The Philippine E-Commerce Law: A Preliminary Analysis

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When President Estrada signed the e-commerce law, the Philippines became only the third country in Southeast Asia with legislation to promote and protect electronic transactions. This culminates a very long and tedious process that was started way back July 1st 1998, when Senator Juan M. Flavier filed the first of many bills that would eventually lead to the Philippine Electronic Commerce Act (R.A. 8792, an act providing for the recognition and use of electronic commercial and non-commercial transactions, penalties for the unlawful use thereof, and for other purposes).

The E-Commerce law addresses the significant legal challenges facing Filipinos who wish to participate in this wealth-creating global phenomenon. First, it gives validity and legal recognition to electronic documents, electronic signatures and electronic transactions. Second, it facilitates the admission of electronic documents and electronic signature as evidence in cases of disputes. Third, it outlaws and penalizes unauthorized access to information and interference in communications systems (i.e., hacking, introduction of viruses and the like). Finally, it calls upon government to formulate and institute programs that are not only supportive of e-commerce but would actually get the government online.

Many questions will be raised especially in the first months of the law’s implementation. This is an initial attempt to provide some answers to questions regarding to how the law was intended to mean. This will discuss many, not all, provisions of the law that we feel is the most important for the private as well as public sectors.

TOWARDS THE INFORMATION ECONOMY

In this law, the Philippine government explicitly recognizes the vital role of information and communications technology (ICT) in nation-building. The need to create an information-friendly environment that would ensure the availability, diversity and affordability of ICT products and services is also recognized as an important component of government policy. It also recognizes the need for policies and programs to develop human resources for the information age. The law also recognizes the need to marshal, organize and deploy a national information infrastructure. In achieving these goals, the primary responsibility of the private sector in contributing investments and services in ICT is acknowledged.

This e-commerce law is intended to facilitate the use of electronic contracts and agreements, domestically and internationally. It recognizes the authenticity and reliability of electronic data messages, as well as to promote the universal use of electronic transactions (section 3). While it has been believed by many that the law is intended to apply only to commercial transactions between and among private persons, the law is intended to cover government as well in its dealings with the public. In terms of coverage, this law is to apply to any kind of electronic data message or electronic document used in commercial and non-commercial activities (Section 4). It is important to underscore that non-commercial electronic documents such as wills and affidavits could fall under the purview of this law.

LEGAL RECOGNITION OF ELECTRONIC DOCUMENTS

With this law, electronic documents are provided the same legal protection as paper-based documents. For instance, Philippine courts will be duty-bound to accept electronic documents as evidence. This is not to say that courts can accept any type of electronically-generated document for the very same bills have set certain standards for its acceptability.

Under this law, information shall not be denied validity or enforceability solely on the ground that it is in the form of an electronic data message or that it is merely incorporated by reference in that electronic

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message (section 6). This provision refers to two things: the electronic data itself, and/or another that has been merely incorporated by reference to it. There are many messages whereby the original refers to another data message. For example: A sends an e-mail to B offering to sell his car the picture and specifications of which are contained in, say, a web page. That web page that has been referred to is in a sense, incorporated into the email message and becomes part of the whole communication even if it was merely referred to. The law says that both cannot be denied legal effect: the email and the web page that has been referred to. This creates convenience also because the primary messages do not have to be too bulky as they are allowed to incorporate by reference something else.

Section 7 assuages whatever doubts Section 6 might still create by explicitly saying that electronic documents shall have the legal effect, validity, or enforceability as any other document or legal writing. Further it states that where the law requires a document to be in writing, that requirement is met by an electronic document if the said electronic document maintains its integrity and reliability and can be authenticated so as to be usable for subsequent reference. This applies whether the requirement in the law is in the form of an obligation or whether the law simply provides consequences for the document not being presented or retained in its original form. For evidentiary purposes, the electronic document is now deemed to be the functional equivalent of a written document under existing laws. The limits has been set, however, when the provision states that this Act is not intended to modify any statutory rule relating to the admissibility of electronic data messages, except the rules relating to authentication and best evidence.

The phrase “functional equivalent” recognizes that electronic documents can never be the same as paper-based ones, they simply are different. But electronic documents can achieve the purposes or functions of paper-based documents: as a record, as a preservative mechanism of facts, as proof of existence of a particular fact or agreement, etc.

Legal recognition of Electronic Signatures is provided for in Section 8. Electronic signature on the electronic document is now recognized as equivalent to the signature of a person on a written document. However, certain conditions are given for electronic signature is to be recognized--that a prescribed procedure was followed under which such procedure identifies the party sought to be bound and that he had access necessary to obtain his consent and approval through the electronic signature.

The legal recognition of electronic signature will allow digital or electronic contracts subject to the Statute of Frauds. The Statute makes unenforceable certain contracts- e.g., contracts that have for their object goods exceeding ₱500 in value- unless they are written and subscribed. In this situation the requirement for a memorandum is now met by the legal validity of the electronic document, and the subscription part is now answered by the declared equivalence between manual and digital signatures.

**INTEGRITY OF ELECTRONIC DOCUMENTS**

The integrity of electronic documents (in Section 9) provides for prima facie presumptions relating to electronic signatures: that the electronic signature is that of the person to whom it correlates, and that the signature was affixed with the intention of signing or approving the electronic document. This means that when A’s signature is attached to a document, one may presume that it is A’s signature and that he was the one who signed it with the intention of signing or approving the same. The presumption is, of course merely prima facie, it may be rebutted with better evidence to the contrary.

What constitutes Original Documents is also discussed in the law. This is important as it impacts on rules of evidence or court procedures where the concept of original is most vital to whether one’s piece of evidence is admitted or not. Presently, where the law requires information to be presented or retained in its original form, that requirement would be deemed met by an electronic data message or document if the integrity of the information is shown by evidence aliquantia or otherwise and that it is capable of being displayed to the person to whom it is to be presented. This provision of law will be of great help to those who go to court presenting electronic evidence. While the old paradigms could only conceive of original document as just being generally singular, this paves the way for the existence of many “originals” as long as the provision’s criteria of integrity and reliability are met.

The authentication of electronic data messages and electronic documents, covered in section 11, amends the rules on evidence. Given the different nature of electronic data messages vis-a-vis paper or other objects, authentication procedures necessarily will have to be different too. This law calls for electronic data messages to be authenticated by demonstrating, substantiating, and validating a claimed identity of a user, device, or another entity in an information system. Electronic signatures are to be authenticated by proof that
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a symbol or character representing the person named therein or attached thereto or that an appropriate technology or security was used with the intention of authenticating or approving the electronic document. The electronic data message shall be authenticated by proof that an appropriate security procedure, when applicable, was used for the purpose of verifying the originator, or detecting errors.

The law also provide a guide as to when a data message is to be admitted in evidence and to how much weight is to be given to them (Section 12). The provision states that no rule shall render the data message inadmissible on the sole ground that it is in electronic form or on the ground that it is not in the standard written form. Evidential weight is to be given such electronic document after assessing the reliability of the manner in which the originator was identified, and other relevant factors have been given due regard.

The provision is designed to function in the interim, i.e., pending the promulgation by the Supreme Court of its own rules.

FROM FILE CABINETS TO ELECTRONIC FILES

Nothing represents the modern office more than filing cabinets. Offices have rooms full of filing cabinets largely because there are no other ways of keeping files that are required by government or by law. This Act may yet make filing cabinets obsolete.

Under this law, the retention of documents in its original form is satisfied by retaining them in the form of an electronic data message or electronic document as long as the criteria of accessibility, integrity, and identification of person and time is assured. (Section 13, Retention of Electronic Data Messages). The person required to retain the forms may also do it by using the services of a third party. This may be applied where the government, say the BIR, requires the retention of receipts for at least three years, for audit purposes. This can free corporations from having to keep the required documents in paper form.

Affidavits are dealt with under Sections 14 and 15. The requirements in Section 9 on integrity, and Section 12 on admissibility may be established by affidavit. This is useful as the requirements may prove to be too stringent and inflexible. Of course, as in any statement contained in affidavits and presented in courts, such are subject to the right of the person against whom the affidavit is executed, to test the accuracy and truth of the affidavit by cross-examination.

ELECTRONIC CONTRACTS

The Formation and Validity of Electronic Contracts is considered in section 16 of the law. Despite the provisions of the Civil Code which says, that a contract is a meeting of the minds and generally could take whatever shape or form, many still feared that contracts entered into electronically may encounter some problems. Here the law states unambiguously that, “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 documents”. The law further stipulates that no contract shall be denied validity or enforceability on the sole ground that it is in the form of an electronic document.

The question “From whom does the message come from?” is answered in sections 18. A message is that of the originator if the originator him/herself (or his/her authorized representative) sent it and it was sent by an information system programmed by or on behalf of the originator to operate automatically. The last phrase recognizes the situation whereby one programs a computer to look for bargains or, on the other hand, by another to look for buyers. When these two systems meet, even without the direct intervention of the parties at that particular exact time, the messages sent will be deemed as having come from both the originators.

The issue of when and where meetings of minds or contract have been reached is revisited in Section 20 (on the agreement on acknowledgment of receipt of electronic data messages), Section 21 (on the time of dispatch of electronic data messages), Section 22 (on time of receipt of electronic data messages), and Section 23 (on place of dispatch and receipt of electronic data messages).

The autonomy of parties-to-a-transaction in the choice of type or level of security for their own purposes is explicitly recognized in section 24. However, this is subject to rules and guidelines which government may promulgate regarding e-commerce transaction security.

The law is designed also to apply to actions on contracts related to carriage of goods. What is envisioned is that airway bills, bills of lading, receipts, sales, transfers of ownership, and other documents or papers related to carriage of goods by land, sea, or air may now be done electronically. Given the scores of
copies of documents required and necessary for imports and exports, and even domestic trade, this will be of
great help in reducing inefficiency and making transactions move faster. In fact in subsections (f) and (g)
that “where one or more electronic data messages or electronic documents are used to effect any action, no
paper document used to effect any such action is valid unless the use of electronic data messages or electronic
documents has been terminated and replaced by the use of paper documents.” This is meant to encourage
further the use of electronic data messages in trade transactions.

TOWARDS E-GOVERNMENT

The law will move us closer to e-government, or, at least, to the electronic delivery of government
services. It mandates that government as well as government- owned and controlled corporations use
electronic transactions in all its processes (Section 27). The law also mandates government to undertake
these initiatives within two years.

In order to facilitate the abovementioned goal, Section 28 of the law call for the installation of a
government-wide electronic online network, that would facilitate the open, speedy, and efficient online
transmission amongst all government agencies, down to the regional and provincial offices. Section 29
empowers the DTI to promote and develop electronic commerce as well as to promulgate rules and
regulations, provide quality standards or issue certifications in the pursuance of this Act’s intentions.

By 2003 we should expect government agencies to do most of their licensing functions, acceptance of
payments, or the issuance of receipts on line. To make this a reality, the executive agencies should
immediately develop a strategic plan to deal with the public online. An important effect of this provision of
law is it will create a huge market for private sector activities in this area. This law clearly shows that aside
from creating a favorable environment for electronic commerce, government is interested in stimulating its
growth by being a leading-edge user itself.

DEVELOPING TRUST

An important goal of any e-commerce legislation is to ensure that electronic transactions are safe and
and that data collective electronically are kept private and confidential.

Privacy issues are addressed in sections 31 and 32 of the law. Section 31 says that access to an electronic
file, signature or document shall be limited only to those that are authorized to possess and use it. Electronic
keys used for identity and integrity may only be made available to another upon consent of the individual in
lawful possession of the key. Section 32 obliges those who obtain access to an electronic key, signature or
document not to convey or share the same with another. These two sections are important in that it recognizes
that these files are property of an individual and can be possessed only by another upon the consent of its
owner. It further recognizes the privacy and personal nature of the key by obliging those who gets to
possess it not to share it with others. We submit that a violation of these two sections may be punishable by
the catch- all provision in Section 33 paragraph (d).

Security issues are addressed in section 33. While this section deals with penalties, its net effect is to
help create a more secure environment for electronic transactions. This law specifically punishes hacking or
 crackers which has been defined as either unauthorized access or interference in a computer system or any
other type of access- authorized or not- with the intention to destroy, corrupt, alter, or steal data. Included in
this definition is the introduction of viruses. Penalty is rather steep by contemporary Philippines standards:
a minimum fine of ₱100,000 and mandatory imprisonment of from six months to three years.

Piracy or the unauthorized copying, reproduction, dissemination, distribution, importation, as well as
broadcast of protected works is also punishable by penalties ranging from a minimum fine of ₱100,000 and
mandatory imprisonment of from six months to three years.

The extent of liability of service providers is tackled in Section 30. Under this law no person or party
shall be held liable for any data message to which the party - acting as a service provider- merely provides
access, subject to certain requirements. Service providers who have no knowledge that the materials passing
through them are unlawful and those who do not financially benefit directly from such unlawful activity, or
do not commit an unlawful act need not be penalized. This refers to materials that pass through a provider
that may either be libelous, seditious, or is a pirated material, etc. The service provider is not tasked with
monitoring every material that passes through his facilities as that may either be impossible or an undue
invasion of the privacy interests of others.
A GLOBAL LEGAL FRAMEWORK?

The Philippine e-commerce act is based on UNCITRAL (United Nations Commission on International Trade Law) Model Law on Electronic Commerce. The UNCITRAL is that UN organ tasked to draft model laws, which its member nations may adopt in order to have harmonized legal regimes insofar as business and trade are concerned. Under Section 37 it is stipulated that in the interpretation of this law regard must be had to its international origin. Section 39 states that if the other party to a transaction comes from a country that does not grant the Filipino similar rights contained herein, he will not be allowed also to enjoy the benefits of this law's provisions.

In recognizing the international character of electronic commerce, this law is not merely bowing to reality. It is committing the country to a mode of action that would move us closer to a universal set of rules for e-commerce. This is important, as the real benefit of electronic commerce is experienced not when we are able to electronically transact among ourselves. The real benefits of e-commerce will be felt when Filipinos outside the country are able to buy goods from Filipinos in the Philippines and when Filipinos in the Philippines are able to sell their goods internationally as easily as they would sell them to fellow Filipinos.

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