

E-COMMERCE LAW IN PAKISTAN

Introduction

With the advent of Global trade being crystallised under especially the auspices of the World Trade Organisation and exponentially accelerated by the use of instant communication across the Internet the 21st Century is an era where the law is faced with new and growing challenges.

Matters ranging from cross-jurisdictional issues, lack of enforcement capabilities, security, transactional sanctity, evidential matters and payments terms to cyber crimes and Terrorism are all intertwined in Global Commerce. In fact E-Commerce has come to mean Global Commerce. *Lex Meractoria* is now more than ever feeling the effects of a lack of uniform principles relating to legal frameworks around the globe in a Market where the exposure and trade is Global.

Fortunately the disparity of legal frameworks or the lack thereof in various jurisdictions is not an obstacle when compared with the technical advancements around the World. Computers, Programming, the Internet and Information Technology Infrastructure around the World are largely compatible. Thus, the tools of ECommerce have progressed at a faster pace and are capable of handling nearly all matters relating to Global ECommerce with security and a great degree of satisfaction for users. The Legal Framework on the other hand has been lagging behind. This was a reality in Pakistan more so than other jurisdictions because the laws generally were nearly a Century old.

Moreover, if Pakistan is to become operationally and commercially viable for taking advantage of Global Trade, the fast pace of Commerce as a result of Electronic means and the countless opportunities that it held it is necessary for Pakistan to provide the users of E-Commerce with the Legal Infrastructure, framework and protection of the law in relation to E-Commerce.

As a result of the advanced vision of the Government of President Musharraf, the Electronic Transactions Ordinance 2002 has come to fruition and is being promulgated. This is a first step and a solid foundation for providing Pakistan with a comprehensive Legal Infrastructure to facilitate and provide legal sanctity and protection for Pakistani E-Commerce locally and Globally.

There are various aspects relating to Commerce generally and providing legal cover only to Transactions is akin to providing a Contract Act & Evidence Act. In order to facilitate Commerce, however, other areas also need to be addressed; such as:

- E-Banking/Finance
- Intellectual Property
- Anti-Trust/Competition
- Consumer Protection
- Conflict of Laws
- Telecommunication

Technology Law
Data Protection & Confidentiality
Cyber Security
Cyber Crimes/Terrorism
The Shariah Aspects

Thus, this Government as it were has put the first man in Orbit in a long Space Race. It is now necessary to concentrate on the continued and efficient implementation of the ETO 2002 by correct interpretation and application and also the promulgation of laws in the other areas identified above.

It will be an effort to first highlight the salient features and policy reasons for the particular provisions of the ETO 2002 both in the domestic context as well as in comparative light of International regimes. This will be followed by an identification of the areas of Pakistani E-Commerce Law that exist at present and an analysis of whether legislation in those areas is desirable and if so briefly what form it might take.

Electronic Transactions Ordinance 2002

The Ordinance deals with 8 main areas relating to E-Commerce:

1. Recognition of Electronic Documents.

The Ordinance gives legal recognition to documents, information, records and allows their admissibility into evidence in a court of law without the need for witnessing. In addition the requirement for maintaining any document in writing has been satisfied if the document or record is in electronic form and is capable of being retrieved and accessible. Moreover, rules regarding what would be an electronic original form of the documents, information, record or communication and rules regarding compliance in electronic form with any law requiring retention of such documents, information, record or communication have also been defined. Thus, the legal foundation for all matters relating to moving Pakistan from a paper intensive to a paperless and electronic economy and government are provided for in this Ordinance. This will undoubtedly lead to speed and efficiency in accessing of records and documents through electronic means and will have an exponential impact on Commerce, Administration and Governance in Pakistan.

2. Electronic Communications

The Ordinance especially lays down rules regarding how to associate/attribute a particular electronic communication to a particular recipient or sender. It also provides for specific rules regarding legal acknowledgement, the legal rules regarding time and place of sending and despatch of the communication. This is vital to E-Commerce since it gives legislative cover and clarification to what would otherwise under common law be akin to the 'postal rule' and lead to multiplicity of interpretation on the origin, receipt and time and place of offers, acceptances and creation of contracts and vital communications that not only affect Commercial interest but also rights of citizens in general. This clarification thus, gives stability to the Commercial sector by guaranteeing and informing both business and consumers the implications of how, when and where from or to send a communication which can lead to the creation of legal obligations and rights.

3. *Digital Signature regime and its evidential consequences (presumptions)*

The Ordinance recognising the possibility and apprehensions of the market and administrations in general of maintaining security of such electronic information, documents, records and communications provides for security in the EEnvironment of Pakistan and over the Internet. Instead of becoming technology specific when defining what would legally deemed to be secure electronic documents, records, communications and information, the Ordinance defines the principles that are required in any security application for it to be deemed legally secure. Hence the purpose that signatures and seals fulfil under current law and commerce are replaced by an electronic signature or electronic application that acts as a lock on any document, communication, record or information.

Recognising the cost of acquiring advanced electronic signatures the Ordinance allows for a two tier system. The first tier is simply an electronic signature which can be any symbol, image, number, character etc. or its combination which is included in the electronic information, document, record or communication which is affixed by the affixer with the intention of authenticating or signifying his ownership or approval of the same. This however, is not secure as it may be tampered with and thus fails to fulfil the criteria of integrity and secured authenticity of the electronic information, document, record or communication. In such a case the signature if relied upon for either authenticity or integrity before a Court of law would need to be proved by the one relying on the same and the burden of proof would initially lie on that party. Thus, it possible to allow legal recognition of such a simple electronic signature by leading evidence but it does not attract any special favours for evidential purposes in the Court and thus, proving the signature may prove to costly.

Hence, there is incentive built into this Ordinance for the acquisition and application of the more secure and reliable digital signature or as has been defined the advanced electronic signature. This constitutes the second and higher tier in relation to electronic signatures in this Ordinance. The digital signature by its very nature and programming is designed to provide secure authenticity (identity) of the maker, originator or approver of the electronic information, document, record or communication and also simultaneously provide integrity of the electronic information, document, record or communication ensuring that the same has not been altered, modified or tampered with without leaving a record of the same. The heavy incentive that has been attached with use of an advanced electronic signature is the fact that the Ordinance proved a legal presumption in favour of any advanced electronic signature thereby reducing the costs increasing the efficacy of proving such an electronic signature in Court. This does not mean that the signature cannot be disproved. The opposing party can launch an objection and claim that the signature is false or unreliable and for this the burden of proof and hence the cost is borne by the challenging party.

Advanced Electronic Signatures are those signatures that have the criteria of authenticity and integrity simultaneously or any signature that has been provided by a certification provider 'accredited' by the Certification Council. This latter provision is an incentive for the local IT industry to develop encryption capabilities and apply for voluntary accreditation in this regard with the Accreditation/Certification Council which aims to ensure that its accreditation promotes and encourages both local IT industry but at the same time ensures the security of the E Environment.

4. *Providers of Certification of Web Site & Digital Signatures*

In order to provide security and guarantee that websites and EBusinesses are reliable not only with regard to their security procedures but also with respect to reliances being placed upon them for transacting commercially, the birth of the certification service provider and encryption (digital signature) providers in Pakistan will go along way to boost the IT industry and promote International standards and thus economic growth both for the domestic as well as international (exportable) markets. In order not to stifle the industry and become restrictive and create obstacles or disincentives for entry into this industry, the policy decision was very clearly not to make such accreditation into a licensing or regulatory framework. Akin to and in line with the logic of all E-developed countries accreditation was specifically made voluntary. However, the legal presumptions attached with accreditation and the credibility and following in the market that the Council will have to create would be the basis for incentivising the voluntary accreditation of such providers.

5. *Stamp Duty*

The Ordinance further incentivises the transition from paper-based to paperless E-Environments and E-Commerce by excluding the payment of Stamp Duty on Electronic Transactions, with the exception of items such as Negotiable instruments and transfer of immovable property.

6. *Attestation, notarization, certified copies*

The legal requirement for attestation, notarization are excluded and the process by which certified copies of Electronic forms are to be obtained are laid out in the Ordinance.

7. *Jurisdiction*

Consequent upon the very global nature of E-Commerce and the Virtual and Electronic Environment, it was necessary to allow jurisdiction over matters that may have substantial foreign elements and as long as they are connected in any way to connected to or have an effect on any person, systems or events within Pakistan to the Pakistani Courts. This provides greater degree of security to E-Commerce in Pakistan and Pakistani Consumers as it allows them recourse in their own jurisdiction.

8. *Offences*

As an interim measure before the promulgation of the Cyber Crimes or Computer Misuse legislation it was necessary to deter and prevent certain Electronic Crimes that would foster in the wake of legal recognition of Electronic Transactions. Thus, the criminal offences under the Ordinance were made cognizable, compoundable and non-bailable. From false information being supplied by the subscriber of services of a certification service provider, to issuance of false certificates by the provider and serious crimes such as violation of privacy (data protection) and damage caused to electronic systems leading data loss or alteration etc. are covered under the Ordinance. There is a need to bring a comprehensive regime relating to Computer Misuse which is under consideration by the Information Technology Law Forum.

The Ordinance has thus created the legal basis and incentivised the propagation of the IT industry in Pakistan and consequently ECommerce in Pakistan as well. It will create incentives and demand for cheaper local programming and encryption technology as well as demand for Data Warehousing, Digital Security, Surveillance and many other areas which at this time may not even be conceivable. The Ordinance is the foundation and the dawning of the true IT Revolution in Pakistan and the mantle of Pakistan's progress in the new Millennium.

Outstanding issues

It is now vital that global payment mechanisms of EFT and Digital Payments such as E-Wallets, TradeCard and other means of making payments across the E-Environment including cross-border and global trade are opened up for the speed of the Commerce will be held hostage to the speed of the payment mechanism. In an E-Environment with global Commerce methods of instant payments will only lead to a growth of Commerce and International Trade in and from Pakistan bringing the Pakistani business and industry to the door step of the World Community.

The Sub-Group on E-Banking of the ITLF tackling this very challenge and the draft of the E-Banking legislation is on its way.

The ETO 2002 takes heavily from the International experience and comparison of International legislations in this area from Ireland, to Hong, Kong, Singapore, India, UK, US, UNCITRAL, EU, New Zealand and Australia. In keeping with its spirit to maintain standards that are the best and International and to take the best from the Global experience, it is necessary that the draft of the E-Consumer Protection and E-Commerce Legislation take into account the vital recommendations of OECD and the EU:

- (a) accessibility and affordability;
- (b) consumer friendliness of equipment and applications and the skills necessary to use them;
- (c) transparency including the quantity and quality of information;
- (d) fair advertising, marketing practices, offers and contract terms;
- (e) protection of children against unsuitable contents;
- (f) security of payment systems, including electronic signature;
- (h) the apportionment of responsibility and liability;
- (i) privacy and the protection of personal data; and
- (j) access to efficient systems of redress and dispute resolution;
- (k) information technology as a tool for information and education;
- (l) establishment of consumer confidence and trust are a pre-requisite for consumer acceptance of, and participation in the Information Society and
- (m) global cooperation

These aspects of E-Commerce would have to be seen in the light of the impact that the Sales of Goods 1930 and the Transfer of Property Act 1882 would have on Transactions over the E Environment. – need to dilate on effects of the provisions of these legislations and their interaction with ETO 2002 and E-Commerce in Pakistan in general.

The advent of the ETO 2002 also has had exponential impact on the possibilities for enhancement of International Trade and Finance in Pakistan as the advent of the eUCP will bring Pakistani exporters at par in their speed, legal framework and accessibility with their competitors. These matters will be further dealt with in my next paper which will concentrate on the impact that the ETO 2002 shall have on the Financial Institutions with regard to day to day banking practices, in particular matters relating to International Trade Finance, Loan/Finance Documentation, Evidentiary matters and the impending legislations regarding e-Banking that are under consideration by the ITLF.

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He is a member of the Bar of England & Wales, International Bar Association, Inter-Pacific Bar Association, American Society of International Law, Sindh High Court Bar Association, Life Member Lahore High Court Bar Association, Lahore Bar Association and Karachi Bar Association, Member American Society of International Lawyers, Member International Bar Association, UK, Member Inter-Pacific Bar Association, Tokyo, Member International Chamber of Commerce (ICC), Member ICC Commission on E-Business, IT and Telecoms, Member International Lawyers for Multilateral Trade Cooperation, Geneva (UNCTAD) .

As a member of the Information Technology Law Forum, Ministry of Science & Technology, responsible as the core drafter of the Electronic Transactions Ordinance, 2002 and is currently working on the drafts of the Cyber Crimes Law, the Electronic Banking Law, Telecommunication & Convergence Law and the Anti-Trust Law relating to the Information Technology Industry of Pakistan. Presently, the Chairperson of the e-Commerce Committee of the ITLF

He is a Member of the E-Business IT and Telecommunications Commission of the International Chamber of Commerce at Paris (EBITT), Chairperson and member of International Chamber of Commerce (ICC) National Committee on E-Business IT and Telecommunications, Pakistan (EBITT), Vice Chairperson Legal Working Group United Nations Council on Trade Facilitation and E-Commerce (UN/CEFACT), Geneva and a Member of AFACT and Chairperson Joint Legal Working Group of Asia Pacific Council on Trade Facilitation and E-Commerce (AFACT).

He is also providing Legal & Policy advice to the State Bank of Pakistan as well as the ECH Task Force of the SBP headed by the Mr. Naved Khan, County Representative for ABN AMRO and NIFT.

He is presently the Legal Consultant to the World Bank Project implemented through the Ministry of Commerce by United Nations Convention on Trade and Development Transport & Trade Facilitation Program.

He has been the Legal Consultant for the Task Force for Rehabilitation of Sick Industrial Units and has drafted rehabilitation plans for revival of sick as well as privatized units from a list of 800 Industries all over Pakistan.

He is a Professor of U.S. Constitutional Law at the Sindh Muslim Law College, University of Karachi, and also lectures in U.K. Constitutional Law for the LL.B. (Hons), University of London at L'Ecole, Karachi and an Advocacy Trainer Accredited by the Bar of England & Wales to Train in Pakistan.