Hangzhou Forum: Cross-border e-Commerce

Organized by
United Nations Centre for Trade Facilitation and Electronic Business
(UN/CEFACT)

Legal Issues in e-Commerce

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CROSS-BORDER e-Commerce……

… ……international online trade

- sale or purchase of products via online shops across national borders.
- Buyer and seller not located in the same country
- not ruled by the same jurisdiction,
- use different currencies, and
- speak different languages.

Hence, it can be characterized as follows:

- Online ordering, sale, communication and, if applicable, payment,
- Cross-border transactions/shipments,
- Physical (tangible) goods, and
- Destined to consumer/buyer (commercial and non-commercial).

RISK AND CHALLENGES IN CROSS-BORDER e-Commerce

E-commerce is providing businesses an abundance of opportunities, but there are many risks and challenges in the cross-border e-commerce market:

- Market-entry
- Laws and regulations
- Logistics and reverse logistics
- Localization
- Understanding local taxation
- Fraud
- Cross-border payment
- lack of Standardized and harmonized procedures

Legal Issues in Ecommerce

IDENTITY MANAGEMENT

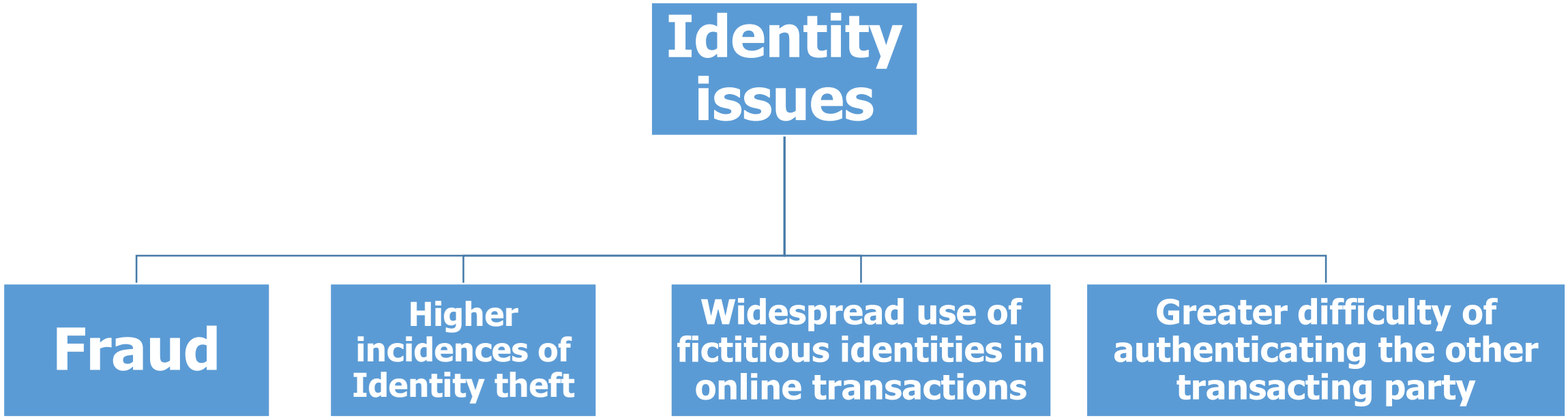
IDENTITY ?

- **Identity –** *a set of attributes associated to a person*.

What is Digital Identity?

- Digital identity is the information, comprising a set of attributes, **used by computer systems** to recognize the entity.
- It is a way for an individual or a business to prove who they are online with a certain level of trust.
- The more reliable a digital identity, the more complex online transactions the user will be able to make.

IDENTITY ISSUES:



- These are few of the real life issues we are facing currently concerning identity.
- With the increase in sensitivity and value of the transaction, the availability and reliability of accurate information about the identity of the remote party in order to make a trust-based decision increases as well.

LEGAL ISSUE OF IDENTITY:

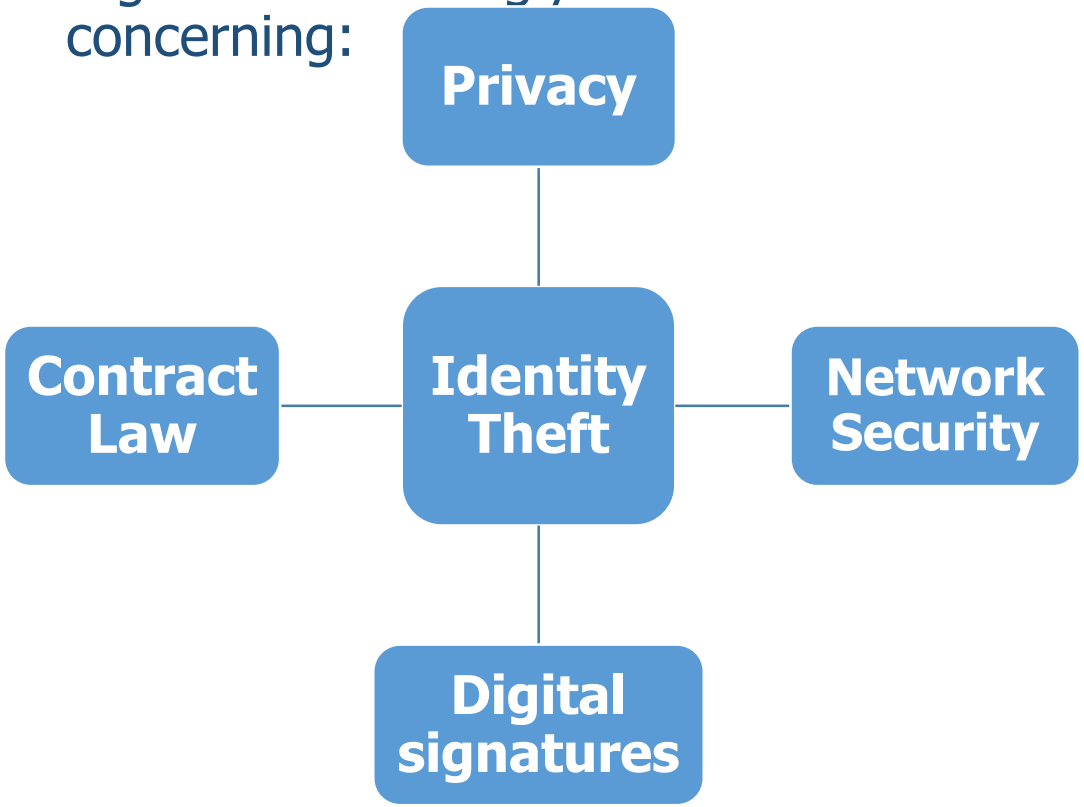
Reliability of proof of the identity

How to verify the identity of remote parties such as determining:

- who is seeking access to an online database of sensitive information,
- who is trying to do an online transfer of funds from an account,
- who signed an electronic contract,
- who remotely authorized a shipment of product, or
- who sent an email.

OTHER LEGAL ISSUES THAT IDENTITY THEFT MAY ARISE:

- The problem of mistaken identity (Incorrect identification, Faulty authentication, Misuse of personal data) in e-commerce transactions brings together seemingly unrelated issues concerning:



- Further, if an identity provider makes an incorrect online statement to a relying party about the identity of a subject, applicable law might treat issuing that incorrect identity assertion as a breach of a warranty, as a tort of negligent misrepresentation, or as an unfair business practice. The scope of the identity provider's liability for any damages suffered by the relying party (which may grant access to or enter into an unauthorized transaction with an importer as a result) may well depend on which jurisdiction's law and which legal theories apply.

- UNCITRAL has rightly recognized that identity management is a basic requirement for electronic signatures, electronic transferable records and its future working related to single window and mobile payments etc.

CHALLENGES IN IDENTITY MANAGEMENT SYSTEMS

Although the critical importance of identity management systems (Identification, Authentication and Authorization) is well recognized in promotion of secure ecommerce systems but these systems are also facing certain challenges:

- **Cyber Security**
- **Lack of standardization and interoperability**
- **Lack of User's control**
- **Regulatory Uncertainty**

WHAT CAN BE DONE: LEGAL ASPECTS

- Need to further increase trust in Identity Management systems in order to extend its use. Trust is "**the belief that something is reliable**"
- Identity Management - specific laws need to address risk allocation:
  - Clarify parties' obligations
  - Allocate liability, e.g., through Presumptions; Exemptions and limitations of liability; Mandatory insurance.
- Establishing an enabling environment for identity management
- Clarify the legal status of Identity management
- Prepare adequate legal tools to facilitate mutual recognition
- Identify legal obstacles in cross border identity management systems

FEDERATED IDENTITY MANAGEMENT

A third-party is identity provider and a single identity credential can be relied on by numerous organizations that had no direct involvement with the original issuance of the credential.

How to make Federated Identity Management system work

- Define and govern the legal rights, responsibilities, and liabilities of the participants with respect to the specific identity.
- Clarify the legal risks parties assume by participating in the identity system (e.g., warranties, liability for losses, risks to their personal data).
- Provide remedies in the event of disputes among the parties, including methods of dispute resolution, enforcement mechanisms, termination rights, and measures of damages, penalties and other forms of liability.
- Make the business and technical operational rules legally binding on and enforceable against the participants.

WORKING ON IDENTITY MANAGEMENT

- Numerous intergovernmental groups (OECD, ISO, ITU), states, private international groups, and commercial entities are actively exploring identity management issues and opportunities, developing technical standards and business processes, and seeking ways to implement viable identity systems.

- United Nations Commission on International Trade Law (UNCITRAL) has begun work on a project that may lead to the development of international legal rules in identity management.

- UNCITRAL (model law) as and when finalized would serve to address these issues/risks and to bring global harmony about Identity Management.

Emerging technologies like block chain, biometrics and Artificial Intelligence can help to deliver secure identity services, in particular by governments and financial institutions, and solutions should meet both the objectives of ensuring secure identity and improving user experience.

JURISDICTION

JURISDICTION ISSUE IN E-COMMERCE

LEGAL ISSUES IN JURISDICTION

- Ecommerce exists in a borderless environment. Hence, create concern –
  - Whose jurisdiction?
  - Where to take action?
  - What test and laws to be followed?
  - When individual resides outside jurisdictional area?
  - Laws of which country applies on a particular e-Commerce transaction?
  - Courts/Authorities of which country are to be approached for enforcement of rights?
- The more business conducted, the more likely a court / authority will be to use a **long-arm statute.**
- The exercise of jurisdiction across national borders is governed by **treaties between the countries**.

JURISDICTION: WHY NECESSARY

Determination of jurisdiction about a transaction is primary & fundamental question in matters related to:

- Enforcement of Rights of the Parties
- Dispute Settlement
- Intellectual Property Rights
- Consumer Protection
- Data Protection
- Taxation

JURISDICTION

There is a dire need for a specific legislation to be enacted to determine issues involving jurisdiction for e-commerce disputes.

PRIVACY AND DATA PROTECTION

PRIVACY AND DATA PROTECTION – ISSUES

In an online environment, use of innovative technologies and lack of secure systems makes it easy to obtain personal and confidential information about individuals and lack of secure systems makes it easy to obtain personal and confidential information about individuals and organizations. Online consumers are confronted with privacy issues like:

i. Dissemination of sensitive and confidential medical, financial and personal records of individuals and organizations;

ii. Sending spam (unsolicited) e-mails;

iii. Tracking activities of consumers by using web cookies; or

iv. Unreasonable check and scrutiny on an employee's activities, including their email correspondence.

WHY PRIVACY AND DATA PROTECTION MATTERS?

- The affirmative answer to issues below leads to **TRUST** building:
  - Are consumers comfortable in sharing their personal information with Platforms?
  - Is the information, so shared, safe?
  - Whether the information is only used for the given purpose?
  - Are remedies available to consumers against any data breach?

More TRUST means more e-Trade

PRIVACY AND DATA PROTECTION

In this background EU has enforced the General Data Protection Regulation (GDPR) in May 2018, salient features of the GDPR are:

- Enriched Rights to the data subject (natural persons)
- Strict obligations on the persons processing the personal data (data controllers & data processors)
- Lawfulness of the purpose of personal data processing
- Stringent monitoring & enforcement through independent authorities
- Administrative penalties

GDPR

EU General Data Protection Regulation

PRIVACY AND DATA PROTECTION

Cross-Border Applicability of GDPR – Territorial Scope

GDPR applies to the processing of personal data of **data subjects who are in the EU** by a **controller or processor not established in the EU**, where the processing activities are related to:

- the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the EU; or
- the monitoring of their behavior as far as their behavior takes place within the EU

- Due to its territorial scope, GDPR, is applicable even outside the EU
- e-Commerce Platforms, outside EU, therefore needs compliance with GDPR
- Other jurisdictions (countries) are also likely to enact data protection laws

TAXATION

TAXATION ISSUES

Difficulties in taxing e-commerce transactions:

- Determination of economic activity (to avoid double taxation)
- Identification of the existence of permanent establishment
- Tracing commencing and end point of transaction
- Lack of documentation to know the nature of contract.

The Indirect tax laws needs to be evolved and re-designed to consider the changing business dynamics of e-Commerce since the activities involve high volume and low-value supplies.

HOW TO AVOID DOUBLE TAXATION

- Double tax treaties are based either on OECD or UN model treaties. Appropriate insertions / amendments are required, about e-Commerce transactions with respect to determination of place of economic activity, in these models.

- The Countries then may incorporate these insertions / amendments within their respective treaties signed with different countries.

- However, the more appropriate solution is to have same set of rules/definitions applicable across the board framed by international forums (like UN or WTO).

CONTRACT

LEGAL ISSUES IN CONTRACTS IN E-COMMERCE

- Capacity of Customer
- When an offer is said to be made?
- When an acceptance has been communicated back to the offeror?
- whether the website advertisement is an 'invitation to treat" or an offer?
- When a contract is actually formed? Establishment of time and place of contract.
- Electronic Signatures
- Evidential weight of electronic signatures
- The conflicts of jurisdiction

INTELLECTUAL PROPERTY RIGHTS

INTELLECTUAL PROPERTY RIGHTS

- The Internet is a boundless and unregulated medium and therefore the protection of intellectual property rights ("IPRs") is a challenge and a growing concern amongst most e-businesses.

- The existing laws that protect IPRs in the physical world, the efficacy of these laws to safeguard these rights in e-commerce is uncertain.

- Some of the significant issues that arise with respect to protecting IPRs in e-commerce are:

  - Determining the subject matter of protection (patent example)
  - Ascertaining novelty originality
  - Enforcing IPRs
  - Preventing unauthorized Hyperlinking and Meta tagging
  - Protection against unfair competition

ONLINE ADVERTISEMENT

ONLINE ADVERTISEMENT

- The traditional laws of advertising are enacted in the interest of all consumers to prevent deceptive and unfair acts or practices. These laws is also applicable to advertising on the Internet.
- The websites may be subject to any liability that may arise due to false designations, origin, misleading description of fact that are likely to cause confusion or misrepresent the nature, characteristics, quality or geographic origin of the good as or services that are offered for sale in an advertisement.
- An advertisement may be exposed to liability under the consumer protection laws since it may be subject to different interpretations by the consumer in different jurisdictions.
- An online advertisement should be legal, decent, honest and truthful. It should not be misleading and bring advertising into disrepute. It should respect the principles of fair competition generally accepted by business.
- There are different organizations worldwide which deal with this issue creating rules, guidelines and laws

CONSUMER PROTECTION

CONSUMER PROTECTION

- There are various consumer protection issues in e-commerce, including:
  - unfair commercial practices
  - unfair contract terms
  - online payment security
  - data protection and privacy
  - dispute resolution and redress
  - cross-border online transactions
- Policy measures should be build consumer trust in e-commerce, including:
  - appropriate laws and enforcement
  - consumer education
  - good business practices
  - international cooperation
- UNCTAD and OECD have issued guidelines on consumer protection in context of e-commerce

LIABILITY

LIABILITY

- Since the Internet knows no boundaries, the owner of a website could be confronted with legal liability for non-compliance or violation of laws of almost any country.

- The liability may arise through website terms and condition, the description and use of product, laws of another country or wrongful interference with the business or wrongful defamation or any remark or action that may cause injury to one's property or reputation.

  - Contractual Liability
  - Statutory Liability
  - Tortuous Liability
  - Product Liability

- Owners of websites should guard against the potential sources of liability which could lead to legal claims against them.

WAY FORWARD

WAY FORWARD

- The new and rapid expansion of cross-border E-commerce is impacting all countries and jurisdictions, so its management needs a globally innovative, inclusive, strategic and collaborative approach.

- It is imperative that governments and the private sector ensure that the potential benefits are realized by working in partnership to ensure the facilitation of legitimate cross-border E-Commerce trade, fair and efficient revenue collection and community protection.

Thank you.

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