

A Convention on Electronic Evidence: helping to provide for certainty in international trade

Stephen Mason

The idea of a Convention on Electronic Evidence

When undertaking the training of judges and lawyers in electronic evidence across the world, participants have frequently asked if the United Nations, the Council of Europe or any other international agency were considering preparing a Convention on Electronic Evidence. It was not obvious that any organization was considering such a Convention. This might be because there is no interest at the political level, and because such a Convention may possibly take some years to develop to the satisfaction of all the parties. It is appreciated that drafting such a Convention at the international level between governments will also include political considerations, concerns over differences in legal culture and the underlying philosophy of national legal norms. These are important issues that should not be ignored, because they help define the very being and the meaning of the state to its citizens.

Reasons for a Convention

Given that we now live in a networked world, where digital data knows no boundaries, it is important to understand that the flow of electronic data is important, especially in regard to the ready acceptance of such evidence before courts in different jurisdictions. In the context of international trade, it will be useful for there to be some degree of certainty about the acceptance, handling and legal recognition of electronic data that forms the basis of much of the trade that takes place across the world today. The United Nations Commission on International Trade Law has negotiated a number of helpful documents of internal application, and companies such as Bolero International Limited (<http://www.bolero.net>) operate to facilitate the exchange of trade information and contractually binding trade documents in a secure manner. This is beneficial when attempting to ensure disputes do not occur, but if litigation does happen, there are no internationally recognized rules dealing with the fundamental issue of how to deal with electronic evidence in legal proceedings.

Development of the Convention

In the absence of a discussion of the development of such a Convention at an

international level, I concluded that it would be useful to develop a draft Convention with the help of judges, lawyers and other interested individuals across the world. This was a private initiative, but sometimes such initiatives help move idea forward. (The methods by which a convention might be developed are discussed in Stephen Mason, ‘Towards a global law of electronic evidence? An exploratory essay’, published jointly by *Amicus Curiae* The Journal of the Society for Advanced Legal Studies, Issue 103, Autumn 2015, 19 – 28 and *Revista de Concorrência e Regulação* Ano VI, number 23-24, julho– dezembro 2015, 239 – 258.)

The launch of the Convention

The consultation on the Convention was opened at the DataFocus 2016 conference in Zagreb on 5 April 2016, and the final version was published in the open source international journal *Digital Evidence and Electronic Signature Law Review* in 2016 (<http://journals.sas.ac.uk/deeslr>).

What the Convention covers

The main objective of the draft Convention on Electronic Evidence is to pursue a common policy towards electronic evidence, taking into account the differences in the treatment of evidence in individual jurisdictions. The draft Convention does not aim to harmonize judicial systems. The purpose is to encourage judges and lawyers to more fully understand the concept of electronic evidence in the interests of providing for fairness in legal proceedings; to promote adequate procedures in legal proceedings, to implement appropriate legislation where necessary, and to promote international co-operation.

The text of the draft Convention focuses on practical evidential matters directly related to electronic evidence. The aim has been to be strictly neutral, in that there is no attempt to distinguish between criminal and civil proceedings, or between common law and civil law cultures. In addition, the disclosure or discovery of electronic evidence prior to trial is not addressed, and neither is encrypted data. Both topics are considered to be so sensitive and central to the core of a national legal system that they were not considered to be properly the subject of this draft Convention.

The difference a Convention could make

We have to think about electronic evidence in a different way to paper and other more

familiar forms of evidence. In particular, we have to understand that the authentication of electronic evidence is different to paper. This is why so much attention was given to developing the tests for authenticity that were initially developed in the first edition of *Electronic Evidence* in 2007 and revised in subsequent editions (the 4th edition was published as open source on 4 May 2017), and to incorporate them into the draft Convention. It is also desirable to encourage governments to permit the faster movement of evidence across jurisdictional boundaries. Living in a world connected by software code means that it is important for judges and lawyers to understand the importance of the topic – by so doing, any problems with proving a contract in legal proceedings, for instance, might be alleviated if the Convention were taken up by an international organization and subject to more detailed scrutiny before being proposed and possibly adopted.

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