The adoption of the Electronic Communications Convention by Montenegro:  
Policy choices and Impact

Aneta Spaic  
Assistant Professor  
University of Montenegro School of Law

Luca Castellani  
Secretary, Working Group IV  
UNCITRAL Secretariat

On September 2015, Montenegro deposited its instrument of ratification of the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”). It thus became the sixth State Party to the Convention. The Convention will enter into force for Montenegro on 1 April 2015.

This paper aims at providing fundamental information on the expected impact of the entry into force of the Electronic Communications Convention in Montenegro, highlighting associated benefits.

Existing Montenegro e-commerce laws

Currently, e-commerce is not particularly developed in Montenegro. Network access is increasing, though broadband penetration remains low compared to other European countries — it was at 13.9% in October 2012, with significant differences in the various regions. The official goal is to reach 60% penetration by 2016.

Like the rest of the Balkans, Montenegro has adopted legislation in the field of e-commerce inspired by European Union (EU) texts. This is done because of the desire to support the EU enlargement process. As a result, the laws of Montenegro are periodically reviewed against EU laws to measure the distance between the two.

* The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.
In particular, relevant Montenegrin legislation consists of the Electronic Signatures Law,¹ the Law on Electronic Commerce² and the Law on Electronic Document.³

In the latest such “Screening Report”⁴ available, the current status is assessed as follows: “Montenegro stated that its legislation is largely aligned with EU legislation. To that end the Montenegrin Act (80/04, 41/2010) on Electronic Commerce ensures a high level of alignment with EU Directive 2000/31/EC on e-Commerce. Draft amendments aiming at full alignment have been prepared. Regarding e-signature, Montenegro stated that the Montenegrin Law on Electronic Signature adopted in 2003 and amended in 2005 and 2010 is fully aligned with the Directive 1999/93/EC.”⁵

Those statements may be correct but could benefit from additional clarification.

Firstly, the legislation of the European Union has historically focused on two aspects, consumer protection and the use of electronic signatures, deemed relevant to build the internal market. On the other hand, texts prepared by the United Nations Commission on International Trade Law (UNCITRAL), including the Electronic Communications Convention, focus on purely commercial transactions.

Directive 2000/31/EC⁶ on electronic commerce is an important text for the protection of consumers, but does not deal in too much detail with issues related to the commercial use of electronic means. It is to some extent aligned with UNCITRAL texts, for instance in its article 9, on treatment of contracts, endorsing the principles of non-discrimination of electronic means and of technology neutrality.⁷ More significant from the international perspective, Recital 58 of that Directive specifies that: “This Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, UNCITRAL) on legal issues.”

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¹ Official Gazette of the Republic of Montenegro 55/03 and 31/05.
² Official Gazette of Republic of Montenegro, No. 80/04.
³ Official Gazette of the Republic of Montenegro, No. 5/08.
⁵ Screening report, page 5.
⁷ Directive 2000/31/EC, Article 9(1): “1. 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.”
Directive 1999/93/EC\(^8\) dealt with the use of electronic signatures. It has been repealed and substituted with the eIDAS Regulation\(^9\) because of its disparate and non-uniform application in different EU member States. In particular, differences arose on the implementation of article 5 of the Directive 1999/93/EC, which could be understood as mandating the use of qualified signatures, or attaching a presumption to them. The matter is crucial as mandating the use of a particular type of signature may result in a violation of the principle of technology neutrality.

The eIDAS Regulation focuses on public trust framework and leaves decisions on the use of electronic signatures in commercial transactions largely to party autonomy. However, it is too recent to have an influence outside the EU (where it actually has not yet been implemented).

The Law on Electronic Commerce is clearly inspired by the EU e-commerce law directive, though its provisions are for domestic use only, and focuses on consumer protection. However, some of its articles seem to be relevant also for commercial transactions. Thus, article 10 of that Law recognizes the validity of contracts concluded electronically. The content of that article is similar to article 9(1) of Directive 2000/31/EC. Moreover, article 13 of the Law on Electronic Commerce makes a general statement on the legal recognition of electronic signatures, referring to other law for the determination of additional legal requirements.

The Electronic Signatures Law of Montenegro went through significant amendments since its first adoption in 2003. Article 7 of the original text required “an advanced electronic signature based on a qualified certificate and created by a secure signature-creation device” in order to establish functional equivalence between handwritten and electronic signatures. That law, which had unlimited scope, was in fact technology-specific.\(^10\)

The 2005 version of the Electronic Signatures Law contains meaningful differences. For instance, article 3 excludes a number of matters from the scope of application of the law. Article 6 indicates explicitly that the validity of the electronic signature may not be denied, nor may be rejected as the evidence solely because it is not based on a qualified

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certificate or it is not an advanced electronic signature. Clearly, the legislator intended to depart from the previous technology-specific approach, and to adopt an approach more in line with the Directive 1999/93/EC, which is based, as mentioned, on the “two-tier” model. That model recognizes all types of electronic signatures but attaches presumptions to those signatures meeting certain requirements that are described in technology-neutral terms. However, article 7 of the 2005 version of the Electronic Signatures Law sets forth that only advanced electronic signatures that can be verified on the basis of a qualified certificate are equivalent to handwritten signatures and may be used as evidence in commercial transactions. Hence, article 7 adopts again a de facto technology-specific approach. The application of the policy approach underlying article 6 to the text of article 7 may pose difficulties.

With respect to the recognition of foreign electronic signatures, article 17 of the 2005 version of the Electronic Signatures Law follows the approach of the Directive 1999/93/EC and, in particular, its article 7. One significant difference is that the Montenegrin law recognizes automatically certificates issued by certification service providers based in the EU. In any case, the mechanism envisaged in article 17, which is not easy to implement, is limited to certificates and does not apply to other forms of electronic signatures. It represents however a significant step forward compared to the corresponding provisions of the 2003 draft of the Electronic Signatures Law.

Last, but not least, reference is to be made to the Law on Electronic Document. That law establishes that electronic documents must contain unique identifiers, also with respect to their originator. It also sets high standards of integrity. The electronic document meeting the requirements of article 6 is deemed to be original.\footnote{Article 6. “Electronic document in documentation cycle must meet the following requirements: 1) to be uniquely marked, based on which the individual electronic document can be unambiguously identified; 2) to contain a unique mark by which the identification of the creator of the document can be performed unambiguously; 3) to have information integrity and ensured inviolability of electronic document; 4) to have ensured access to the content of electronic document, in each phase of documentation cycle; 5) to be in a form of a record which makes it easy to read the content.”} Although the language of this law is technology-neutral, the approach seems to favour or, at least, presume the use of certain technologies. Thus, for instance, article 13(1) of the Law on Electronic Document requires that, “[i]n all operations of documentation cycle of electronic document there must
exist the opportunity of verifying its authenticity, originality and immutability.” Such requirements may implicitly refer to the use of PKI.

Interestingly, the Law on Electronic Document contains also provisions directly inspired by the UNCITRAL Model Law on Electronic Commerce, namely those on dispatch of electronic document (article 16), receipt of electronic document (article 17), confirmation of receipt of electronic documents (article 18), time of dispatch and receipt of electronic document (article 19) and storage of electronic documents (article 21).

In general, the Law on Electronic Document seems to adopt an approach different from that of favour for enabling, but not regulating the use of electronic communications. Its operation in conjunction with the Law on Electronic Commerce and the Electronic Signatures Law could present challenges.

**UNCITRAL texts in Montenegro**


Indeed, the Electronic Communications Convention has been originally drafted with a view to establishing functional equivalence for those formal requirements contained in treaties concluded before the broad use of electronic communications. Given the primacy attributed to treaties in many legal systems, it was felt that only another treaty could give ultimate predictability and certainty on the issue. Those formal requirements include, for instance, the need for a written copy of the arbitration clause and of the arbitral award under the New York Convention, or of the contract for sale of goods under the CISG.

Eventually, the Electronic Communications Convention went well beyond that original goal. The final text of that treaty is able to satisfy multiple functions, including providing a common core for cross-border electronic commerce, for instance with respect to functional equivalence rules and to electronic contracting.
With respect to existing Montenegrin legislation, the Electronic Communications Convention fills an important gap. As seen above, the laws of Montenegro are either inspired by EU models, or by prescriptive legislation. EU models are, in turn, enabling in nature and technology neutral, but do not deal in detail with commercial transactions, which are left to party autonomy. However, the development of electronic commerce in a new State and a small jurisdiction, with limited capacity and infrastructures, may benefit from additional clarification.

By adopting the Electronic Communications Convention, Montenegro has brought in its legal system clear statements of the fundamental principles of electronic commerce, which already exist in its laws, but in a manner that is fragmented and now always coherent. It has also introduced important provisions on electronic contracting. Finally, it has created a mechanism for the recognition of foreign electronic signatures that is non-discriminatory and technology-neutral. This mechanism fills a gap in existing legislation, which is limited to certificates. It is also in line with the liberal approach endorsed in the new eIDAS Regulation.

Conclusions

Montenegro is a small State. This status offers advantages but also limits. In the case of the Electronic Communications Convention, Montenegro could move fast and embrace an innovative treaty before most other States. In fact, the Electronic Communications Convention is currently the only treaty that deals exclusively with e-commerce law. As such, it is the only legal text that ensures that fundamental principles of e-commerce law are recognised and enforced across borders. It contains the only legal mechanism that ensures technology-neutral mutual recognition of electronic signatures, a requirement that is increasingly mandated in bilateral and multilateral free trade agreements.

The Electronic Communications Convention is as well the only treaty that addresses the use of electronic means to satisfy formal requirements contained in pre-existing trade law treaties. This last point is critical in order, for instance, to allow for the use of electronic communications in alternative dispute resolution.

The above analysis indicates that the Electronic Communications Convention may provide common rules for electronic contracting that do not exist, or exist only partially, in
EU member States and in other States closely related to the EU. The example of Montenegro should encourage greater EU participation in that Convention, thus promoting cross-border e-commerce not only in the EU but especially between EU and non-EU member States in a predictable, modern and efficient enabling legal framework.