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# The Chilean Draft of Electronic Documents in Relation With the UNCITRAL Model Law of Electronic Commerce

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## 1. Introduction

At its most basic, a document is a writing that uses a signature as support for its contents. In the early days of commerce, documents served the simple function of proving the existence and scope of a contract. Over time, the formality of documenting commercial transactions became so pronounced, that many transactions and contracts would not be recognized in the absence of proper documentation. Eventually, the use of documentation in commercial transactions evolved to the level where the documents themselves were used as means of both establishing and transferring rights, as is the case with credit instruments.

The documents that served these various functions have, until now, taken only a tangible form, such as a papyrus, a parchment or a piece of paper. However, as we move from the 20th to the 21st century, the advancement of technology has brought on a fundamental change in the way we do business. The traditional reliance on tangible documentation is quickly being replaced by a system where contracts are documented electronically and transmitted to the contracting parties instantaneously.<sup>1</sup>

This new way of doing business has created a need to establish an international instrument that can facilitate this electronic data

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1. The law draft on electronic documents was handed to the Commission on Constitutional, Legislative, Justice and Regulations of the Senate of the Republic of Chile by the Honorable Senators Edgardo Boeninger, Juan Hamilton, Hernán Larraín, Sergio Romero and José Antonio Viera-Gallo, and is still pending, having neither been discussed nor approved.

interchange. With this goal in mind, the United Nations Commission on International Trade Law (UNCITRAL), established a working group on International Payments to frame a model law on this subject. The end result was the creation of the UNCITRAL Model Law of Electronic Commerce ("Model Law"), which was approved by UNCITRAL in 1996. The Model Law, once it is adopted by the various nations of the world, will ensure uniform rules regulating the electronic exchange of information.

As Chile is a country with an open economy, where international commerce plays a valuable role, a great part of which is carried on by electronic means, it became necessary to have a juridical text, internationally harmonized, to regulate this area. To further this goal, Chile is considering adopting a law on electronic commerce, largely drawn from the Model Law. The object of this article is to consider the antecedents of Chile's draft, its principles and objectives, and its contents.

## II. Antecedents of the Draft

The major sources of inspiration for the Chilean draft were the Model Law, the Guidelines of the European Union about electronic signature of May 13, 1998, and recent legislation on this matter by Italy, Germany and Argentina. In many areas, the Chilean draft resembles the Model Law. Drawn from the Model Law and incorporated into the Chilean draft, were the general rules regarding recognition and acceptance of electronic documents. The Chilean draft deviated from the Model Law in the area of the electronic signature, with these provisions being drawn largely from the Guidelines of the European Union.

## III. Principles and Objectives of the Draft

One of the fundamental principles of the Chilean draft is that there shall be no discrimination among the diverse technologies that may be employed for the creation of the electronic document and the electronic signature. This principle is reflected in the fact that the Chilean legislation on this matter does not favor the use of any particular technology, rather, it permits the use of any of them. Thanks to this principle, once the draft is approved as national law, its dispositions will continue to be applicable, notwithstanding the changes that may appear in the technological field.

The other major guiding principle of the draft is one of equating the electronic document and the electronic signature with its equivalent on paper and the holographic signature. This

comparison pertains to the juridical regime applicable to both, as well as to the effects or juridical consequences that they produce.

Based on these principles, the Chilean law grants juridical effect to any act, contract, transaction or operation, whether arising between private parties or out of the public sector, that is memorialized by means of an electronic document, save the cases particularly excepted by law. Recognition of particular exceptions reflects the intent of the authors that the draft be enacted with minimum change to the existing legal order. This criterion is justified only by the need to obtain draft approval, because once it becomes law, it will be necessary to implement all other pertinent reforms, so as to facilitate its incorporation into the existing legal system.

The primary objective of this legal initiative is to establish a limited legal system creating the fundamental rules regarding electronic documents and electronic signatures. Thus, the draft serves as somewhat of a framework, spelling out only the most general rules, while leaving the more specific and detailed matters to by-laws that are to be enacted in the future. This reflects the difficulty of arriving at a consensus regarding the recognition and regulation of this new area of law and the need to provide flexibility in this area of law that is still evolving.

#### IV. Contents of the Draft

As far as the scope of the matters included in the legal initiative, we regret to say that it is extremely limited. The areas with which this draft is concerned, is limited to:

1. the concept of the electronic document;
2. establishing the electronic document and the electronic signature as the legal equivalent of a document on material paper and a holographic signature;
3. the legal recognition of many acts and contracts that are memorialized by means of electronic documents, save those which expressly require documents on paper format or the personal appearance of some of the parties.<sup>2</sup>

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2. In this sense it is more complete than the Supreme Decree No. 81 of June 10, 1999, of the Ministry Secretary of Government, published in the diario oficial of 26 June, 1999, that regulates the use of Digital Signature and Electronic Documents in the Administration of the State, which defines, in Title I, the concept of electronic document, electronic signature, digital signature, private key, public key, integrity and certificate of digital signature. Title II deals in particular with the use of these documents, the subscription of the same by means of a digital signature and their treatment as the equivalent a document on paper supported by

It seems to us that the Chilean legislature should adopt a more ambitious draft, one that includes a clear definition of data message, whether this substitutes or compliments the definition given for an electronic document. Likewise, we also believe it is necessary to include within the draft a definition of an original, and duplicate, electronic document. Further, the drafters should establish some rules about the preservation of electronic documents.

We also believe that now is the best time to legislate on critical matters, such as the time and place in which an electronic contract is consummated. It is not enough that the draft limits itself to simply acknowledging the general validity of such a contract. Obviously, the parties that agree on a contract by electronic means are not present in the same place. Because the time and place of contracting has many important consequences, such as the substantive legislation applicable (which may be of one or another country) it becomes necessary to have clear rules about the moment and place in which such a contract is consummated.

It is possible to go even further with the legal initiative without transforming it in an extensive and complex text. The drafters could easily establish certain fundamental rules about electronic business in certain specific areas, particularly in the field of documents relating to land, maritime, and air transportation, such as the bill of lading, that fulfill the juridical function of mobilizing the goods represented by them. Establishing rules regulating these areas is necessary given that the use of paper documents in such transactions is quickly being replaced by the use of electronic documents, according to the free will of the parties, without an objective juridical norm to regulate them.

It is evident that if the draft recognizes the validity of the electronic document as a proper means of memorializing all kinds of acts and contracts, and correlates the electronic document to that on paper, it should naturally follow that it is possible to issuance and circulate, by electronic means, credit instruments that support these acts and contracts. Given the economic importance and the frequent use of credit instruments in such transactions, the draft should consider the essential rules about the electronic issuance and circulation of these electronic credit documents.

Despite its shortcomings, we recognize that the Chilean draft will fill a legal vacuum in our juridical system, which has no special

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a holographic signature. Title III deals exclusively with the digital signature, describing the form in which it is generated by means of a cryptographic system that is composed of a pair of correlative keys, one private and other public.

rules regarding electronic commerce. It is also important to recognize that the model law will later be complemented by more specific norms on electronic commerce, as has been the case in Mexico, Peru and other Latin American countries that have already adopted legislation on this matter.

## V. Conclusion

The Chilean Parliament is faced with the alternative of approving the law that we have analyzed, with its limited objectives, and later complementing it with rules and regulations issued by the President of the Republic using his constitutional authority, or establishing more comprehensive legislation. The latter option would involve either adopting in full the Model Law or selectively incorporating those provisions of the Model Law that deal with areas which the Chilean draft does not address. Given these options, the Chilean Parliament should adopt the Model Law in full. Adoption of the Model Law will not only give Chile comprehensive rules regulating this new area of commerce, but, as it is incorporated to the international law of other countries it will attain a second objective, furthering the uniformity of law in this area. The existence of a uniform regulation on electronic commerce will facilitate international business by removing the obstacles arising out of the diversity of juridical regimes applicable in different countries.

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