CHAPTER - 7

THE INFLUENCE OF THE MODEL LAW ON ELECTRONIC COMMERCE AND THE IMPORTANCE OF THE ELECTRONIC COMMUNICATIONS CONVENTION IN THE MACAU SAR LEGAL SYSTEM

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I INTRODUCTORY PART: GENERAL CONSIDERATIONS

1.1 The Importance of E-Commerce and E-Communications

Electronic commerce is becoming more and more the most important way of doing business. There are many reasons that can explain it. From our perspective there are essentially two reasons. The first one is related with the companies themselves: electronic commerce is an easier and cheaper way for companies to be in the business; in fact, they spend less resources namely in real estate, in staff and in the maintenance of the place of business. The second one is related to the buyers, whether they are consumers or companies: the buyers increasingly prefer this way of buying not only because it is more practical but also because it allows them to do a better comparison of prices and, in consequence, to make a better choice and a better selection of the products.

Accordingly it is not new, nor surprising that the electronic commerce is growing greatly, especially in the countries that are facing high levels of economic development. Stating this understanding: "As online transactions are increasingly embraced by enterprises and consumers, the global landscape is rapidly changing, with developing countries as a group assuming a more prominent role as both buyers

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and sellers of goods and services online. […] It is estimated by UNCTAD that the value of global business-to-business (B2B) e-commerce in 2013 exceeded $15 trillion […]. Global business-to-consumer (B2C) e-commerce accounted for an estimated $1.2 trillion in 2013".[1]

Even though we cannot talk about total electronic commerce, because the commercial relation is still based in traditional ways, it is undeniable that the electronic communications are the most common way of establishing the communication between the parties. In fact, more than a phone call or a written letter, the parties communicate through email and other instant messages services. Those means are faster than the traditional mail and are more reliable than a simple call. So, even when commerce is not fully electronic by definition the usage of electronic means of communication is actually the reality of business, especially in the international transactions field.

The fact is that electronic commerce and the electronic communications raise some questions that traditionally we did not face. And new questions bring new challenges for the traditional legal regimes. Frequently domestic legislation cannot offer a safe and reasonable solution to the new problems. Despite this, the international organizations and institutions are totally aware of those new challenges and already offer some important tools to the new business reality. It was around those ideas that this study started.

1.2. Plan of Analysis

Apart from the introductory part, this study is clearly divided into two different and autonomous parts. The next part of this paper is based on the analysis of the "UNCITRAL Model Law on Electronic Commerce", (hereinafter 'Model Law'), adopted on 12 June 1996, with an additional article 5 bis adopted in 1998.[2] The last part of this paper is based on an examination of the "United Nations Convention on the Use of Electronic Communications in International Contracts", (hereinafter Electronic Communications Convention), [3] adopted on 23 November 2005.

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1 UNCTAD "Information Economy Report 2015 – Unlocking the Potential of E-commerce for Developing Countries" United Nations Conference on Trade and Development (Switzerland, 2015) p xi <http://unctad.org/en/PublicationsLibrary/ier2015_en.pdf>.

2 UNCITRAL "UNCITRAL Model Law on Electronic Commerce" (1996) <www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html>.

3 UNCITRAL "United Nations Convention on the Use of Electronic Communications in International Contracts" (New York, 2005) <www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html>.

Electronic commerce and electronic communications in international contracts are thus the focal points of our study.

Considering that in the first case our analysis reference is a Model law and in the second case is an International Convention, the study of the first hypothesis must be different from the second one. In the first case, what we can do is verify whether the domestic laws Macau Special Administrative Region (MSAR) have adopted, or not, the solutions of the Model law in the legislation internally approved. In the second case, and since the Convention is not applicable to the MSAR, the exercise that should be done is to verify what could be the real contributions of the Convention to the domestic legal system.

1.3. This Study in the Context of the Conference

The present study falls within the conference titled "Regional Perspectives on Contemporary and Future Harmonization Agenda in International Trade Law", jointly organized by the United Nations Commission on International Trade Law – Regional Centre for Asia and the Pacific and the Faculty of Law of the University of Macau.

The study does not come up with business solutions, commercial perspectives or technological instruments for the issues related with the international electronic trade. Differently, this study is based on juridical analyses of the domestic legislation, the Model Law and the Electronic Communications Convention. However, the importance of legal studies to the improvement and development of the international transactions should not be underestimated. International trade only can take place, progress and grow on a healthy and stable basis if the interest of the parties are properly guaranteed by effective legal instruments. This perspective has also been one of the considerations that was in the basis of the Model Law: "the establishment of a model law facilitating the use of electronic commerce that is acceptable to States with different legal, social and economic systems, could contribute significantly to the development of harmonious international economic relations".[4]

Furthermore, it is important to emphasize that the significance of the legislation is only theoretical if we do not have a detailed and precise knowledge of it. Accordingly, with this study we aim to contribute to awareness about the legislation in this field both internally and internationally. At the same time, detecting some problems or insufficiencies of the domestic law, we humbly expect to contribute to

4 UNGA Res 51/162 (16 December 1996).

the improvement of the legal system, and a better legal system means a better atmosphere for the commercial transactions.

II MODEL LAW

2.1 Scope

According to the official information available on the website of the United Nations Commission on International Trade Law (UNCITRAL), the domestic legislation of the Macau SAR is influenced by the UNCITRAL Model Law on Electronic Commerce and the principles on which it is based. The domestic legislation that the UNCITRAL is referring to is Law 5/2005, which establishes the legal regime of the electronic documents and signatures and which entered into force on 7 September 2005.[5]

Starting from these statements we will undertake the analysis of the extent of the influence of the Model Law over domestic legislation. Our primary intention is realizing which solutions of the internal regime are in fact influenced by the Model Law on Electronic Commerce. Thereafter we will specify some solutions of the Model Law that had not influenced the domestic regime and that, in our humble opinion, should be taken into consideration by the legislator in the future.

2.2. The Nature and Advantages of a Model Law

A Model Law acts like a reference for the domestic legislators. It does not bind any State or Region to follow its solutions and it is not directly applicable as a Convention or an Agreement is. A model law is an orientation that the States or Regions can take into consideration when they draft their internal regime.

We can point out two important advantages of a Model Law: 1. First, a Model Law is usually draft by good technicians and has a high level of accuracy, so when a State or a Region incorporates its solutions that State or Region is adopting a solution that is good and reasoned from a legal and technical perspective; 2. Second, being a reference for many States and Regions, it promotes uniform solutions in many internal legal systems, which is vital to encourage international transactions and to solve the problems that could arise from them.

5 Law 5/2005, art 35.

2.3 The Influence on Domestic Legislation

2.3.1 The Domestic Legislation

As we stated before, the domestic legislation of the Macau SAR that is influenced by the Model Law and the principles on which it is based is Law 5/2005, which establishes the legal regime of the electronic documents and signatures. This regime was approved on 8 August 2005 and has entered into force on 7 September 2005.

Law 5/2005 is composed by thirty-five (35) articles. As can be easily reached by its name the regime established by this Law is related with *electronic documents* and *electronic signatures*. Most of the articles regulate electronic signatures more than electronic documents. In fact, many articles are related to the electronic signature, the certification of the electronic signature, the obligations of the user of an electronic signature, the entities that have competency to certify the electronic signature and its activity, etc. In consequence few articles are related to electronic documents, even if we consider that the regulation offered by those few articles seems to be clearly enough.

Other important point to focus is related with the fact that the domestic legislation is related with electronic documents no matter what the type of relationship established between parties. In fact, while the Model Law proposes a regulation for the electronic commerce, the domestic legislation, apart from some exceptions,[6] regulates the usage of electronic documents in all contexts. So, from this perspective, the internal regulation is broader than the regime proposed by the Model Law,[7] since Model Law, in principle, is only applicable to commercial legal relations. However the Model Law itself in the footnote "**" admits the possibility for States to extend the application of the proposed regime to more situations and suggests, for this case, an alternative article 1.[8]

We will then make effort to understand and measure the sphere of influence of the Model Law on domestic legislation, ie try to realize which solutions of the Model Law have been adopted by domestic legislation.

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6 UNCITRAL "Model Law on Electronic Commerce" (1996) para 2 art 1.

7 Accordingly, a very positive and important solution of this law is that, in article 31, it regulates the usage of electronic documents by public services and entities.

8 To be worded as follows: "This Law applies to any kind of information in the form of a data message, except in the following situations: [...]."

2.3.2 Legal Recognition

Article 5 of the Model Law, under the title *legal recognition of data messages*, states "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message". This is the consecration of the principle of the legal value of the electronic data messages.

This solution is also adopted by the domestic legislation. In fact, the paragraph 1 of the article 3 of the Law 5/2005 states: "The document submitted in electronic format cannot, therefore, be denied legal effects".[9] The domestic legislation adopts the same principle of the Model Law, here with slightly different formulation: the principle of the legal value of the electronic documents. This principle is the basis or the starting point of both regimes.

It is important to emphasize that, despite the consecration of this principle, the domestic law expressly states that the provisions of this legal regime shall not preclude the application of legal, regulatory or conventional rules requiring the use of paper documents or other special ways or means of presenting, formulating, transmitting or filing them, in particular when it concerns to notarial and registration acts, procedural acts, acts that entitle personal legal relationships, acts relating to insolvency proceedings, and situations where the physical presence of the signatory or face-to-face recognition of signature is required – paragraph 2 of the article 1 of Law 5/2005. It is easy to conclude that the law expressly safeguards some exceptions to the principle of the legal value of the electronics documents.

2.3.3 Documents in Writing

Paragraph 1 of article 5 of the Model Law states: "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". As we can see the Model Law proposes that even when the Law requires that some information needs to be in writing the electronic information has legal effects on the following condition: the information contained therein is accessible so as to be usable for subsequent reference.

In almost the same sense, the MSAR domestic law, in paragraph 2 of article 3 of Law 5/2005 states: "The electronic document accomplishes the in writing legal requirement when its content is able to be represented as a written statement and its integrity can be demonstrated".[10] The solution is almost the same of the Model Law

9 Author's translation.

10 Author's translation.

with an additional requirement: the integrity of the document must be able to be demonstrated.

2.3.4 Signature

The Model Law, in paragraph 1 of article 7, states that where the law requires a signature of a person, that requirement is met in relation to a data message under certain conditions 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. So, what this article is doing is recognizing legal effects of a data message in those situations where the law requires the signature of a person.

A similar solution is prescribed by the domestic law. In fact, paragraph 1 of article 5 of Law 5/2005 states that a qualified electronic signature is equivalent to the autograph signature. This solution means that where the law requires the signature of a person, this requirement is met by the qualified electronic signature. As we can conclude the domestic law is a little bit more demanding than the Model Law: it still requires a signature (even if it is an electronic signature); this signature must be qualified. And what is a qualified electronic signature? It is a type of electronic signature based on a qualified certificate and created by a secure signature creation device, capable of effectively guaranteeing, in accordance with internationally recognized standards, the protection of the signature against fraudulent use – paragraph 4 of article 2 of Law 5/2005.[11] The internal solution is therefore more demanding than the solution proposed by the Model Law, however nowadays it easy to get that qualified electronic signature required by the Law 5/2005.

Anyway we must remember that the Law 5/2005 does not apply where the physical presence of the signatory or face-to-face recognition of signature is required – paragraph 2 of article 1 of Law 5/2005. So, in these situations, the pre-essential signature cannot be dismissed and replaced by the electronic signature.

2.3.5 Admissibility of Data Messages in Evidence and their Evidential Weight

The Model Law, in paragraph 1 of article 9, stipulates "In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence" just because it is a data message or if it

11 Most of the articles of the Law 5/2005 are exactly to regulate this signature and the requirements and the entities that can certify it.

is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form. On the other hand, paragraph 2 of article 9 states "Information in the form of a data message shall be given due evidential weight" and regulates some aspects to take into consideration to get the evidential weight of the electronic information.

In the same way, article 4 of Law 5/2005 regulates the evidential weight of the electronic documents. In this article, the evidential weight varies according with the fact that the document has been, or not, signed with the qualified electronic signature. But even when that qualified electronic signature has not been attached to the electronic document, the article still recognizes it with some evidential weight.

2.3.6 Acknowledgement of Receipt

Article 14 of the Model Law presents some solutions regarding the acknowledgment of receipt. As we all know, in legal terms and in commerce in particular, the moment after the recipient acknowledgement certain information is essential to extract some legal effects. So the decision of defining when this moment takes place as regards electronic communications is very important. Considering this importance, article 14 prescribes many solutions including the definition of the moment of the acknowledgment, the different ways of getting this acknowledgment, the situation where we cannot consider that there was an acknowledgment, etc. This article deals with some important solutions that are essential because otherwise the parties would spend time arguing whether they consider that there was an acknowledgment or not.

In a similar way, article 8 of Law 5/2005, under the title *confirmation of receiving*, establishes the regime of the confirmation of the receiving of the electronic documents. The solution of the domestic legislation is not as protective or as detailed as the solution of the Model Law. We can consider that it only offers the minimum rules in this field. However, it is positive that the legislator has at least taken this solution into consideration.

Despite the low protection level mentioned above, the MSAR legislator adopted an interesting solution in this field. In fact, paragraph 1 of article 7 of Law 5/20005, under the title *registration*, states that the transmission of an electronic document, with qualified electronic signature, by an information system which ensures its effective reception, is equivalent to a transmission by registered post. On the other hand, in paragraph 2, the legislator contemplates that if the reception of the previous communication has been confirmed by the addressee, it is considered registered post with acknowledgement of receipt. Those are two interesting solutions adopted by the MSAR legislator that have no equivalence in the Model Law.

2.3.7 Time and Place of Dispatch and Receipt of Data Messages

Finally, the last solution of the Model Law that we want to emphasize is the one adopted in article 15, related with time and place of dispatch and receipt of data messages. This is a fundamental question when we are talking about electronic communications. Regarding time, electronic communications are done in seconds or less than seconds, so it could be difficult, but very important, to determine when they are considered dispatched and received. Regarding the place, since we can use informatics systems wherever we want and the informatics systems are hosted in a place usually different from the place where the sender is sending the information, another difficult question to determine is the place of dispatch and receipt of data messages. And, as we know, in the commercial relations, the sending and receiving is an important reference for several legal and contractual solutions.

Considering these difficulties regarding the time and the place, the Model Law offers some clear criteria to determine them precisely avoiding superfluous disputes between the parties on its determination. For example, paragraph 1 of the article 15 states the following: "Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator". Another example, paragraph 4, stipulates "Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business".

In a very similar way, despite being not so detailed, the domestic law of the MSAR offers the same solution. In fact article 6 of Law 5/2005, under the title *sending and receiving*, stipulates the rules regarding the time and place of sending and receiving electronic documents. This is a very important solution since we are talking about electronic sending and receiving and, without the legal prescription, could not be easy to determine when those moments take place for legal effects.

2.4 Solutions to be taken into Consideration in Future

The Model Law offers many solutions regarding the usage of electronic data. Some of them have already been adopted by the domestic legislation of the Macau SAR, as we concluded above. However, some others have not been taken into consideration by the MSAR legislator in 2005. Considering its importance, we will proceed to enunciate some of those solutions that should be taken in consideration by the MSAR legislator in the future. It will be a brief exposition just to call the attention to them:

2.4.1 Original Documents

The Model Law, in article 8, previews some situations where the electronic data message meet the legal requirement of the "original form". In fact, in some situations, the law requires that certain documents should be submitted in its original form. Accordingly, this article states the conditions in which this original form is to be fulfilled even if the document is an electronic document. This represents an important solution for the internal legal regime and we cannot find it in the MSAR legal system. So we consider that it should be taken into consideration in the future.

2.4.2 Retention of Documents

The Model Law, in article 10, states that where the law requires that certain documents, records or information be retained, that requirement is meet by retaining data messages, if some conditions exposed are satisfied. In fact, sometimes the law requires that some documents must be retained for some period of time. In the case of electronic documents this retention should be electronic. So the Model Law fixes the requirements to allow the retention of the documents in an electronic way. We do not find this solution in the domestic legislation and we think that it is a good solution to think about.

2.4.3 Formation and Validity of Contracts

The Model Law, in article 11, states: "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". This solution is highly important especially because, even if we do not have statistics to prove it, we admit that nowadays, the most of the contracts are negotiated or concluded by this way. So having an article stating that the electronic negotiation or the electronic conclusion of the contract should not affect its validity is a very relevant rule. In the domestic legislation, we do not have an article and a solution like that. That does not mean that we cannot get the same answers in our legal regime, however it is not sure that this will be the solution, since there is no article expressly recognizing it.

2.4.4 Attribution of Data Messages

Article 13 of the Model Law, under the title *attribution of data messages*, gives us answer to this question: when can we consider that the electronic message was sent by the originator or sender? This question is particularly difficult to answer in electronic relations since the messages are not directly sent by the person but through an electronic mean or by other person on his or her behalf. So this article offers some

responses like the following "As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent: […] b) by an information system programmed by, or on behalf of, the originator to operate automatically" – paragraph 2. This solution is very important to clarify some answers that could not be easy to get according to the traditional legal mind-sets. However, the domestic law does not have this solution. We consider that the legislator should reflect about the potential insertion of a solution like this in the domestic legal system.

2.5 The Importance of the Preceding Exercises

As a final reflection we would like to emphasize the two main reasons why we consider that the preceding exercises have been important:

1. First, because they led us to the conclusion that many solutions of the domestic law are in fact influenced by the Model Law. Accordingly, there is a high probability that the MSAR is sharing the same domestic solution with many other States, Regions or Jurisdictions. This circumstance definitely contributes to the desired standardization of the legal regimes, which is truly important when we are talking about commercial transactions.

2. Second, because though we conclude that many of the domestic solutions are inspired by the Model Law, we can also conclude that the Model Law and its explanatory report can present an important guide to us about the interpretation of part of our domestic regime contained in Law 5/2005.

III ELECTRONIC COMMUNICATIONS CONVENTION

3.1 Scope

In this part, we will start to expose the status of the United Nations Convention on the Use of Electronic Communications in International Contracts regarding the Macau SAR. Secondly we will expose some of the best legal solutions that the Convention can offer and its impact in solving some internal issues that the domestic law cannot solve or cannot solve in a satisfactory way. At the end we will conclude whether the eventual application of the Convention in the Macau SAR is desirable or not.

3.2 The Application of International Conventions and Agreements in Macau SAR

When we talk about the *Electronic Communications Convention* and its relation to the domestic legal regime of the MSAR the first question that arises is the following: is MSAR party to this Convention? The answer is clearly negative: MSAR is not party to the *Electronic Communications Convention*. The second

question that immediately arises is the following: can MSAR be a party to this Convention? The answer to this question is now affirmative: MSAR can be part to *Electronic Communications Convention* in the future. What we need to do next is understand in which circumstances and in which conditions that can happen.

3.2.1 The Position of MSAR on the International Scene

In the abstract MSAR can be party to this Convention by 2 different ways: (i) directly, ie, as a subject of international law; (ii) indirectly, ie not as a subject of international law, because the subject of international law is the People's Republic of China (PRC). In both cases, the onvention is applicable to the MSAR, even if MSAR is party to the Convention in different and distinctive way. Let us briefly analyse these two possibilities.

(i) To be a party to a Convention as a *subject of international law* the MSAR must fulfil two material requirements and one formal requirements, respectively: (a) the agreement is not reserved for sovereign states, since MSAR is not a sovereign state but a Special Administrative Region of the People's Republic of China; (b) the agreement is related with economic, trade, financial and monetary, shipping, communications, tourism, cultural, science and technology, and sports fields; (c) the MSAR is party to the Convention under the designation of "Macao, China".

The first requirement is not directly provided by Law, but it is a logical requirement and it is peacefully accepted by authors. The second and the third ones are provided by the Basic Law of the MSAR,[12] specifically resulting from the combination of paragraph 3 of article 13 of the Basic Law, and article 136 of the Basic Law. The paragraph 3 of the article 13 states "The Central People's Government authorizes the Macao Special Administrative Region to conduct relevant external affairs, on its own, in accordance with this Law". On the other hand, article 136 states "The Macao Special Administrative Region may, on its own, using the name "Macao, China", maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural, science and technology, and sports fields".

(ii) The possibility of being party to a Convention *when the PRC is the subject of international law*, occurs when the PRC decides to extend the application of a certain convention to the MSAR. This is the solution stated by paragraph 1 of article 138 of

12 See for the English version of the Basic Law of the MSAR <www.umac.mo/basiclaw/english/main.html>.

the Basic Law: "The application to the Macao Special Administrative Region of international agreements to which the People's Republic of China is a member or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region".

As we can conclude from the analysis of this disposition, this possibility is essentially dependent on two requirements: (a) The MSAR government must be consulted in order to get its point of view regarding the extension, in what we can call a *consultation process*, which is compulsory but not binding; (b) The Central People's Government must decide on the extension to the MSAR after the consultation process, a decision that is discretionary and sovereign.

3.2.2 The Position of MSAR regarding the Electronic Communications Convention

We started this title with two questions and their answers. Is the MSAR part to the *Electronic Communications Convention*? The answer has been negative. Can the MSAR be part to this Convention? The answer has been affirmative. So after we had explained, in the abstract, the two different ways for the MSAR to be party to international conventions or agreements, we want now to conclude, specifically, which is the way for the MSAR to be party to the Electronic Communications Convention.

(i) Firstly, we will check whether MSAR can be party to the Convention as a subject of international law**.** The first requirement is the condition that the agreement is not reserved for sovereign states. Well, the MSAR does not fulfil this requirement since, according to paragraph 1 of article 16 of the Electronic Communications Convention "This Convention is open for signature by all States". The further paragraphs of the same article also refer to the "States" and, as we have noted before, the MSAR is not a state. This conclusion is also confirmed by article 17 of the Convention which regulates the participation in the Convention by entities other than states and only refers to *regional economic integration organizations* and not to administrative regions like the MSAR. In fact paragraph 1 of article 17 states "A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention". As we can conclude the Convention is exclusive to states and regional economic integration organizations constituted by the Sovereign States. Accordingly, the MSAR cannot be party to this Convention directly, ie as a subject of international law.

Regarding the other two requirements, we do not really need to verify whether they are fulfilled or not because the possibility of the MSAR be party to the Convention fails in the first requirement. However, to make a complete analysis we cannot avoid to talk about them. The second requirement is related to the fact that the agreement is related with economic, trade, financial and monetary, shipping, communications, tourism, cultural, science and technology, and sports fields. We can consider that this agreement is related to the economic, trade and communications fields, so regarding the content of the Convention the MSAR was in a position to sign the agreement by itself. The third requirement, which states that the MSAR must be party to the Convention under the designation of "Macao, China", we can only analyse after the conclusion of the agreement, an exercise that cannot be done because there is no agreement concluded.

(ii) Secondly, we will check whether the MSAR can be party to the Convention indirectly. Considering the two requirements that we have analysed above, the possibility of the MSAR be party to the Convention through this way is real. So if a consultation process takes place (no matter the result) and the Central People's Government decides to extend its application to the MSAR, the extension will occur. In this possibility, the MSAR will be party of the Convention even if not as a proper subject of international law in this case.

Admitting this possibility, the focal point is that, until now, the PRC has only signed the Convention[13] but there is no public information regarding its ratification and, even less, no information regarding the intention of the PRC to extend the application of the Convention to the MSAR.

So we face two obstacles now: the Convention has not been ratified yet; there is no information regarding the intention of the PRC to extend it to the MSAR. So what we can conclude for now is that the application of the Convention can be extended by the PRC to the MSAR but we have no information if it will happen or not.

One final note just to emphasize that, according to our understanding, the extension of the application of the Convention can be done by the PRC anytime. Accordingly if the PRC does not do it soon, when the eventual ratification process takes place it can be done any time.

3.2.3 Intermediate Conclusion

The MSAR is not party to the Electronic Communications Convention yet. The only way for the MSAR to be part to this Convention is the possibility that the PRC

13 The Convention was signed by the PRC on 06/07/2006.

will extend the application of it to the MSAR under the provision of article 138 of the Basic Law. This extension can be operated by the PRC during the ratification process or after and it depends on the adoption of the specific procedure stated by the Basic Law.

3.2.4 The Non-application of Article 18 of the Convention

The fact that the PRC has already signed the Convention and it will probably ratify it soon leads us to the interpretation of article 18 of the Convention, whose title is *Effect in domestic territorial units*. According to paragraph 1 of article 18: "If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time". Our concerns are specially related to paragraph 4 of article 18, which states the following: "If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State".

Our question is therefore the following: if the PRC makes no declaration under paragraph 1 of article 18 of the Convention will its application be automatically extended to the MSAR under paragraph 4 of the same article? The answer depends on the concept of "domestic territorial units". Our understanding is that the MSAR cannot be considered as a territorial unit because it is a Special Administrative Region of the PRC with a high degree of autonomy, including on the legislative and judiciary plains. This is expressly stated in article 12 of the Basic Law: "The Macao Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government".

In conclusion: our understanding is that we cannot apply article 18 of the Convention, specially its paragraph 4, to the MSAR because the MSAR is not a territorial unit of the PRC, but is one of its Special Administrative Regions. So if the PRC does not state anything about the extension of the Convention to the MSAR it will not be applied automatically as paragraph 4 of article 18 stipulates.

3.3 The Importance of the Convention in Solving Some Domestic Issues

We concluded in the preceding paragraphs that the MSAR is not party to the *Electronic Communications Convention*, although that possibility exists in case the PRC decides to extend its application to the MSAR. Accordingly, our goal now is

trying to understand the advantages of the Convention to solve some internal issues that, otherwise, the domestic law cannot solve or cannot solve in a satisfactory way.

As we will realize, those advantages do not necessarily mean that we cannot get the same solution according to the domestic law. The problem is that, in some cases, it could not be easy to get that solution using the traditional contractual rules.

This advantages should be seen as an encouragement to the PRC, in case of ratification of the Convention, to initiate the process to extend the application of the Convention to the MSAR. Of course the MSAR can make some amendments to its legislation and adopt the same solution as the Convention prescribes. However, the internal legislation of the MSAR does not bind the other States so, since we are talking about international transactions, the best tool to regulate them are the international instruments.

Before we move forward, it is also important to emphasize the following: this Convention does not intend to regulate in detail the regime of the international contracts. We cannot expect to find in its articles a solution for all the important matters related with international contracts. This Convention aims to solve only some part of the issues of the international business: it wants to offer certain solutions related with the use of the electronic communications in the international contracts. It is with this limitation in mind that we should analyse the further considerations.

We have chosen three important and expressive hypotheses:

3.3.1 The Determination of the Place of Business

One of the greatest advantages of this Convention is the introduction of clear indications and elements to determine the place of business. The concept of "place of business" can be used by the law or by the contract in several situations. For example: the parties can stipulate that the law applicable to the contract is the law of the jurisdiction where the seller has its place of business. Another example: the parties can stipulate that the price should be paid in the place of business of the seller.

In all of the mentioned situations, it can be difficult to clearly identify which is this place. In fact it is important to remember that we are talking about international contracts that have been concluded under the usage of electronic communications. And the electronic communications introduce some elements that can shuffle the traditional mind-sets. Example: company A has its headquarters in MSAR; company B has its headquarters in Singapore; Company B places an order from Company A through its website, which is hosted in Hong Kong under the domain www.companya.hk; the order was placed when the representative of Company B was on a business trip in the USA. In the contract, company A expressly declares

that its place of business is MSAR. However, company B considers that the place of business is Hong Kong since it is the place where the website is hosted.

As we can easily realize, the use of electronic communications brings us some more and new elements to take into consideration when we are trying to determine where the place of business is located. And in fact, in our example, it is not difficult to argue that the place of business is in Hong Kong because it is where the virtual place of business is located.

To expose the problem we can say that the domestic legislation does not offer us a clear solution to determine where the place of business is in this case. Accordingly the point is not that the domestic legislation provides a different solution from the solution stated in the Convention. The point is that there is no specific regulation about this issue in the domestic legislation so the answer is not clear. We can eventually reach the same answer as if we are applying the Convention, however there are no express indications pointing to that.

Differently, the Convention clarifies "A location is not a place of business merely because that is: *(a)* where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or *(b)* where the information system may be accessed by other parties" – paragraph 4 of article 6. And also that "The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country" – paragraph 5 of article 6. These prescriptions are extremely important nowadays to solve some of the difficulties that arise from the use of electronic communications in international contracts.

3.3.2 Proposals to Conclude a Contract vs Invitations to Make Offers

Another important solution offered by the Convention is related to the public information or advertisement done by one company and how it binds that company in terms of the conclusion of the contract. What we have in mind on this point is the following: when a company advertises or gives some public information regarding a service or goods, is the interest addressed by the other party an acceptance of a proposal or does it mean only an offer to the first company?

The main question is then the following: Are the advertisements or the information of the first company a proposal to conclude a contract or an invitation to make offers, which means almost nothing in contractual terms?

According to article 564 of the MSAR Commercial Code: "All information or publicity, sufficiently precise, conveyed by any form or means of communication in relation to goods and services offered or presented, binds the entrepreneur who

makes it available or uses it and is considered to be included in the contracts that may be concluded".[14] So according to the domestic legislation any information or advertisement is seen as a proposal to conclude a contract.

The solution is not the same if we apply the Convention. In fact, article 11 of the Convention, under the title *Invitations to make offers*, states the following: "A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance". This clearly means that, under the Convention, that public information or advertisement cannot be seen as a real proposal to conclude a contract but as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

Should the solution of the Convention be seen as better than the internal solution? Our opinion is affirmative. Why? Because it is important to remember that we are not talking about contracts concluded between two companies in Macau. We are talking about international contracts. So, a company that is doing advertising could not be aware that there is a buyer on the other side of the world that will see it and accept it, and the internet makes that possible. Imagine that a company is making an offer on its website in Macau regarding some product. If a buyer from South America accepts it, according to the internal law, if applicable, the contract is perfect and concluded, therefore if the seller does not execute the contract he is breaching it. And the reason for not executing could be diverse: the shipping costs are huge; there are commercial restrictions between the two jurisdictions; taxation makes the business not profitable, etc.

So we are inclined to consider that when we are talking about economic communications regarding international contracts, the best solution is, as a matter of principle, to not consider the public information or the advertisement as a real contractual proposal. However, if we apply our domestic legislation we cannot achieve this solution.

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14 Author's translation.

3.3.3 Errors in Electronic Communications

Another relevant hypothesis to analyse is related with the errors made in electronic communications. If one party of the contract makes some errors, these errors will be part of his contractual declaration. And when we are talking about electronic communications, the possibility of errors occurring is much higher than when the communications are made face-to-face.

When there is an error in the communication, the party should not be bound to that error, for the simple reason that it was not the party's contractual intention. So the legal systems offer different ways to withdraw that communication made with error. In the MSAR legal system, we can essentially point out two articles: article 243 and article 244 of the MSAR Civil Code, applicable to this commercial relation. Article 243 states that the invalidity of the contract exists "where, by reason of an error in the declaration or its transmission, the will declared or transmitted does not correspond to the actual intention of the author of the declaration".[15] And article 244 states that: "The mere error of calculation or writing, revealed in the context of the declaration itself or through the circumstances in which the statement is made, only gives right to rectify it".[16]

As we can conclude, according to the domestic law, if the party makes an error in communication and it is an error of calculation or an error of writing, the communicator has the right to rectify it. However, if it is an error in the declaration (that is not related with calculation or writing) or if it is an error in transmitting the communication, the party that made the error needs to require the invalidity of the contract and to demonstrate and to prove the requirements stated by law.

A much simpler and easier solution can be found in the Convention. According to paragraph 1 of article 14 of the Convention, under the tittle *error in electronic communications*, it is stated: "Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if: *(a)* The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and *(b)* The person, or the party on whose behalf that person was

15 Author's translation.

16 Author's translation.

acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party".

Taking into consideration the domestic regime and the solution stated by the Convention the last one presents two evident advantages: (i) In first place, it offers an easy and simpler solution for the party that made the error – that party has the chance to rectify the error under certain conditions. Differently, in the domestic law that regime is only possible if the error is an error of calculation or an error of writing. In the remaining situation, the party needs to require the invalidity of the contract or of the clause. (ii) In second place, it is not clear that the domestic regime is only applicable to the situations where the receiver of the communication is a human person or also in the situations where the receiver is an automated message system. So, once again, the solution of the Convention can be applicable for some situations where the internal regime is not clear.

But we can ask once more: is the solution prescribed by the Convention better than the internal solution? We consider that the solution stated by the Convention is better than the internal solution because errors in transmitting the communication could be more frequent when the communication is done with an automated message system and less frequent when the communication is done with human people because in this case, since there is a conversation, there are more chances to realize the error. On the other hand, for the same reasons, it is easier to the party to rectify the error before the contract is considered closed. So the solution of the Convention, since it makes easier the possibility of rectifying the error, must be considered to be better and more protective to all the interests in conflict.

3.4 The Generic Advantage of Standardization

Under this separate title we want to emphasize one advantage of the Convention that is common to all conventions but that deserves to be mentioned anyway. We are referring to standardization, ie the possibility for different countries to offer the same solution for the same issues - a uniform solution then. Accordingly, if the Convention is applicable to the MSAR this application represents a small but important step towards the desirable standardization of the legal solutions, especially when we are talking about international contracts, contracts that have connection with more than one state or jurisdiction and, for that reason have a claim for a uniform solution.