



**The Scope of the Federal UAE
E-Commerce Law: is it self defeating?**

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Introduction:

With the advent of the internet, communication has become easy and speedy. People from different countries of the world can communicate with each other effectively through e-mail and even conclude contracts via exchange of e-mails. The revolution in communication and internet transformed the world into a small village and eliminated the geographical boundaries. This revolution in communication provided companies with golden opportunities to penetrate new markets. It is now easy for companies to offer their products and services to a far larger community. Moreover, this gave birth to companies which specialize in offering goods for sale over the internet and act as middleman. It is also possible for potential buyers to view the goods, their features and specifications on the seller's website and place their orders accordingly. In some cases, it is possible to undertake a virtual trial, or demonstration, which makes the buyer aware of all essential elements of the goods before ordering the same.

The digital technology raises a host of legal issues. The advances of technology not only facilitated communication, but also made it easy to deceive purchasers. Since communication recognizes no boundaries and the parties involved may belong to more than one country, e-commerce raises the issue of conflict of laws. Moreover, e-commerce raises the liability of the verifier of the electronic signature and the admissibility of electronic documents as evidence.

Therefore, it could be argued that e-commerce requires a different legal regime that adapts to the nature of e-commerce and accommodates the needs of the persons involved in electronic transactions. The risks and security issues inherent in dealings over the internet require regulations and controls. Therefore, various countries have taken the initiative to regulate e-commerce.





In the Arab world, Dubai pioneered the regulation of electronic transactions by issuing the law No. 2 of 2002 on the Electronic Transactions and Commerce. Following in the footsteps of Dubai, the UAE Federal Government issued the Federal Law No. 1 of 2006 on the Electronic Transactions and Commerce.¹

As far as the Middle East and the Gulf regions are concerned, the UAE E-Commerce Law is considered as an example to follow. Therefore, the UAE Law on Electronic Transactions and Commerce will be used as reference by neighboring countries when they wish to draft their own electronic commerce law.

Since the E-Commerce Law has been enacted only in 2006, it is not surprising that there is a dearth of case law and scholarly work. It is unfortunate that the E-Commerce Law did not use the UNCITRAL Model Law on Electronic Commerce as the first building block.² Therefore, whilst venturing these uncharted waters, frequent reference will be made to the UNCITRAL Model Law.

This study will focus on the UAE Federal Law No. 1 of 2006 on the Electronic Transactions and Commerce (“**E-Commerce Law**”) and explore the *raison d’être* of the E-Commerce Law, the scope of the E-Commerce Law and the impact of the exclusions on the efficacy of the E-Commerce Law.

I. The Raison d’être of the E-Commerce Law.

The e-commerce law in any country would cover a number of key areas and issues that arise out of the modern technology and its impact on society. These key areas include, *inter alia*, the verification of electronic signature, the evidentiary value of electronic documents, electronic contracts, the responsibility of signature verifier and the responsibility of the internet service provider. In an ideal world, a single piece of legislation would cover all of the key areas. As such, the e-commerce law will be self-sufficient.

The UAE E-Commerce Law in its Article 3 specified its objectives. It is noteworthy that specifying the objectives of the law in the text of the law

¹ Regretfully, there is very little literature on the topic.

² The UNCITRAL Model Law on Electronic Commerce adopted by the UN General Assembly Resolution No. 51/162 of December 16, 1996 (United Nations publication, Sales No. E.99.V.4, ISBN 92-1-133607).



The Scope of the Federal UAE E-Commerce Law: is it self defeating?

itself is not part of the practices or legislative traditions of the civil law countries in general and in UAE in particular. This is a practice that is associated with the common law countries. This in itself suggests that the E-Commerce Law has been prepared by common law practitioners and has been influenced by the British drafting style. This especially so, since in the civil law countries the objectives of the law and its background appear in the preparatory works and the explanatory notes accompanying the bill.

A. Article 3:

The two main objectives that relate to the core of our study are the following: protecting the interest of the parties involved in electronic transactions; and defining their obligations and enhancing the applications of electronic commerce and reliability through legislative development.

B. Evaluation of the Objectives.

It is noted that Article 3 provided for a wide spectrum of objectives that cannot be achieved by a single piece of legislation independently of other laws. The achievement of such objectives depends on the legal environment in the UAE as a whole and not only on the text of the E-Commerce Law itself. Having electronic records by one of the parties does not automatically encourage or enhance the electronic commerce. The critical issue is the regulation of the transaction itself and the admissibility of such electronic records as evidence in litigation.

The E-Commerce Law aimed at encouraging electronic transactions by providing rules as to the verification of electronic signature to ensure the authenticity and validity of electronic documents. This is a primary step in securing the rights of the parties involved in electronic transactions. The E-Commerce Law has to a large extent achieved this objective by having detailed rules in respect of the verification of signature. It could be argued, however, that the E-Commerce Law focused on the formalities rather than the substance. Whiles, the majority of the Articles of the E-Commerce cover extensively the authenticity of electronic messages and verification of signature, the substantive rules left much to be desired. The real success is when the E-Commerce Law passes the test of litigation and turns out to be effective in protecting the interest of all the parties involved in an electronic transaction.



It is quite interesting that one of the objectives is to enhance electronic commerce on the domestic and international levels. It is conceivable that the E-Commerce Law by regulating electronic transactions can enhance the domestic e-commerce but it is not clear how the E-Commerce Law can enhance the e-commerce on the international level. The reference to international e-commerce requires regulation as to the issues arising out of the conflict of laws and which law is to apply to the transaction. However, the E-Commerce Law did not deal with the issue of conflict of laws or the applicable law in the case of international transaction involving a UAE party.

II. Exclusions from the Scope of Application of the E-Commerce Law.

Article 2 of the E-Commerce Law provided for a list of documents that do not fall under the scope of the E-Commerce Law. Such exclusions are worth exploring to define whether they serve the purpose of the E-Commerce Law or not.

A. Exclusions:

When exploring the list of the excluded activities and documents, this study will not follow the same order used by the legislature but rather deal with the straightforward exclusions first and then focus on the controversial ones.

The first exclusion under Article 2 is matters relating to personal status such as marriage, divorce and wills. The drafters of the E-Commerce Law are to be praised for excluding these matters given the importance of such matters as well as the religious aspects of such matters.³ Personal status matters by its very nature and due to its attachment with religious beliefs and rituals cannot be subject to the E-Commerce Law. Marriage and divorce have their own rituals under Shariah which do not fit within the electronic environment. It is noteworthy that marriage, divorce and wills are set out by way of example and hence this is not an exhaustive list. Therefore, all personal status matters falling under the scope of Law No. 28 of 2005 are excluded. Inheritance, guardianship and legal capacity are additional examples of personal status matters that are excluded although not enumerated under the E-Commerce Law.

³ The Legal Regime of Electronic Commerce in the United Arab Emirates, Dr. Khaled Mohamed Kadfour Al-Mehiri, 2nd edition, P. 161.



The Scope of the Federal UAE E-Commerce Law: is it self defeating?

The second exclusion is title deeds relating to immovables. This exclusion is interesting because it is in effect repeated in the fourth one. The exclusion of title deeds for immovables sounds strange with the move of the UAE government towards e-government applications. Moreover, the E-Commerce Law provided for the rules ensuring the authenticity of the electronic signature. One would assume that if a title deed is signed electronically by the seller and buyer and satisfies the requirements of electronic signature under the E-Commerce Law, such title will fall under the scope of the E-Commerce Law. However, this is not the case because of this second exclusion. Likewise, a title deed issued by the government bodies using e-government applications should have fallen under the E-Commerce Law.

The fourth exclusion relate to transactions of sale and purchase of immovables and any other disposition of immovables. The sale and purchase of immovables will inevitably involve the creation of title deeds. Hence, there was no need for the drafters of the E-Commerce Law to provide for the title deeds as a stand-alone exclusion. The fourth exclusion extends to include lease for more than ten years and dealings that create other real rights such as easements, usufruct. As this exclusion deals with any disposition of immovables, this means that any dealing on immovables is excluded. For example, endowment and gift will be excluded from the application of the E-Commerce Law. As commented above in relation to the exclusion of title deeds, this exclusion should have taken into account the applications of e-government adopted by the UAE government and the local governments of some of the Emirates and Dubai government in particular.

The fifth exclusion relates to any document that is legally required to be notarized i.e. executed before a notary public. For example, Powers of Attorney are legally required to be executed before a Notary Public.⁴ This exclusion is logical and acceptable because it respects the formality required by the law for certain documents.

Article 2 provided that any document or transaction that is excluded from the application E-Commerce Law by virtue of a provision under any other law will not fall under the purview of the E-Commerce Law. This

⁴ Ibid, P. 168.



Yasser Omar

exclusion is quite serious because it allows other laws to control the scope of application of the E-Commerce Law. It is possible that this exclusion be used to amend the scope of application of the E-Commerce Law without amending Article 2 of the E-Commerce Law itself. In addition, it makes the legal research and practice quite difficult. If a legal practitioner or researcher needs to decide whether a particular transaction falls under the E-Commerce Law or not he has to examine all other laws in order to be sure that there is no other law that excluded such transaction from the scope of application of the E-Commerce Law.

The third exclusion is the negotiable instruments. The term “negotiable instruments” is a generic term that includes a wide range of legal instruments.

First, this term covers securities such as shares and bonds issued by companies. It is unfortunate the drafters of the E-Commerce Law excluded negotiable instruments from the scope of the E-Commerce Law. This exclusion has been criticized by commentators⁵. In today’s world, the majority of transactions on securities are done on line i.e. electronically. Owners of shares and other securities can give instructions for the sale or purchase of securities to their brokers by e-mail. Moreover, a sale and purchase of securities can be made by exchange of e-mails between the seller and buyer. Such exclusion leads to the exclusion of financial services from the scope of application of the E-Commerce Law. This does not fit within the UAE drive to be the region’s first financial centre. UAE has done a lot of efforts over the last few years to position itself as the financial hub of the Middle East. This would necessitate the legislative environment to adapt to the methods and techniques of work in the financial services sector and caters for the need to have proper regulations while taking into consideration that that sector has become almost fully automated.

Second, the term “negotiable instruments” covers also all instruments that are transferable and entitles the bearer or beneficiary to claim the delivery of the goods, or the payment of sum of money such as consignment notes, bills of lading, warehouse receipts, bills of exchange and promissory notes. This exclusion means that all of these instruments are excluded from the application of the E-Commerce Law. Accordingly, the E-Commerce

⁵ Ibid, P. 166.



The Scope of the Federal UAE E-Commerce Law: is it self defeating?

Law does not apply to the instruments issued by logistics and shipping companies because they are negotiable instruments. In fact, these instruments are used to sell and transfer goods from one party to another. Thus, a sale and purchase transaction can be done through exchange of e-mails and completed by the endorsement of the bill of lading to the purchaser. However, such transaction will not fall under the E-Commerce Law.

It would have been much better if the E-Commerce Law limited this exclusion to the transactions conducted under the rules of regulated stock exchanges and did not opt for this sweeping exclusion of negotiable instruments.

It should be noted the UNCITRAL Model Law did not exclude these instruments from its scope of application. In fact, the UNCITRAL Law included specific rules that apply in relation to the logistics services. Such rules could have been adopted by the drafters of the E-Commerce to widen the scope of application of the E-Commerce Law.

It is noteworthy that the UNCITRAL Law did not contain such list of exclusions. Article 1 of the UNCITRAL Law⁶ was worded in a way to ensure the widest scope of application for the UNCITRAL Law. It would have been a proper approach for the E-Commerce Law to adopt the same wording in respect of its scope of application

B. Authority of the Council of Ministers.

The third paragraph of Article 2 of the E-Commerce Law gave the Council of Ministers the authority to amend the list of exclusions set out in the second paragraph of Article 2. The authority granted to the Council of Ministers includes the authority to add more exclusion; remove one or more of the exclusions, or amend the exclusions. It is quite interesting that the drafters of the E-Commerce Law decided to give the Council of Ministers the authority to widen or tighten the scope of application of the E-Commerce Law. It is understood that the purpose of this authority is to make this piece of legislation flexible.

The drafters of the E-Commerce should be praised for allowing this flexibility under the E-Commerce Law. This makes life easier to overcome

⁶ Article 1 of the UNCITRAL Law provided that: "This Law applies to any kind of information in the form of a data message used in the context of commercial activities".



the loopholes explained above in terms of the excluded activities and instruments. The Council of Ministers can simply correct the situation by passing a resolution amending the list provided for under Article 2 of the E-Commerce Law.

III. Do the Exclusions serve the Objectives of the E-Commerce Law?

The key objectives of the E-Commerce Law is to provide protection for the parties involved in electronic transactions and enhance the applications of e-commerce. These objectives require having a piece of legislation that covers all applications of e-commerce.

A. The above exclusions in effect limit the scope of application of the E-Commerce Law and take out from its scope a crucial sector which is the financial services. Moreover, the impact of excluding the negotiable instruments will not only exclude financial transactions but also lead to a number of sectors losing the benefit of the E-Commerce Law, such as the logistics services sector. The last exclusion which is the possibility to exclude other transactions is rather risky and could limit the scope of application of the E-Commerce Law by just passing other laws that are particularly designed to add more exclusions.

B. One of the key objectives of the Law is to facilitate e-commerce and remove the hurdles that may curb the development of e-commerce. However, we noted from the exclusions that trade in negotiable instruments and securities is excluded from the E-Commerce Law. This leads to conclude that the E-Commerce Law had in fact limited its scope of application to regulating the trade in traditional goods and commodities in the context of electronic environment. Should the E-Commerce Law be keen on enhancing e-commerce, it should have covered all forms of e-commerce. Thus, the limitations on the scope of application of the E-Commerce Law had more or less defeated some of its objectives.

IV. Conclusion

The E-Commerce Law has been enacted only two years ago which means that it still in its infancy and it still has to develop. The above journey through the objectives of the E-Commerce Law and the exclusions from its scope of application shows that there is a need for a reform.

The required reform is to revisit the exclusions and widen the scope of application of the E-Commerce Law by (a) including trade in negotiable



**The Scope of the Federal UAE
E-Commerce Law: is it self defeating?**

instruments in the scope of application of the E-Commerce Law and (b) eliminating the last exclusion and thus no other law can diminish the value of the E-Commerce Law or affect its scope of application. Moreover, the authority of the Council of Ministers to widen or narrow the exclusions should be reconsidered. Finally, it will be a giant and an applaudable leap if the E-Commerce Law can cover the difference between transactions between businesses (B2B trade) and transactions between businesses and customers (B2C trade).

It is possible to correct the situation by having the Council of Ministers to amend the list of exclusions using the authority granted to it under the E-Commerce Law. Thus, the process of correction is rather simple and not complicated.

Being the leaders of the Arab world in regulating e-commerce puts a burden on UAE shareholders to continuing its leading role by updating its E-Commerce Law and bring to the stage where it becomes a comprehensive piece of legislation.

