent of manuscript signatures, Standard Electronic Signatures are only assured of non-discrimination. The effect of this is quite far reaching. To be assured of equivalence signatories must utilise one particular form of electronic signature, certified dual-key signature systems. Thus unlike the Model Law and unlike UETA and E-Sign, the Directive is not technologically neutral. The long term implications of this choice are not yet clear, but it is clear that the EU Directive lacks the flexibility seen in the UN and US provisions.

Collectively the effect of the E-commerce and Electronic Signatures Directives are to require Member States to provide equivalence for e-documents in all contractual matters except those listed as exceptional by Article 9(2). Their aim is to sweep away the final barriers to the use of e-documents in all formal contracts. They provide measures designed to ensure consumers are adequately compensated for the removal of the badge of formality attached to written documentation, that the framework to ensure consumer confidence is upheld and through Article 11 of the E-commerce Directive, that the delivery rule is to be applied to all methods of electronic communication, which will go some way towards providing a degree of harmonisation, but falls short of prescribing exactly when a contract will be concluded.

\[11\] This is due in particular to requirement (d) that the signature “is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.” This is due to the data checksum value embedded in dual key systems. Alternative methods of identification such as biometric data do not offer this function. For detail on how dual key signature systems work see Reed (2000).
2.2.2 A Case-study in Mis-implementation: The UK Approach to E-contracting.

The UK Government is well-known for its sluggishness in implementing European Directives, and therefore it was no surprise that it took to August 2001 to launch its initial public consultation on implementation of the Directive, some 13 months after the Directive was adopted in. The consultation document, Consultation Document on Implementation of the E-Commerce Directive (UK DTI 2001), set out the Government’s initial position and sought response on a few narrow questions.

On the implementation of Article 9(1), the UK Government hinted that it did not intend to adopt the widespread equivalence provisions found therein. Instead they suggested that “[t]he Government is still considering whether form requirements (e.g. notices or copy documents) must be disapplied, such as those which have to be satisfied for a contract to be enforceable and where the context makes it clear that a physical instrument is required.” (UK DTI 2001, 16). The reason for this becomes immediately and abundantly clear “[to do] so, could require considerable amendment of the legislation concerned.” (UK DTI 2001, 16). The UK Government had considered blanket equivalence previously in considering the drafting of the Electronic Communications Bill in 1999 (UK DTI 1999, paras 15-16). At this point they had rejected equivalence in favour of a “case-by-case” approach. (United Kingdom House of Commons 1999, 13) It appeared they were about to do so again. Although consultation was sought on more technical questions such as: “What are the consequences of failure to comply with the requirement of acknowledgement ‘without undue delay’ and the other requirements in Articles 10 and 11?” and “Are there any likely circumstances in which it might not be straightforward to identify the point at which the parties to whom these messages are addressed are able to access them?” It was clear the DTI had already made the major policy decisions relating to implementation over the previous months. Consultation was to be a mostly cosmetic exercise, where consultants were to be asked only to flesh out the detail.

When the responses were compiled following closure of the consultation period, it was clear consultees were at odds with the DTI’s approach to the implementation of Article 9(1). There were renewed pleas for the Government to move faster on eliminating requirements for writing from existing statute and common law. It was suggested by several respondents, including the Alliance for Electronic Business, that the order-making power found in s.8 of the Electronic Communications Act 2000 did not implement Article 9 of the Directive and that a blanket equivalence for electronic writing was required.

Unsurprisingly though when the first draft of The Electronic Commerce (EC Directive) Regulations 2002, was published on 7 March 2002, there was a clear omission. draft Regulation 11 would enact almost word for word Article 10 of the Directive, and by draft Regulation 13, the provisions of Article 11 were to be fully enacted, including by draft Regulation 13(2) the first indent of Article 11(1). There was though no attempt to provide implementation of Article 9. A glance through the Interim Guide for Business, (UK DTI 2002a) published contemporaneously gives the official answer for this omission. Firstly, the DTI, suggests that most contracts are already compliant with Article 9:“The Government believes that the great majority of relevant statutory references (e.g. to requirements for writing or signature) are already capable of being fulfilled by electronic communications where the context in which they appear does not indicate to the contrary.” (UK DTI 2002a, para. 5.12) While this is certainly true, the overwhelming majority of contracts were capable of being fulfilled by electronic communications long before the process of drafting the e-Commerce Directive was begun: the “stickiness” of the system was to be found in the minority of “contracts of form” which, as was admitted by the DTI themselves, did not allow e-documents to be used. There is a clear contradiction here in the language used by the DTI in consultation on the Electronic Communications Bill and the language used in Consultation on the e-Commerce Regulations (UK DTI 1999). Those contracts which were not compliant with Article 9(1), would, in the view of the DTI, be “mopped up” by legislation passed under the Electronic Communications Act or the European Communities Act. Thus the DTI signaled its intent to take a robust view of “contracts of form”, showing no intention to depart from the
approach first adopted in the Electronic Communications Act of recognition on a case-by-case basis, and an outright rejection of blanket equivalence, despite Article 9 being most clear on this matter.

The draft Regulations drew seventy-seven published responses from industry, consumers and representative associations. A sizable number of responses made comments in relation to the provisions relating to electronic contracting: the failure to directly implement Article 9 of the e-Commerce Directive being pre-eminent among them. Organisations as diverse as Abbey National plc. (Abbey National plc 2002, 1), the Digital Content Forum (Digital Content Forum 2002, 3), Baker & McKenzie (Baker & McKenzie 2002, 1-2) and the Finance and Leasing Association (Finance & Leasing Association 2002, 3-4) all stated with one voice that the Regulations as currently drafted did not meet the blanket equivalence requirement of Article 9 of the Directive. The DTI was urged in the strongest possible terms to reconsider on this point. The message was clear: the potential for consumer confusion and the resultant loss of consumer confidence (which had been a driving force behind the Directive in the first place) would remain high if the UK Government failed to implement Article 9 fully. The Department of Trade and Industry waived aside all such concerns and when the Electronic Commerce (EC Directive) Regulations 2002, enacted the provisions of the Directive into UK Law there was no place for the provisions of Article 9(1). In the accompanying guidance to business (UK DTI 2002b) No effort has been made to account for the difference between Article 9 of the Directive (blanket equivalence) and the wording of the Regulations which relies upon a piecemeal award of equivalence, first seen in the Electronic Communications Act 1999. The UK Government has, regarding equivalence for e-contracts, taken a radically different stance from not only the Model Law but from the European Directive. Thus three different approaches to the recognition of e-contracts emerge from the experiences of North America and Europe. The North American approach as typified by the Uniform Electronic Transactions Act is to allow for blanket equivalence, the European approach is to allow for qualified equivalence, while the UK has decided to implement a case-by-case approach. The question for South American lawmakers is which approach is to be recommended?

3. Conclusion: What Can Latin American Lawmakers Learn?

The approaches taken in the United States, European Union and United Kingdom demonstrate three quite different methods of implementing the Model Law. The United States has taken the most straightforward, and open approach, that of blanket equivalence for all four pillars of the Model Law. The European Union has steered a middle road, one where blanket equivalence is offered to documents and data, a qualified parity is offered for electronic contracts and signatures are narrowly regulated. The United Kingdom, in defiance of its obligations under the E-commerce Directive, has taken the most conservative approach. Data is given equivalence but electronic documents and electronic contracts are approved on a case-by-case basis, with signatures again being narrowly regulated. Which approach is best? It is still to early to state definitively which system will provide the best long-term advantages, but one thing is clear. It is better to actively choose blanket equivalence, as the US has done, or a narrow permissions based system as the UK has done. The EU approach has proven to be quite unsatisfactory with the provisions of the E-commerce Directive leading to ongoing problems (Hultmark Ramberg 2001: 16). In attempting to tinker with contract formation principles they have created a degree of confusion and uncertainty which aids

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12 The seventy-seven responses may be accessed at: http://www.dti.gov.uk/industries/ecommunications/second_consult_responses.html There was a wide range of respondents from telecoms giants such as BT and AOL through retails groups such as the British Retail Consortium and the Alliance for Electronic Business to regulatory authorities such as the London Trading Standards Authorities.

neither consumer or retailer. The UK approach although narrow, does lead to the simple integration of e-contracts into the British legal systems once approved. Thus the transition, in comparison to Continental Europe at least, has been quite painless. It is though, in the author’s opinion, the United States which provides the best model. The integration of e-contracting into US Law has been swift, simple and quite painless. Blanket equivalence provides the simplest and best model. The law of contract has proven over the centuries to be most flexible and reactive. Many new technologies have effected contract formation previously, including the development of the mail service, telegraph, telephone, facsimile, telex and EDI. On the whole these have been assimilated without the need to develop new rules for contract formation. This is because contract law is based in general principles not specific rules, these principles may apply whichever means of communication apply and are designed to ensure agreement has taken place. Contract law is thus a law regulating persons not methods of communication, blanket equivalence is therefore the best, simplest and most efficient model to integrate e-contracts into any legal system. It is to be hoped lawmakers in Latin American states realise this.
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