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ELECTRONIC COMMERCE
Recent Legal Developments in Colombia

By Francisco Reyes Villamizar

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ELECTRONIC COMMERCE

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PART I.

GENERAL ISSUES

I. Sources of Law

a. Custom

As inherited from the Roman-Germanic tradition, the Colombian legal system is based upon the prevalence of written law over any form of custom. An underlying concern regarding the importance of legal certainty, has been traditionally argued as the main objective obtained through said prevalence. The local legal system incorporates a general principle whereby “judges, in their decisions are only subject to the rule of written law. Equity, case law and general law principles and doctrine constitute auxiliary criteria for the judicial activity” (Article 230 of the National Constitution).

Although customary law is not even mentioned in the above-quoted provision, the Constitutional Court has determined that the term “law” as used by said rule includes customs and usage as subsidiary sources of law. Thus, commercial usage and customs are considered to be a subsidiary set of rules which are legally binding in the absence of a written statute.

Article 3 of the Colombian Commercial Code states that “mercantile usage shall enjoy the same authority of commercial law, provided it would not actually or tacitly conflict with it and that the facts that serve as its foundation are public, uniform and reiterated in the place where the obligations are to be fulfilled or where the relations which must be regulated thereby have arisen”. In light of this rule, commercial custom should be considered as a source of law such as the mercantile law itself.

Even though the legal rule referred to above appears to imply an identical hierarchy between commercial custom and commercial law, this principle is only applicable if the mercantile usage does not contradict the law. Furthermore, Article 4 of the Commercial Code establishes that contractual clauses should enjoy preference over alternate legal provisions and commercial usage. In addition, according to the rule set forth in Article 822¹ of the same Code, the Civil Code provisions regarding contracts and obligations are considered commercial law in relation with matters that are not specifically regulated by the mercantile statute.

¹ Article 822, quoted, states that “The principles governing acts and contracts in civil law obligations, their effect, interpretation, extinction, annulment or rescission, shall be applicable to juridical commercial obligations and matters, unless otherwise provided by law”.

Given the legal recognition of mercantile usage, the law provides for certain procedural rules applicable to customary evidence. Pursuant to said rules, a mercantile custom is legally enforceable if it has been recognized within at least two judicial decisions or if it has been duly certified by the local chamber of commerce.

b. Civil and Commercial Regulations

The problem related to the dichotomy of private law has been extensively addressed by legal doctrine and jurisprudence. The lack of solid objective criteria to determine the civil or commercial nature of a business transaction, creates difficulties for the assessment of applicable substantive law.

Following the Continental European tradition and particularly the French heritage of the Code Napoleon, there is a long-standing dichotomy of Private Law. Hence, there are two codes regulating the same subject: a Civil and a Commercial Code. This legal duality is troublesome in the specific field of contracts, due to the existence of duplicity of regulations for many private agreements. The assessment of the applicable substantive regime is usually difficult and often characterized by subjective definitions. However, this dichotomy is not reflected in Civil Procedure. Thus, there are no differences between civil and commercial courts within the Colombian legal system as there are in its French counterpart.

Commercial law, as established by Article 1 of the corresponding codification, regulates all matters related to commercial transactions and merchants. Nevertheless, in the absence of specific legislation in said code and within the restrictions set forth in article 3², commercial practices are judicially enforceable. However, in order for commercial customs to be legally binding, certain legal requirements must be met. Articles 3 and 6 of said Code provide a detailed regulation in this respect.

If neither specific commercial legislation nor commercial customs are applicable, the Civil Code can be used as a subsidiary legislation in commercial matters. In connection with this legal criterion, Article 2 of the same codification determines that “commercial questions which cannot be regulated according to the foregoing rule shall be governed by the provision of civil law”.

Notwithstanding the aforementioned theoretical discussion, Law 527 of 1999, on electronic commerce, has established an objective criterion in order to determine its sphere of application. In fact, Article 1 of said statute, provides that “this Law would be applicable to any kind of information in the form of a data message, except in the following situations:

2 "Mercantile usage shall enjoy the same authority of commercial law, provided it would not actually or tacitly conflict with it and that the facts that serve as its foundation are public, uniform and reiterated in the place where the obligations are to be fulfilled or where the relations which must be regulated thereby have arisen. In the absence of local usage the general usage in the country shall be taken into account provided it meets the requirements of the foregoing paragraph."

- a. “Within the context of duties assumed by the Colombian State due to International conventions or treaties.
- b. “Within the context of any written warnings that should be printed on certain products, due to the risk generated by its commercialization, use or consumption”.

As it may be noted, the aforesaid legal provision establishes a broad sphere for the application of Law 527 of 1999. According to such rule, any information contained in a data message will be subject to the legal regulations of electronic commerce. Since the law did not distinguish between the commercial or civil nature of the act or contract, it must be understood that said statute is applicable to all kinds of business transactions. The absence of such distinction overcomes the troublesome issue related to the determination of the applicable law.

II. Contract Formalities

- a. Legal nature of electronic messages

According to Law 527 of 1999, electronic messages possess the same legal enforceability as documents. In fact, Article 6 establishes that “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”. Furthermore, Article 10 provides for an assimilation criterion according to which an electronic message is equivalent to the concept of document as regulated in the relevant rules of Civil Procedure.

- b. Legal effects of the digital signature.

Article 2 of law 527 of 1999 defines digital signature as “a numeric value that is attached to an electronic message using a known mathematical procedure, related to the public key of the sender and the text of the message, which permits the determination whereby said value has been obtained exclusively with the public key of the sender and that the message has not been modified after the transformation was made”.

In the same manner, according to Article 7, “Where the law requires a signature of a person or provides consequences for the absence of a signature, that requirement is met in relation to a data message 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.”

Furthermore, the last paragraph of Article 28 of Law 527, quoted, establishes that “the use of a digital signature will have the same enforceability and produce the same

effects of a handwritten signature, provided that the following conditions are complied with:

- a. "It is unique to the person that utilizes it.
- b. "It may be verified.
- c. "It is under the exclusive control of the person that uses it.
- d. "It is linked to the corresponding information or message in such a manner that if the latter changes, the digital signature would be invalidated.
- e. "It is duly adjusted to the rules issued in this respect by the National Government."

III. The law of agency and representation

Authority to act is governed by several rules both of commercial and civil nature. Private law establishes different criteria according to which certain persons are considered incompetent to assume any legal obligation due to different circumstances. The categories set forth in the law are related to minors, individuals affected by a disability to communicate their will and mentally incapacitated persons. Nevertheless, these persons may enter into a civil or commercial transaction, provided that they act through their legal representatives.

As to juristic persons their capacity to enter into legally binding transactions is limited to all acts or operations related to the business activities provided for in the purpose clause. Corporation law capacity rules are determined by the doctrine of "ultra vires", which will be explained in detail in further paragraphs. Generally speaking, any "ultra vires" act will be considered outside the scope of the corporation's capacity and therefore, it will be deemed void as against public policy.

The law of agency and representation is of paramount importance within private law. In fact, Any circumstance that affects the capacity of a party to a civil or commercial transaction, may result in the judicial nullification of the contract. Article 899 of the Commercial Code establishes that "a juridical act shall be deemed null and void in the following instances: [...] 3. If executed by a fully unqualified person".

IV. Law 527 of 1999 on Electronic Commerce

Law 527 defines and regulates the access and use of data messages, electronic commerce, electronic signatures, the certification process related to data messages, the enforceability of the acts performed by electronic means, and a number of rules concerning transportation issues. This statute also determines the faculties of the public and private entities involved in electronic interchange.

Due to the recent enactment of the law, its practical effects have not been evaluated yet. The statute provides for a 12-month period in order for the Superintendency of Industry and Commerce to develop the administrative infrastructure needed to perform its duties as the highest certification authority in the country.

Law 527 has closely observed the general guidelines established by the UNCITRAL Model law for Electronic Commerce. Nevertheless, the Colombian statute regulates a number of issues that may distinguish it from the Model Law. One of the main differences is related to the extension of the sphere of application. Indeed, according to previously quoted Article 1 of Law 527, such statute is applicable to any kind of operation held through electronic means.

As to the regulation of certification authorities, the most important characteristics of such regulation can be summarized as follows: (a) A number of general requirements must be fulfilled by all certification authorities. Therefore, certification authorities will be subject to homogenous criteria in order to operate; (b) The National Government is entitled to set forth rules to regulate the certification activity³, and (c) The Superintendency of Industry and Commerce will have a permanent surveillance faculty regarding certification authorities.

V. Conflict of Law Rules in the Context of Electronic Commerce

In the absence of specific legislation and market practices, all kinds of contracts can be entered into by private parties. Therefore, within the scope of the Colombian legal system, the ability of contractors to celebrate private agreements should be considered to include the possibility of entering into electronic commerce transactions. In fact, in the specific event in which no legislation is found to be appropriate for the relevant transaction, the parties can resort to any licit private agreement on the grounds of the principle of self-ruling determination. Both the civil and the commercial code embrace this principle. “The Civil Code acknowledges that private initiative and efforts, which are exercised within the frame of due respect to third parties’ rights and general interest do represent a contribution to the general progress and welfare of society. Therefore, all due care has been placed to guarantee freedom to the highest possible extent in all transactions entered into by private parties. This liberty is extended to all juristic transactions of an economic nature, according to the rule set forth in Article 1602 of the Civil Code. Pursuant to said provision, private parties, in a free manner and in accordance with their own personal conveniences are entitled to determine the contents, scope and shapes of their business transactions.

”The principle referred to above implies that private parties to a transaction can decide all relevant aspects of any civil or commercial agreement entered into by them. They can decide on whether to celebrate the transaction or not, to act directly or through an agent, to choose the type of contract to be celebrated, the manner to express their will, and to solve the possible controversies the transaction might bring about. More importantly, private parties can decide on the applicable law to a specific transaction”.⁴

The legal grounds for this self-determination rule can be found in already mentioned Article 1602 of the Colombian Civil Code. Pursuant to this provision “Any duly executed contract is equivalent to a mandatory law. Such contract cannot be invalidated in the absence of the parties’ mutual agreement or upon the occurrence of a legal cause”. In

³ The national government has issued Decree 1747 of September 11, 2000, which regulates the actual functioning of certification authorities.

⁴ Ospina Fernández, Guillermo, “Teoría General del Contrato y de los Demás Actos o Negocios Jurídicos”; Editorial Temis, 1994. Pg. 13

accordance to said legal provision, it is obvious that parties are entitled to celebrate any form of private agreements. Furthermore, the law establishes the mechanisms whereby these private agreements are binding upon the subscribing parties, provided that all relevant requirements are fulfilled.

Although extensive amplitude to celebrate all sorts of private agreements has been recognized by law, private parties are subject to some boundaries, which have to be respected. Third parties' interests and public policy are highly protected by both Civil and Commercial Codes. The former establishes several control mechanisms and a number of requisites for these agreements in order for public policy not to be violated. In accordance to Articles 1518, 1524, 1741 and 1742 of this Code, it is obvious that even if the parties enjoy an important amount of liberty, they are also subject to legal restrictions and controls.

The Commercial Code contains a complete regulation regarding the formation of contracts. This comprehensible legislation includes provisions related to the precontractual period and a detailed explanation of the mechanisms whereby offers and acceptances operate. An offer is defined by Article 845 as "the scheme of a juridical transaction made by one party to another, which must contain the essential elements of the transaction and be passed on to the recipient. It shall be understood that a proposal has been passed on when any adequate means have been used to convey it to the recipient".

Depending upon the manner in which it is formulated, an offer can be express or implied. When the offer is implied, there is no explicit procedure by the proponent. Thus, a fact or attitude determines the acceptance of the offer. Article 854 of the Commercial Code establishes that "tacit acceptance, as evidenced by an unequivocal fact of performance of the proposed contract, shall bear the same effects of an express acceptance, provided the proponent would be aware of such a fact within the terms provided by Articles 850 through 853, as the case may be".

The offer can be performed in the presence of the offeree or in his or her absence. When formulated in the presence of the offeree, it must be accepted or rejected immediately after it is heard. In the alternative, when an offer is made by in the absence of the offeree, the offer contents are not known immediately by the recipient. This difference is extremely important in light of the legal principles governing the validity and expiration dates of the offer.

The term "presence" as used in Article 850⁵, does not necessarily imply the physical participation of the relevant parties. In fact, pursuant to said provision there are other legal possibilities. In accordance to said Article any proposal formulated by telephone is also considered to be an offer made in the presence of the offeree. Furthermore, an extensive interpretation of said provision will lead to the conclusion that the legal requirement is related only to the immediate communication between the parties, notwithstanding the system used to achieve this purpose.

⁵ "Verbal proposal of a business transaction between parties present must be accepted or rejected immediately after it is heard. A proposal made by telephone shall be assumed, for acceptance or rejection purposes, to have been verbally made between parties present."

The objective content of an offer is regulated by Article 845 of the Commercial Code. The offer must include the essential elements of the business or future transaction to be entered into. These elements are described in Article 1501 of the Civil Code. From a subjective standpoint, the offer must express the intention of the offeror to be bound by the transaction proposed.

An offer must be passed on in the terms provided for in Article 845. This provision establishes that “it shall be understood that a proposal has been passed on when any adequate means have been used to convey it to the recipient”. Offers between absent parties, as regulated by article 845, are embodied in a system by which the offer is understood made when it is remitted. Articles 851 and 852 of the Commercial Code regulate the validity of the offer after it has been delivered. These articles establish that the offer will be valid during the next 6 working days. If the proponent and the recipient are in different locations, the said term will be added the distance therefrom. Nevertheless, private parties may agree on different dates for the expiration of the offer as set forth in Article 853⁶. Once communicated, an offer is binding upon the proponent in accordance with article 846 of the same Code. If the offeror revokes the proposal, he or she will be liable for any damage. Furthermore, as a general rule, even if the offeror dies, the offer is still binding until it expires.

An acceptance to an offer is the consent of the offeree to celebrate the transaction. The acceptance, as well as the offer, may be implied or express. In the absence of specific legal requirements to be fulfilled, the fundamental effect of the acceptance would be the execution of the business transaction. Implied acceptance, contemplated in Article 854⁷ is made up by unequivocal acts of the offeree which result in his obvious determination to celebrate the transaction. As a general legal rule, silence does not constitute acceptance.

As to the possibility of including choice of law clauses within commercial contracts, it has to be born in mind that Law 315 of 1996 provided for the possibility of including such a clause.⁸ At the present moment, it is valid for Colombian parties to submit controversies with foreign parties to international arbitration, pursuant to Article 1 of said statute. Article 2 of the same statute provides that international arbitration shall be governed by the rules provided for in the treaties or conventions on arbitration that Colombia has signed and ratified. At the present moment these conventions are:

- a. The U.N. (New York) Arbitration Convention of 1958 ratified by Law 39 of 1990;
- b. The Inter-American (Panama) Convention on International Arbitration of 1975, ratified by Law 44 of 1986; and

⁶ “The parties may set terms different from those for acceptance or rejection of the proposal or this latter may set them out”.

⁷ “Tacit acceptance, as evidenced by an unequivocal fact of performance of the proposed contract, shall bear the same effects of an express acceptance, provided the proponent would be aware of such a fact within the terms provided the proponent would be aware of such a fact within the terms provided by Articles 850 through 853, as the case may be”.

⁸ Characterized by its brevity, this law has been subject to many unresolved discussions.

- c. The Inter-American Convention on the Extraterritorial Efficacy of Judicial decisions and Arbitral Awards ratified by Law 16 of 1981.

Any final arbitration award or foreign judgement may be recognized and enforced in Colombia. Through a procedural system provided for under Colombian law known as “*exequatur*”, subject to the provisions of Article 693 and 694 of the Code of Civil Procedure, no re-trial or re-examination of the merits of the case is required. A simple formal examination takes place.

Article 693 provides that a foreign judgement or arbitration award is enforceable in Colombia in accordance with the terms specified by treaty or, in the absence of a treaty, on the same conditions given to Colombian judgements by the country in which the foreign judgement has been rendered. Proof or evidence of reciprocity or of the existence of a treaty would have to be submitted to the Colombian Supreme Court of Justice within “*exequatur*” proceedings. The Supreme Court of Justice has emphasized this requirement in a landmark decision rendered in 1996 when it established the importance of said reciprocity.

VI. Certification Authorities

Due to the recent expedition of Law 527 of 1999, certification authorities are still not operating in Colombia. However, Article 29 of said statute provides for the creation of these authorities and establishes the parameters that must be observed⁹. Pursuant to said article, certification authorities in Colombia may be private or public individuals or juridical persons both national or international. Chambers of Commerce are also entitled to be certification authorities. In any event, the constitution of a certification authority is subject to a prior application filed before the Superintendency of Industry and Commerce, which eventually authorizes the entity’s operation. Furthermore, some requirements established by the National Government must be met¹⁰.

Pursuant to Article 45 of Law 527 of 1999, the Superintendency of Industry and Commerce within the following 12 months after the publication of the statute must enable one of its divisions to perform controlling duties on the activities performed by the certification authorities.

Law 527 of 1999 has not regulated the use of other electronic signatures that do not require the intervention of a trusted third party. However, according to the broad construction principles provided for in the law, other electronic signatures may be used in the absence of a prohibition in this sense. Nevertheless, the evidence weight given to a

⁹ Already quoted Decree 1747 of September 11, 2000, has established the basic requirements for the operation of certification authorities.

¹⁰ The requirements referred to above can be summarized in three crucial aspects: (1) Financial standing and credit rating; (2) Appropriate technical capabilities to handle information; (3) The professional qualification of the entity’s officers and managers must be previously acknowledged by the Superintendency. Articles 30 to 32 complement the above-mentioned provision by establishing a number of duties and a series of activities that these entities are entitled to carry out.

signature that has not been certified by the corresponding authority will not have the far-reaching procedural consequences granted to one, which has been duly certified.

VII. Current Electronic Commercial Practices

Probably the most extended form of electronic commerce in Colombia is related to precontractual negotiations. Such dealings, which take place in advance to the eventual execution of a business transaction, are frequently carried out by electronic media. Therefore, faxes and electronic messages have become unavoidable elements for the trade of goods and services. At the same time, in the context of corporations and other business associations, it has become customary to execute several acts through electronic mechanisms. The granting of powers of attorney, the issuance of votes for the participation on voting sessions of boards, committees or stockholders' assemblies are frequent examples of corporate action by means of electronic commerce.

On the other hand, electronic invoices have been authorized by the national government. The Electronic Data Interchange proceedings have also been sufficiently permitted for national taxation purposes, by Decree 1094 of 1996, provided that they are carried out under the EDIFACT standards. In like manner, the Colombian Institute for Industrial Codification and systematization has approved a number of master documents for transactions performed through EDI.

The development of electronic commerce transactions in Colombia, even if confronted to many obstacles, has already surpassed the most important one. A law regulating the subject has already been executed by the national government on August 18, 1999. Naturally, the practical application of this law still has to overcome several other legal and cultural obstacles. Although many can be mentioned, the rooted distrust for anything, which has not been printed on paper, seems to be the most important cultural aspect to be dealt with.

In fact, Colombian legal culture has been characterized by excessive formalisms. The weight of evidence given to stamp, sealed and signed documents appears to be of a far reaching nature in procedural matters. Moreover, multiple statutes provide for a number of steps and solemnities that have to be accomplished in advance to the celebration of several acts and contracts. Furthermore, the notarial function and its supposed formal control over public deeds become troublesome in the context of a dematerialized commerce where said controls are superseded. At the same time the extended absence of technology in several levels of the Colombian judicial system may also become a considerable obstacle in the legal understanding of the new electronic evidence rules. Access to Internet could still be considered a privilege for several Colombian judges, particularly in small municipalities. Hence, at this rather early stage, it may be complicated to introduce electronic evidences (different to faxes) in the context of civil proceedings. Furthermore, according to the principle of sound judgement assessment of evidence established in the Colombian legal system, it may be difficult for a judge to decide solely on the grounds of electronic evidences, due to the comparative lack of knowledge of the relevant technologies.

VIII. Other Legal Issues

Already quoted Law 527 of 1999 has established efficient steps for the development of electronic commerce. The aforementioned statute does not include a specific provision regarding the applicable jurisdiction. It contains certain rules, which allow for the determination of the place in which the contract has been considered executed. According to Article 25 of said statute, “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 it is deemed to be received at the place where the addressee has its place of business”.

Law 527, however, provides little guidance as to the jurisdiction in which possible conflicts will be resolved. As explained in previous paragraphs, Law 315 of 1996 provided for the possibility of including international arbitration clauses within any commercial contract. Pursuant to the terms of said provision, the possibility of choosing the jurisdiction is fully authorized. Nevertheless, there may be legal obstacles associated with applicable taxes. Generally speaking, Colombia has not subscribed any treaties or conventions regarding international taxation. Therefore, the subject of taxes is regulated merely under local law. The possibility of international electronic commerce in which the country or its citizens could be involved will always face taxation obstacles.

PART II.

SPECIFIC ISSUES

I. Relevant legal definitions prior to the enactment of Law 527 of 1999

a. Writing

There is no particular legal definition of the word writing in the Colombian Legal System. There is, however, a definition of document as will be addressed later. Both, the Civil Code and the Commercial Code, determine that certain acts or contracts must be in writing. Some examples of this requirement can be found for the promise to enter into a contract (Article 89 of Law 153/1887); the conveyance of intellectual property rights (Article 119 of Law 23 of 1989); the transference of certain credits and rights (Articles 1959 and 1961 of the Civil Code) and the incorporation of a business association (Article 100 of the Commercial Code).

Article 89 of Law 153 of 1887 regulates the promise to celebrate a contract and sets forth that in order for such promise to be binding upon the parties, “it must be in writing”. Consistent case law has determined that the lack of such formality derives in the nullification of the promise to contract. Since Law 153/1887 is a civil statute, there is controversy as to the applications of said requirement in connection with promises to celebrate contracts of a commercial nature. Within the specific field of the law of mercantile corporations, it is clear that the promise to incorporate is subject to the above mentioned writing formalities as a substantial requirement.

In the Commercial Code and several other related statutes, there are a number of provisions requiring for an act or contract to be in writing. Pursuant to Article 1209 of the Commercial Code, for instance, certain contracts for the pledge of goods must be contained in a written document. In like manner, the judicial construction of Article 1046 of the same Code has been consistent as to the requirement for any insurance contracts to be embodied in written form. Any transaction related to the conveyance of property rights on a Mercantile Establishment has to be in writing. Some other contracts regulated in the Commercial Code, which deal with financial transactions, like bank account contracts, leasing, factoring, deposit, trust, among others, must be in written form due to specific decrees or administrative regulations issued by the Superintendency of Banks.

As it has been explained before, certain contracts, which are considered non-consensual, have to be granted before a Notary Public in the form of a Public Deed. Examples of these are contracts for the conveyance of real estate rights, corporations and other kinds of business associations or any amendment to these entities' bylaws, mortgage contracts, unlimited agency agreements, incorporation of branches, etc.

The approach to contract formalities of the Colombian private legislation prior to the enactment of Law 527 of 1999, was rather rigorous in this respect. In fact, even in the absence of a specific provision establishing a mandatory written formality, the importance of the documentary evidence in any contract was crucial. Article 532 of the Code of Civil Procedure determines that in any event in which no written support for an obligation can be presented before a judicial proceeding, the judge will have to consider this fact as a circumstantial evidence of said obligation's non existence

b. Document

According to Civil Law provisions documents are any kind of objects that possess representative or declarative character (Article 251 of the Code of Civil Procedure). Even though said definition denotes a broad conception regarding documented evidence, the rules governing such evidence portray a rather complicated distinction between different kinds of documents. Pursuant to Article 251 of the same Code, "A public document is any document issued with the intervention of a public officer". On the other hand, "a private document is such that does not comply with the requisites set forth for a public document" (Article 251, quoted).

The above mentioned distinction is of paramount importance to determine the weight given to the evidence when a document is presented before a judicial proceeding. In fact, Article 252 of the Code of Civil Procedure establishes a convenient authenticity presumption on behalf of public documents. Furthermore, pursuant to Article 264 of said Code, any information concerning the intervention of a public officer as well as the issuance, date and declarations rendered by the same, are considered incontestable evidence if they are embodied in a public document. On the other hand, private documents are generally disregarded as solid evidence, unless they are properly authenticated. Moreover, unsigned documents are taken into consideration by the judge only if the defendant or affected party recognizes the issuance of said documents (Article 369). Therefore,

according to evidence rules existing prior to the enactment of Law 527 of 1999, electronic information was considered to meet the standards provided for an unsigned private document. Consequently, the judicial enforceability of said information was uncertain due to the aforesaid legal provisions. Nevertheless, the recent rules that govern digital signatures and the assimilation of data messages to the legal definition of documents, as well as those regarding certification authorities facilitate the legal enforceability of electronic messages.

c. Signature

The Commercial Code contains a legal definition of signature, which has been incorporated in that statute for the purposes of negotiable instruments. Article 826 of said Code, establishes that “by signature is understood the expression of the name of the signer or of some of the elements pertaining thereto or of a sign or symbol as a means of personal identification”. Notwithstanding the aforesaid legal definition, the traditional concept of signature is related to “the name of a person written by him or her, which is used for authentication purposes”¹¹.

Pursuant to Commercial Code regulations, the signature may also be printed by mechanical means. In fact, Article 621 of said Code determines that “the signature may be substituted under the responsibility of the issuer of the document by a sign or countersign, which may be mechanically affixed”. However, article 827 of the same statute limits the legal effects of mechanical signatures by establishing that “a signature by any mechanical means shall not be regarded as sufficient unless admissible by law or usage”.

Although the above-mentioned rules have been conceived for negotiable instruments, they can be applied by analogy to similar transactions. Said provisions are particularly useful in the assessment of the matter of non-handwritten signatures. Since digital signatures may be construed as being mechanically printed, these provisions were applicable prior to the enactment of Law 527 of 1999. Hence, pursuant to a general construction, digital signatures were not regarded as sufficient in order to be used as evidence. Indeed, provided the non-existence of an electronic commercial practice and the lack of a particular law governing this issue, digital signatures were regarded as mere circumstantial evidence.

d. Contract

There is a dual regulation of contracts in Colombian Private Law. In fact, both Civil and Commercial Codes govern the concept of contract. Therefore, some discussion has arisen regarding said legal definition. For the purposes of this analysis it is relevant to address the main characteristics of the prevalent legal doctrine according to the most common understanding of the concept. Pursuant to Article 864 of the Commercial Code “a contract is an agreement between two or more parties to set up, regulate or wind up between them a juridical patrimonial relationship”. In light of this definition the main legal elements of a contract are the intervention of two or more persons, the parties’ intention

¹¹ BERNARDO TRUJILLO CALLE. *De los Títulos Valores*. De. Temis, 1997. Bogotá. Page 283.

geared towards the creation, modification or extinction of obligations and the economic nature of said obligations.

As it may be observed, private law undertakes a broad approach to the legal concept of contract. Such an approach concurs with the principles of contractual freedom, consensuality and self-ruling determination. In general terms, parties to a contract are notably autonomous to decide on matters such as the formalities pertaining to the agreement, the rules governing the parties' legal relationships, the nature of the transaction, etc. Therefore, almost any licit transaction could be legally performed in accordance with the aforesaid broad contractual definition. From this particular perspective, the notions of public order and accepted social custom would be the only boundaries of such liberty.

Consistent with the foregoing analysis, the traditional concept of contract does not constitute a significant obstacle regarding electronic commerce. On the contrary, due to the comprehensive nature of the definition depicted above, electronic transactions may be duly considered as contracts according to the general perspective, even before the enactment of Law 527 of 1999.

II. Relevant Legal Principles

As explained by several local authors, probably the most diffused concept in Colombian Private Law is the principle of freedom of contract. This aspect is considered crucial to any civil law legal system. Following the post revolutionary legacy of the *Code Napoleon*, most of the Civil and Commercial Codes of Latin America adopted provisions promoting the so-called "principle of self-ruling determination". Pursuant to said principle, private parties are entitled to freely govern their contractual relationships, provided that they do so within the boundaries of imperative law. Article 1602 of the Colombian Civil Code embodies this preeminent rule by determining that stipulations set forth by private parties in a contract are binding on those parties with the similar force as that of mandatory laws. Furthermore, the same provision establishes the rule whereby a duly executed contract cannot be invalidated in the absence of mutual consent or without the previous occurrence of a legal cause. In like manner, Article 824 of the Commercial Code determines that "all merchants are authorized to express their will to enter into a contract either verbally, or in writing or by any other unambiguous manner".

The principle of freedom of contract is usually associated with the liberty to adopt contractual formalities. Pursuant to this well-established criterion, the parties to a commercial transaction are granted autonomy to decide on the solemnities by which they will express their intention to be bound in a specific contract. In accordance with this legal concept, only when a written law provides for a specific formality as an essential requirement for the existence of a commercial transaction, said operation would not be formed if such a formality has not been complied with.

The formality relating to the written form is, nevertheless, considerably extended due to procedural regulations like relevant provisions of the Code of Civil Procedure, which undertake a formalistic approach to the rules of evidence. In fact, already quoted Article 232 of said Code embraces the dominant procedural doctrine by which the absence of a

written document will be considered as a circumstantial evidence of the non-existence of the obligation¹². At the same time, the definition of writing, which involves the requirement of a physical autographed signature affixed to it, creates an additional restriction in terms of evidence rules. In addition, Article 269 of the Code of Civil Procedure, denies any value to documents which have not been signed by the parties, unless they have been expressly acknowledged by them.

Notwithstanding the previous analysis, Article 187 of the Code of Civil Procedure attenuates the rigor of said provisions, by granting the judge broad powers for the application of his or her own criterion to consider the weight given to evidences brought to any judicial proceeding. The above-mentioned Article reflects the basic procedural principle usually referred to as the “sound judgment” assessment of evidence. Pursuant to said rule, “evidences should be considered as a whole by the judge according to the rules of sound judgment, without prejudice to the particular formalities provided for in the substantial law for the validity of certain acts” (Article 187, quoted).

In like manner, Article 175 of the Code of Civil Procedure, determines that legally accepted means of evidence are (a) The parties’ declarations. (b) The declaration under oath. (c) The deposition of third parties. (d) The expert’s statement. (e) The judicial inspection. (f) The circumstantial evidence. (G) Any other means which could be considered to be useful in the formation of the judge’s conviction. This provision assumes a flexible approach, which allows for the presentation of all sorts of evidence in any judicial proceeding.

On the other hand, Article 251 of the same Code defines document as a “movable object depicting any representative or declarative character”. Some authors¹³ have considered that the requirement provided for in such definition cannot be fulfilled by an “electronic document” due to the incorporeal nature of the data transmitted by the sender to the recipient. Within a different perspective, an incorporeal right is also considered a movable object¹⁴. The legal controversy is, nevertheless, of little importance at the present moment in light of the issuance of Law 527 of 1999.

A local constitutional provision that should be also carefully considered as relevant to electronic commerce is the principle of good faith. In fact, pursuant to article 83 of the National Constitution, any act or contract entered into by a private party should be performed in good faith. This rule has relevant developments both in the Civil and Commercial Codes. In accordance with Article 1603 of the Civil Code “any contract should be executed in good faith and, therefore, the subscribing parties would be bound not only to the contract’s stipulations but also to any other duties arising from the nature of the obligation. In the same manner, a similar rule of law appears in Article 871 of the

¹² “Article 232. Whenever obligations derived from a contract or convention are to be proved, the absence of a document or any other written evidence should be regarded by the judge as a circumstantial evidence of the non existence of the corresponding act” (Code of Civil Procedure).

¹³ ERNESTO RENGIFO. *Contrato electrónico, documento electrónico y seguridad jurídica*. In *El derecho de autor. Estudios*. Centro Colombiano de Derechos de Autor. July 1998. Page 13.

¹⁴ JOSÉ IGNACIO NARVÁEZ. *Derecho Mercantil Colombiano*. Ed. Legis. 1997. Bogotá. Page 223.

Commercial Code, whereby the principle of good faith is extended to the performance of the contract itself as well as to the commercial custom and the natural equity.

The same statute also establishes the good faith obligation during the pre-contractual period. Thus, any deals entered into in advance to the execution of a commercial transaction have to be carried out in good faith pursuant to article 863 of said Code (*culpa in contrahendo* doctrine). Damages due to negligent behavior during said period must be indemnified to the affected party. Regulations concerning the pre-contractual period are also aimed at the protection of the principle of sufficient deliberation in advance of any contractual relationship. Thus, disclosure of relevant information and transparency of the parties' intentions in said stage are legally required.

Another set of relevant substantive law principles is contained in the Civil Code's section related to the interpretation of contracts. In said division, the Civil Code deals with a number of legal principles aimed at the appropriate judicial and non-judicial construction for contracts' stipulations or clauses. Articles 1618 to 1624 of said codification determine practical criteria to facilitate the private application or the judicial enforcement of civil law transactions. Among these rules it is pertinent to emphasize in the rules of "intention" and "efficacy". According to the former, once the parties' intention is well known, the construction must be aimed at preserving it rather than respecting the literal wording of the contract. The latter relates to the principle of efficacy of contracts. This interpretation rule is contained in Article 1620 of the Civil Code, which determines that all stipulations set forth in a contract must be construed in a manner in which they will produce legal effects.

On the other hand, Decree 960 of 1970, which governs the so-called notarial function, deals with several issues relating to the acknowledgment of signatures, recognition of legal documents, authentication of acts and contracts, public deeds and other formalities. The above quoted statute reflects the traditional continental approach to the notarial function inherited from the Spanish legacy. From the several functions entrusted to the notaries, a tendency to authentication formalities is evident. In fact, many civil and commercial acts and contracts are still subject to the mandatory granting of a public deed before a notary public in order to be binding upon the parties. Such formality also demonstrates a particular concern towards the authenticity of the documents granted before the corresponding officer. The notary public has the duty to verify the identity of the parties and the origin of their declarations in writing and signatures. The same preoccupation is closely related to the similar principle of conservation and integrity of information. Article 56 of Decree 960/1970 requires the notary public to create and maintain a protocol in which several legal documents are conserved.

Both the authenticity and the integrity of the documents referred above guarantee the acceptance expressed by the parties to a commercial transaction of the relevant conditions and obligations as well as their intention to be bound by such written stipulations. By these means the parties ensure that non- repudiation of the contract will take place.

Although previous dealings between the parties of a contract subject to public deed formality can be kept confidential, once the document has been granted by the notary

public its contents become available to any interested third party. Instead of confidentiality, in this case the public policy goal is aimed at the broad diffusion of the transaction's terms and conditions. In fact, several acts and contracts subject to this formality must also be filed before a public registry. Such is the case, for instance, of transactions relating to the conveyance of real state as well as structural changes introduced to corporations or any other business association.

The legal approach contained in the principles explained above was obviously conceived before the development of electronic commerce. Most of such principles have been crafted for transactions in writing and, thus, are of a formalistic nature. Nevertheless, even before the enactment of Law 527 of 1999, it was possible to construe said legal criteria in a manner consistent with modern technologies. Furthermore, a broad construction of the procedural rules of evidence should suffice for electronic operations to be binding upon senders and recipients.

Some specific statutes like those regulating the law of corporations have recognized the importance of electronic commerce. Law 222 of 1995 has permitted the meeting of shareholders' assemblies and boards of directors without the physical presence of stockholders or members of such boards. These variations to the traditional meeting imply the use of any technical facilities that could allow the participants to be in contact with each other through a simultaneous communication. Article 19 of Law 222, quoted, requires for these meetings to be legally effective and binding on the attendees the existence of "any means of evidence" to support such deliberation. This evidence could be presented in the form of an electronic file, namely, a diskette, an optical disk, or any other similar device. The importance of this provision is unquestionable. It simply implies that mostly every relevant transaction involving corporations and other business association (adopted by shareholders' assemblies or boards of directors and other committees) can be voted and adopted by electronic means.

In the field of securities exchange transactions the law had already recognized the viability of electronic media as a valid form of expressing offers and acceptances. The so-called Centralized Securities' Deposit (*Depósito Centralizado de Valores*) was authorized by the relevant Colombian Superintendency to act as a custodian for "dematerialized" negotiable instruments. In this manner, the documentary form regarding several securities' transactions was replaced for a digital registration in said deposit. In like manner, Law 223 of December of 1995, regarding taxes administered by the National Tax Authority had established that an *electronic invoice* could be considered equivalent to the purchase-sale exchange invoice issued by merchants or other entrepreneurs. This provision constitutes a relevant precedent for a more general dematerialization of negotiable instruments, which could take place in the near future. This foreseeable legal progress may be fostered also by the previously mentioned broad definition of signatures contained in Articles 826 and 827 of the Commercial Code.

At the same time, Decree 1094 of 1996 had regulated the use and accepted the validity of said electronic invoices sent through EDI, provided that such interchange of data is performed under EDIFACT standards. According to said statute, in order for the National

Tax Authority to perform auditing proceedings a copy of the electronic invoice must be made available to the aforementioned governmental entity¹⁵.

Some important developments have also been made in recent procedural law regulations. In fact, pursuant to Article 95 of the judicial administration act, the government is required to supply modern technologies to the administration of justice. The provision determines also that such action will be aimed at the improvement of evidence discovery, the formation and conservation of legal dossiers, among other purposes. Furthermore, the statute provides that the documents issued through those mechanisms will have the same validity of an original instrument, inasmuch as its authenticity and integrity are guaranteed.

Recently, the President has passed another decree providing for the deregulation of the administrative functions of the executive branch of Government (Decree 266 of 2000). In several provisions of said statute, there are references to electronic systems, which can be used in any action before governmental agencies as well as various allusions to the possibility of presenting evidence in the form of electronic data. These developments are of relevance in light of the possibility of transmitting electronic data to surveillance governmental institutions like the Superintendencies of corporations and banks. Hence, this specific progress will have a direct impact on the matters concerning corporation law, financial law and bankruptcy proceedings.

Upon the enactment of Law 527, quoted, which adopted with certain variations the UNCITRAL model for electronic commerce, the principles of authenticity, integrity, non-repudiation, writing and signature verification and confidentiality in electronic commerce have been completely incorporated within the stream of Colombian substantive and procedural law.

The comparatively recent execution of the above quoted statute on electronic commerce (enacted in August 18 of 1999) provides little guidance as to the practical application of its rules. There is, however, enormous expectation regarding the statute specific development particularly in the field of fostering commerce both at local and international levels. In Colombia, contradicting the general rule, the legal system has anticipated an economic reality, which is still incipient. Within this exceptional scenario, it is difficult to foresee the actual evolution of Law 527, particularly in the field of legal interpretation and judicial enforcement. It is also complicated to propose any amendments to a legal set of rules, which has hardly been inaugurated.

As to the principles that should be addressed by the possible adoption of an international treaty, it would be relevant to take into account the importance of harmonization within the international community. The simplest way to achieve such goal would be by the massive adoption of a uniform proposal on electronic commerce like the one prepared by UNCITRAL. Naturally, peculiarities concerning the specific legal system of every subscribing state should be contemplated in the manner of unilateral stipulations by means of a reservation to the corresponding international convention.

¹⁵ See ERNESTO RENGIFO. Op. Cit. Page 15.

Due to the legal tendency in the Latin American countries towards formalism and its relationship with legal certainty, it is also convenient to assimilate the electronic document and its effects to the traditional documentary form. This assimilation can be obtained by the adoption of the UNCITRAL model, which provides specific criteria in that respect.

Another issue, which has to be taken care of, is the one related to reciprocal certification at the international level. This objective could be achieved by creating a multi-level system for the authentication of national certification authorities. This system can be designed on the basis of a single national certification authority per country, which could be certified in its turn, in a reciprocal manner by its foreign counterparts.

Another issue that should not be left aside is associated to the tax treatment of international electronic commerce. General guidelines should be provided as to the determination of the obligee as well as the concrete depiction of the relevant duties of the parties including, but not limited to withholding tax obligations, remittance taxes, V.A.T., tariffs, etc. It would be useful to stipulate for the possibility of paying this amounts using electronic payment mechanisms, in order to expedite both the compliance with internal tax laws and the collection of said taxes.

An important matter that should be considered as well is related to the problem portrayed by the determination of the liabilities of both certification authorities and users of electronic commerce in the event of the revocation of a certificate issued by the corresponding authority. UNCITRAL model has not yet taken this into account, leaving the governance of said issue to the local regulators. Given the public interest involved in this topic, the international community may take concerted decisions to this end.

III. Subsisting Legal Restrictions to Electronic Transactions

The most common formalities pertaining to private law are usually related to the granting of instruments before public authorities such as notary publics. Another frequent solemnity in legal texts is the necessity to file certain acts or documents before public registries. It is important to consider the transactions subject to said formalistic procedures, in order to analyze the underlying policies and principles which are germane to these legal requirements. This analysis will be useful to determine the relevance of such solemnities and the possibility of coping with the same public policy objectives through the use of electronic means. The traditional Civil Law approach related to any transaction regarding the conveyance of real estate involves the participation of a notarial officer¹⁶. Therefore, a public deed must be issued for that purpose and eventually filed before a public registry. According to the Civil Code, said formalities are essential for the formation of any such contracts. Hence, the absence of this requisite would imply the legal non-existence of the agreement. The sanction provided by the law suppresses whatever effect to the consent rendered by the parties using any mechanism different from the public deed. The already mentioned registration requirement is used as a justification of this formalistic approach. In

¹⁶ Among the transactions subject to the aforesaid solemnity are the following : (a) Sale and purchase ; (b) Mortgage ; (c) Antichresis ; (d) Barter ; (e) Dation in payment, etc.

fact, the importance of the authenticity of the document to be registered is considered as an unavoidable solemnity that has to be fulfilled in order for the document containing the agreement to become public and available to third parties. Although, a limited number of authors have held that such formality is not necessary when the contract involving real estate is of a commercial nature¹⁷, this construction has not yet been recognized by case law.

This approach can be traced back to the Roman law conception whereby, real estate was considered the most valuable asset and, therefore, its conveyance had to be subject to specific formalities. This same conception is reflected in the present civil law regulation that requires the intervention of two public officers in the formation of those contracts.

In accordance to this same tradition, the conveyance of assets such as aircraft and ships must follow the same proceedings provided for in the law of real estate. Pursuant to Article 1427 of the Commercial Code, any act or contract related to the property rights of a major ship or aircraft must be formalized in public deed. The corresponding deed must be inscribed with the relevant port authority or before the National Aviation Registry, respectively.

As to company law, there is a long-standing tradition of formal proceedings related to any acts concerning the incorporation or any other structural change introduced to the corporate form. Following the European model, two different requirements must be met in order to create a business association. Article 110 of the Commercial Code determines that a public deed containing the corporation by-laws must be granted before a notary public and eventually filed before the mercantile registry. The principles of authenticity and integrity are supposed to be complied with the issuance of said public instrument. The registration procedure is said to guarantee full disclosure and publicity of relevant information to third parties. Among the basic facts that must be disclosed are the purpose clause, the corporation's duration, the capital structure, the legal representative's duties and faculties and the identity of its higher officers. This information is considered of significant importance in light of the "ultra vires" doctrine still in force¹⁸.

Another set of contracts subject to the aforesaid formalities is the prenuptial agreements entered into by merchants. Pursuant to Article 1772 of the Civil Code, all prenuptial agreements must be notarized in a public deed. At the same time, Article 28-2 establishes the obligation of registering prenuptial agreements subscribed by any person who is legally considered a merchant under the definition provided for in the same Code (Article 10). The underlying concern of this set of legal provisions, is the protection of creditors' expectations as they relate to the integrity and conservation of every merchant's equity. In fact, the publicity requirement germane to these particular agreements is

¹⁷ NESTOR H. MARTINEZ. ¿Es consensual la compraventa mercantil de inmuebles? in *Revista de Derecho Mercantil* No. 7. Bogotá. Temis. 1986. Page 49.

¹⁸ Article 99 of the Commercial Code establishes that "the capacity of the corporation shall be confined to the development of the venture or activity contemplated in its purpose clause. This purpose will be understood to cover any acts directly related to it and those which are intended to exercise any rights or fulfill any obligations, whether legally or conventionally, arising from the existence and activity of the corporation".

explained by the protective nature of the commercial statute reflected in the necessity of disclosing certain private information.

In terms of volume of transactions, the contracts referred to in the previous paragraphs amount for the majority of the operations subject to public deed and registry formalities. There are, however, several other legal provisions that set forth a mandatory filing of a public record in order for certain acts or contracts to be enforceable vis-à-vis third parties or to comply with authenticity requirements.

In accordance with the Commercial Code, the chambers of commerce operating in the country have been granted the function of carrying out the mercantile registry. Article 28 of said code, describes a number of acts and transactions that must be filed before said registry with a general purpose of publicity. Therefore, the predominant consequence for not complying with such requirement is the non-enforceability of the relevant act or contract, beyond the limits of the subscribing parties. Article 28 of the Code depicts a number of acts subject to public record with the mercantile registry. Some of these acts are those related to the registration of merchants and their assistants (article 28-1); any acts issued in connection with corporations and other business associations' bankruptcy proceedings (article 28-3); all authorizations delivered to minors for the exercise of the merchant profession (article 28-4); any act referring to the administration of the merchant's businesses (article 28-5) ; the opening of commercial establishments and the subsequent changes in its administrative or legal structure (article 28-6); and the registration of corporate financial books and records (article 28-7).

The filing requirement of the acts and documents depicted above, is intended to fulfill the general purpose of disclosure of information related to the merchant's activity. Said public availability of information fosters a significant level of certainty for the development of commercial trade. It also protects creditors' interests by providing them with an accurate description of the merchants' financial and administrative situation. At the same time, it is useful in preventing any kind of misrepresentation that could affect the merchant's affairs.

Other relevant transactions subject to filing before a public registry are those regarding the conveyance of automobile property rights (Article 922 of the Commercial Code). The importance given by local law to such assets, which is associated with their presupposed commercial value, is said to justify said formality. Hence, all transactions related to the establishment or transmission of property rights referred to automobiles must be filed before the corresponding public registry. This formality can be distinguished from that related to the conveyance of real estate, for it is not a requisite for the existence of such contracts. The purpose served by this particular obligation is to publicize the transaction in order to make it valid vis-à-vis third parties.

On the other hand, several secured transactions as well as regular credit operations must be documented through negotiable instruments. Article 619 of the Commercial Code defines negotiable instruments as "documents needed to enforce the autonomous and literal right incorporated therein". The word document used by this provision must be construed in accordance with the relevant procedural rules. Therefore, the document in which a

negotiable instrument is embodied must be any kind of object that possesses representative or declarative character (art. 251 CPC). The legal theory underlying negotiable instruments has determined certain characteristics that are germane to such documents. Among these concepts it is important to bear in mind for the purposes of this analysis, the principles of literal construction and incorporation. According to the former, the obligations and rights arising from a negotiable instrument are restricted to the document's literal tenor. Pursuant to the latter the right related to a negotiable instrument is materialized in the document in such a manner that the enforceability of the underlying right is dependent upon the exhibition of the original document (Article 624 of the Commercial Code). Therefore, even authentic copies of the document are not judicially admissible. This condition is so strict that in the event of dispossession, destruction or ruin of a negotiable instrument, a judicial proceeding is required for the replacement of the document. Naturally, in the absence of the instrument, the underlying contractual obligations would still be enforceable through an ordinary and lethargic civil proceeding.

In the general context of electronic commerce, it seems to be obvious that the extended use of the document form implies difficulties for the implementation of such technological resources. Certainly, the aforementioned legal restrictions, which involve the compliance of a significant number of formalities for the enforcement of several contracts and secured transactions, create a hostile atmosphere to electronic commerce. The presence of a rather formalistic approach to the rules governing the formation of contracts has, at the same time, crafted a legal culture characterized by an extended reverence to the written form.

The legal scenario described above, depicts the obstacles for electronic commerce that existed before the enactment of Law 527 of 1999. It is foreseeable that most of the legal barriers would be superceded with this new statute. In fact, it addresses several substantive and procedural law issues, which will be useful for the understanding and applicability of electronic transactions.

Law 527 of 1999, defines and regulates the access and usage of data messages, electronic commerce and digital signatures. It also provides for the creation of certification authorities and determines its legal functions. The broad principles embodied in such statute should be considered sufficient to facilitate electronic trade. Not only it creates several parameters to assimilate electronic business practices to the traditional legal concepts of documents, contracts, signatures, authenticity, etc., but it also encompasses specific evidence rules for the enforceability of said forms of trade. Within those principles, it is pertinent to address the following ones:

a. Authenticity

Various provisions of the statute govern the matter of authenticity of an electronic transaction. The regulation allows the parties to determine the source of an electronic communication. The application of this principle is relevant for the determination of the identity of the parties to a commercial transaction, which provides legal certainty to the contractors. It is also important for evidencing a document's originality.

Article 16 of Law 527 of 1999, establishes that “a data message is that of the originator if it was sent by:

- “(1) The originator itself.
- “(2) By a person who had the authority to act on behalf of the originator in respect of that data message; or
- “(3) By an information system programmed by, or on behalf of, the originator to operate automatically”.

In like manner, article 17 sets forth certain presumptions whereby an addressee is entitled to regard a data message as being that of the originator, if:

- “(1) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or
- “(b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own”.

As to the originality of the information, Article 8 establishes that “Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if:

“(a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and

“(b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.

“The rule set forth hereby, applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being presented or retained in its original form.”

b. Integrity

The principle of integrity is related to the precision and wholeness of electronic messages. The verification of the exact identity of the information sent by the originator and of the message received by the addressee, is crucial to assess the nature and extent of the obligations derived from data messages. Law 527, quoted, sets forth a number of rules governing the principle of integrity. Among said rules, Article 18 establishes that when a data message is deemed to be that of the originator, “the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption.

“The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.”

In the same manner, Article 9 of the same statute provides that “the integrity of the information contained on a data message will be presumed if the information has remained complete and unaltered, apart from the addition of any endorsement or any other change which arises in the normal course of communication, storage and display”.

c. Writing & Signature

Prior to the enactment of Law 527 of 1999, the issues of writing and signature constituted a considerable obstacle for the legal enforceability of electronic transactions. According to the traditional approach, legally binding agreements must be embodied in documentary instruments in order to be enforceable as evidence. Furthermore, the existence of formal requirements for the formation of certain contracts implies the intervention of public authorities for the verification of the contents of written documents as well as the identity of the subscriber.

The aforesaid obstacles are addressed in a number of rules that establish assimilation criteria for digital signature and electronic message. By means of these criteria, Law 527 of 1999 deems digital signatures to be considered authentic signatures and data messages to be treated as documents, in accordance with procedural laws.

Pursuant to Article 6 “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. [...] The rule provided for in this article, applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.” In the same manner, according to Article 7, “Where the law requires a signature of a person or provides consequences for the absence of a signature, that requirement is met in relation to a data message 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.”

Furthermore, the last paragraph of already quoted Article 28 of Law 527, quoted, establishes that “the use of a digital signature will have the same enforceability and produce the same effects of a handwritten signature, provided that the following conditions are complied with:

- a. “It is unique to the person that utilizes it.
- b. “It may be verified.

- c. “It is under the exclusive control of the person that uses it.
- d. “It is linked to the corresponding information or message in such a manner that if the latter changes, the digital signature would be invalidated.
- e. “It is duly adjusted to the rules issued in this respect by the National Government.”

d. Non repudiation

Various provisions contained in Law 527/1999 address the problem of repudiation of the consent expressed by an electronic medium. These particular sections are oriented towards the seriousness and legal certainty of electronic trade. Therefore, the main concern addressed by this principle is to ensure that the sender of an electronic message does not have the possibility of denying the information contained therefor. Likewise, there should be sufficient certainty as to the identity between the original message sent and the one received.

The importance of providing legal certainty within a business transaction becomes relevant in the event of a party's refusal to comply with his or her contractual obligations. In such situation, the relying party would be required to demonstrate that the other party's consent was duly rendered. In the context of electronic commerce, parties to a transaction may be able to deny their liability on the grounds of having rendered their consent to a different document. Thus, the law has created certain rules that prevent the parties from repudiating data messages if the proper procedures have been followed. Article 18 of Law 527, for instance, entitles the relying party to assume that the message received corresponds to the one sent and to act accordingly, provided that the sender originated the message. Therefore, any obligation or right that may be derived from an electronic message under said rule, would be legally enforceable vis-à-vis the sender.

IV. Enforceability of Electronic Contracts. Offer and Acceptance Rules

The enforceability of an electronic contract is undeniable due to imperative nature of the provisions set forth in Law 527 of 1999. In fact, according to Article 14 of said statute, “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”. In light of the aforementioned provision, the determination of the effectiveness of the offer does not depend upon the means by which it is issued. Hence, the previously explained rules regarding the offer and its acceptance are also fully applicable to electronic commerce (Articles 845 to 862 of the Commercial Code).

As to the duration of the offer there is no specific provision in Law 527. Hence, the applicable rule in this respect would be Article 851 of the Commercial Code, whereby “in the case of a written proposal it must be accepted or rejected within six working days following the date of the proposal if the recipient resides in the same locality of the proponent; if at a different location, the said term will be added the distance therefrom”.

Nevertheless, law 527 quoted, provides guidance as to the place in which the offer is understood to have taken place as well as to the moment in which it was issued and accepted. The relevant rules are as follows:

“Article 23. Time and place of dispatch and receipt of data message. 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”.

“Article 24. Time and place of dispatch and receipt of data messages. Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

“(a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:

“(1) at the time when the data message enters the designated information system; or

“(2) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;

“(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

“This Article applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under Article 25”.

V. Capacity to Carry Out Electronic Transactions. Agency Rules

The general guidelines for capacity are contained in both the civil and commercial codes. Such rules determine a rather formalistic approach to the qualifications required to carry out legally binding transactions. The sanction imposed on a contract entered into by incapable persons is eventually reflected in its judicial nullification.

The concept of legal certainty associated with this legal approach may be troublesome in regard to the activity of corporations and other business associations. For instance, the idea of a centralized legal representation conferred upon a duly registered person creates a correlative problem in connection with the concepts of apparent and implied authority. In fact, a contract executed by a corporation officer who appears not to be duly registered will not be binding on the corporation. This rigid assessment to the legal concept of authority to act imposes a very careful and sometimes distrustful behavior on behalf of contracting parties.

As to the agency rules, the law provides for a person to act on behalf of another under the legal institution of representation. Voluntary representation takes place when any person empowers another to execute in his or her name one or several juridical transactions. The act whereby this faculty is granted is known as an extended power and it is regulated both in the civil and the commercial codes. Article 840 of the latter outlines the scope of the agent's authority to engage in business on behalf of the principal. Pursuant to said provision, "a representative may carry out any acts falling within the ordinary course of business which he has been entrusted with, but shall require a special power of attorney in respect of any acts where this is required by law".

Notwithstanding the imperative nature of the aforementioned principles and statutes, there is a specific legal provision embodying the so-called theory of apparent agency. In connection with said doctrine, Article 844 of the Commercial Code provides that "whoever creates the impression, under the business usage or on purpose, that any one person is empowered to enter into a juridical transaction, shall be held responsible under the terms agreed with third parties in good faith and free from malice". Although this provision could be construed in an extensive manner in order to protect third parties contracting with a corporation, courts have been reluctant to grant such protective approach to the law of agency. Thus, case law has defended the legal representative's public registration requirement as a mandatory precondition for the validity of corporate contracts.

Said orthodox view of the law of agency may be changing in light of the recent electronic commerce law. Pursuant to the new statute the possibility of apparent authority appears to be more evident under the provision set forth in Article 16-2. In fact, said rule determines that "a data message is that of the originator if it was sent by a person who had the authority to act on behalf of the originator in respect of that data message".

At the same time, Article 28 of Law 527 sets forth the rule whereby, "whenever a digital signature has been affixed to a data message, it is presumed that the owner of said signature had the intention to formalize such data message and the commitment to be bound by its content". This legal inference may also give rise to a different approach regarding agency rules. If the owner of said electronic signature allows other persons to have access to it and to send messages, may become obligated by the contents of such a message. Naturally, the owner will always be authorized to destroy the legal inference by proving that the originator of the message was not authorized to use the signature. However, for this purpose the weight of evidence will be inverted and, therefore, the signature's owner will be required to provide a pertinent demonstration of his or her saying.

The criteria referred to above are of a very objective nature. they create the presumption that anyone utilizing the originator's system will have the ability to bind such person and, correspondingly, the recipient will be entitled to rely upon that assumption. It is clear that this rule will foster a new approach regarding the contractual liability derived from electronic transactions performed by apparent agents on behalf of their principals.

VI. Privacy

1. General Constitutional Framework

Colombian law regulates different aspects related to privacy. The National Constitution includes privacy within the fundamental civil rights. In fact, Article 15 of the Constitution states that everyone has the right to privacy and that the Government will have the duty to protect such right. It also determines that the mail and other means of private communication are inviolable. Another aspect of constitutional concern is the so-called *habeas data*, which forms part of the privacy right. *Habeas data* relates to the access to personal information registered in files or databases. The corresponding constitutional protection restricts the indiscriminate use of this information or the use of it for unauthorized purposes. This concept must be considered of paramount importance regarding electronic information. Nevertheless, there have been no specific case law developments in the concrete field of commerce undertaken by electronic media.

The Constitutional Court has construed the privacy right in general terms. It has held that said right must be understood as an individual guarantee aimed at the protection of the citizen's private life. Pursuant to the court's ruling, such concept can be construed both in a narrow and in a broad sense. The former construction is related to the protection of an individual's private sphere against intrusion that may adversely affect it (Constitutional Court, Decision No. T-414 of 1992). The latter interpretation is oriented to the safeguard of an individual's persona and family. Such concept includes the constitutional protection of privacy, honor, and the good name. Under certain circumstances, the violation of privacy may also constitute libel, which is sanctioned by criminal regulations (Criminal Code, Articles 313 y 314). Another possibility for breach of the privacy right will be the unauthorized disclosure of a patient's medical record (Constitutional Court, Decision No. C-264 of 1996) or the undue revelation of professional secrecy (Constitutional Court, Decision No. T-073A of 1996).

Concerning *habeas data*, the Constitutional Court has recognized the problems related to new information technologies. According to the court's ruling, the indiscriminate use of such technologies may lead to abuses that could affect an individual's privacy. In fact, privacy rights will be violated whenever personal, financial, and other types of records are misused or made public without the express permission of the concerned individual. Although it has been judicially acknowledged that some type of interference is legally admissible (such as the financial records maintained or shared by credit institutions), it is not legally accepted to have these records exposed to the general public or to use them for unauthorized purposes (Constitutional Court, Decisions T-414/92 and SU 528/95).

Another subject covered by the above-quoted provision is the inviolability of correspondence and other means of communication. This is a relevant guarantee in electronic commerce, due to the general protection granted to all forms of private documents, including those embodied in electronic media. Although certain statutes (mostly of a criminal nature) allow for the government to interfere with some forms of communication, such an intervention is only authorized in extreme cases and is generally subject to a previous judicial order.

2. Specific Statutory developments

a. Protection to industrial secrecy and privileged information

Several statutes have been enacted to develop the general concept of privacy contained in Article 15 of the National Constitution. Law 222 of 1995, regarding corporations and other business associations, has assessed the problem of commercial and industrial secrecy. Obviously, this regulation is aimed at the confidentiality of such information. Article 23 of said statute includes the obligation to safeguard such secrecy among the directors' duties of loyalty. The aforementioned corporate officers are also obligated to refrain from improperly using *privileged information*. The first concept (industrial and commercial secrecy) is related to technical information concerning industrial formulas or certain procedures that have an economic application for the business association. The second concept (privileged information) is aimed at the protection of internal information only known by certain employees or officers, which must remain undisclosed in order to avoid damage to the corporation's economic interests. This concept has also been recognized by the Cartagena Sub-regional Treaty (Andean Pact) in the context of intellectual property rights. The disclosure of such information does not only constitute a commercial violation but it may also configure a transgression of other statutes. In fact, such breach of confidentiality is a cause for unilateral termination of an employment contract according to labor laws. It is also considered a crime regulated under the corresponding code and it may lead to civil liability for corporate officers and directors.

b. Integrity and cryptography

Already quoted Law 527 of 1999 does not assess the issue of confidentiality in any specific provision. Nevertheless, it creates a general framework for electronic transactions, including the protection of the information transmitted by electronic media. In fact, article 6 of said statute is aimed at guaranteeing the identity of the originator as well as the integrity of the messages transmitted through EDI. Law 527 of 1999 also regulates the integrity of a data message. The principle of integrity in said legal rule is related to the precision and wholeness of electronic messages. Any interference with the contents or integrity of a data message will also be considered a breach of confidentiality according to general principles already explained. Therefore, the verification of the exact identity of the information sent by the originator and of the message received by the addressee, is crucial to assess the nature and extent of the obligations derived from data messages. Law 527, quoted, sets forth a number of rules governing the principle of integrity. Among said rules, Article 18 establishes that when a data message is deemed to be that of the originator, "the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption.

"The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received."

In the same manner, Article 9 of the same statute provides that "the integrity of the information contained on a data message will be presumed if the information has remained complete and unaltered, apart from the addition of any endorsement or any other change which arises in the normal course of communication, storage and display".

Article 8 establishes that “where the law requires information to be presented or retained in its original form, that requirement is met by a data message if:

“(a) There exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and

“(b) Where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.

“ The rule set forth hereby, applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being presented or retained in its original form”.

Another relevant topic is the one related to cryptography. Generally speaking, it may be used correctly as a method to protect privacy and confidentiality. Nevertheless, cryptography may also be used to unlawfully decode messages or to enter into databases without the relevant authorization. Law 527 of 1999 is not comprehensive in the coverage of the subject of cryptography. Nonetheless, there are certain provisions, which relate to such concept. These legal principles may also be used as a protection to privacy. For instance, Article 11 sets forth an evidence criterion whereby any court must assess the weight of evidence given to an encrypted message according to the reliability of the cryptographic method used. Article 17 of the same statute sets forth certain presumptions whereby an addressee is entitled to regard a data message as being that of the originator. One of those conditions occurs when the addressee has properly applied a procedure previously agreed with the originator for that purpose. Such a proceeding can be a cryptographic method agreed upon by the parties.

VII. Content ownership and Intellectual Property

1. Legal Framework

a. Constitutional Protection

Article 61 of the National Constitution establishes that "the State will protect the intellectual property for the period and in accordance with the formalities set forth by the law".

b. Supranational application of intellectual property rules among the Andean Pact countries

The regulations issued by the Commission of the Andean Pact govern most of the issues concerning intellectual property rights within the member states. Pursuant to Articles 3 and 5 of the Treaty, which creates the Andean Court of Justice, the decisions adopted by the Commission of the Cartagena Agreement will be directly applicable to the treaty's member states. Therefore, according to Article 144 of decision 344 of said Commission, the local rules regarding industrial property will only be applicable in the absence of Andean uniform legislation on the specific topic. In like manner, Decision 351 of 1993 establishes a common legal system for the member states related to author rights.

c. Territorial Protection of Intellectual Property Rights

According to current regulations, any intellectual property protection granted by a foreign country will not be enforceable in Colombia, in the absence of a bilateral or multilateral treaty related to the specific matter. Therefore, it is crucial to take into account the different international treaties that Colombia has signed as well as the criteria used for their application within the national legal system. Pursuant to the general legal principle, the regulations contained in international treaties subscribed and ratified by Colombia are prevalent vis-à-vis national regulations. Nevertheless, national law shall govern regarding those matters, which are not contemplated by international treaties.

Colombia has ratified the following international treaties concerning intellectual property:

- Decision 344 of the Cartagena Agreement. Enforceable in Colombia since November 27, 1969. Bolivia, Ecuador, Perú and Venezuela are the other parties to the agreement.
- Paris Convention. Enforceable in Colombia since September 3, 1996.
- Trade-Related Aspects of Intellectual Property Rights (TRIPS). Enforceable in Colombia since January 1st, 2000.

As it can be easily observed, Colombian legislation grants considerable protection to the holders of registered trademarks. Nevertheless, said rights are only conferred once the corresponding registration has been filed. Therefore, it is highly advisable to file for registration of any trademarks concerning products that may be traded in Colombia. In like manner, it is crucial to follow up closely on the registration in Colombia of similar or identical trademarks to the ones owned by the company in order to guarantee the protection of the corresponding intellectual property rights.

2. Trademark Protection

a. Definition and legal protection

Pursuant to Article 81 of Decision 344, "all distinctive and perceivable signs which are susceptible of a graphic representation can be registered" as trademarks.

"A trademark is defined as any perceptible sign which possesses the ability to distinguish within a market goods or services produced or marketed by one person with respect to identical or similar goods or services of another person".

According to Article 102 of Decision 344 the exclusive use of a trademark is acquired by the registration of such trademark before the corresponding national office. In Colombia the designated national office is the Superintendence of Industry and Commerce (Article 2 of Decree 2153 of 1992). Commercial slogans can also be registered as trademarks pursuant to Article 188 of Decision 344.

The registration of a trademark confers upon its owner the exclusive rights pertaining to it for a period of ten years to be counted from the moment of its concession. Said period can be renewed indefinitely for consecutive periods of equal duration. Non-renewal of the registration will result in the expiration of the trademark rights.

Although the legal system for trademark registration is of a supranational nature (Andean Pact), the registration of trademarks has to be made independently in each one of the same treaty's member states. Nevertheless, there is a right of priority for registration regulated in Article 103 of Decision 344. Pursuant to said statute, the first request for registration of a trademark duly filed in a member state will confer upon the petitioner a priority right to register the same trademark in any other of the member states for a period of six months to be counted from the date of the original filing, provided that the new request is made for the same products or services.

The registration confers upon its owner the right to act against any third party who attempts to undertake any of the following conducts:

- a. To use the trademark or a similar sign without express authorization;
- b. To sell, offer, store or introduce within the commerce stream products or services bearing such trademark;
- c. To import or export products identified with the trademark;
- d. To use for commercial purposes a sign, which is identical or similar to the trademark regarding products or services which are different to the ones for which the trademark was registered, when such usage could induce the general public to error or confusion;
- e. To undertake any conduct, which could be considered similar or analogous to the previously depicted behaviors.

Pursuant to article 115 of Decision 344, the owner of a trademark can confer upon third parties a license for the usage of said trademark or transfer it by means of a written contract. Article 116 establishes that all licenses or transfers of a trademark must be registered before the corresponding national office (Superintendence of Industry and Commerce).

- a. On the other hand, Article 104 of Decision 344, allows the legal holder of a registered trademark to bring an action preventing the importation of goods bearing a trademark, which has been registered in one of the member states. There are signs, which cannot be registered according to Articles 82 and 83 of the Decision 344 of the Andean Pact Commission.

In order to assess the application of trademark law to electronic commerce, it is useful to take into account the existence of different national systems for the acquisition of the right. For example, legal systems that confer intellectual property rights according to the first use of a given trademark may consider said requirement to be fulfilled by the label that identifies an Internet-related product or service. In such case, said legal systems will protect the user of such trademark as the owner of the corresponding trademark. Nevertheless, in a legal system that recognizes intellectual property rights once the trademark has been duly registered, usage of the trademark within the Internet shall not be taken into account.

Furthermore, the absence of territorial boundaries within e-commerce has become a troublesome issue for the protection of trademark rights. In fact, according to the general principle, the legal protection of a trademark is only enforceable within the territory of the country that has conferred said protection. Therefore, the entrepreneur who undertakes businesses through e-commerce will not be protected from any trademark infringements carried out in other countries, unless said person complies with the foreign legal requirements in order to be considered the legal owner of the corresponding trademark.

3. Commercial Names and logos

According to Article 584 of the Commercial Code, a commercial name is the sign utilized by the entrepreneur to identify his or her establishment. The logo is the symbol utilized by an enterprise to identify its establishment. Both, commercial names and logos are protected under a distinctive set of legal principles. As different to the Trademarks, the rights related to commercial names and logos are acquired through their first usage (Article 603 of the same Code). Therefore, no registration is necessary to attain such protection. Nevertheless, commercial names can also be deposited for registration, provided that the corresponding requirements are met. Commercial names can only be transferred as a part of the corresponding commercial establishment. Nonetheless, the transferor is entitled to reserve such name for his or herself (article 608). The expiration of a commercial name occurs upon the termination of the business of its owner or the adoption of a different name for the same business (Article 610). The protection granted to the rights derived from the use of a given commercial name is different from the one awarded to registered trademarks. In fact, the first user of a commercial name would only have the right to oppose to the registration of a similar or identical trademark or commercial name if said user is able to bring evidence of the prior use.

4. Domain Names

Domain names can be defined as the alphanumeric description of the numeric address of a given computer connected to the Internet. The registration of a domain name is made before private companies. Therefore, there is no governmental control over this registration proceeding. Furthermore, in Colombia domain names are not explicitly regulated under industrial or intellectual property regulations. Domain names can be assimilated to some of the intellectual property rights discussed above. Therefore, the registration of a domain name could be considered as a usage of a trademark or a commercial name.

Accordingly, the use of certain alphanumeric addresses or domain names to designate certain web sites may constitute a local infringement of trademark or commercial name rights. In fact, a domain name owned by an unauthorized third party that refers to a registered trademark may be deemed as an infringement of the corresponding intellectual property rights. Due to the commercial nature of the act or contracts developed through the Internet according to Law 527 of 1999, the unauthorized use of a registered trademark within a domain name could be considered a use for commercial purposes of said trademark. In this event, the owner of the trademark could bring an action against the

owner of the domain name pursuant to the above-mentioned general rules (Article 104 of Decision 344).

The protection granted to commercial names may also be considered as a limitation for the use of certain domain names. Domain names that refer to a commercial name may constitute an infringement of the rights of the commercial name's legal owner and may also be considered an act of disloyal competition. In fact, Article 607 of the Commercial Code prohibits the use of a commercial name within the same sort of business in which a similar or identical commercial name is being used. Furthermore, article 609 of the same Code states that "any claimant for damages due to use of a commercial name may appeal to a judge to stop the use of the name and lodge a claim for indemnity". Pursuant to Articles 7 to 15 of Law 256 of 1996, the use of a commercial name that has been previously used by a competitor may constitute an act of confusion, an act of clientele usurpation or even an act of unlawful use of a third party's good will. In such case, the claimant could file a lawsuit against the unlawful owner of the domain name under the Disloyal Competition Act (Law 256 of 1999).

According to the ongoing analysis, the use and registration of domain names must take into account the legal protection of trademark and commercial name rights in order to avoid any violation of said industrial property rights.

5. Industrial designs

An industrial design is any group of lines or combination of colors or any other external bi-dimensional or three-dimensional form, which is incorporated to an industrial product or to a handcraft and that gives to it a special appearance, without changing its original use or finality (article 58). According to the same Decision, industrial designs are susceptible of registration before the corresponding national authority.

6. Patents

According to Article 1 of Decision 344, the member states will issue patents for inventions for products or proceedings in all the field of technology, provided that they are new, that they posses inventive level and that they are susceptible of industrial application. Patents can only be granted for a sole invention or for a group of inventions, which are related with each other in such a manner as to create a unique concept (Article 15 of Decision 344). A model of utility can also be patented according to Article 54 of Decision 344. Such a model is defined as any new form, configuration or disposition of elements pertaining to certain artifact, tool, instrument, mechanism or any other object or part of it, which allows for a better or different functioning, use or production of the same object or facilitates a new functionality, advantage or technical effect (article 54).

Pursuant to Article 13 of Decision 344, the requests for patents must be filed before the corresponding national office. In Colombia, said office is the Superintendence of Industry and Commerce as provided in Article 2 of Decree 2153 of 1992.

Article 2 of the same decision considers that an invention is **new** when it is not encompassed within the state of the art. Such state in turn will encompass all inventions, which have been made accessible to the general public by means of a written or oral description or by any other means. According to Article 4 of the same decision, the **inventive level** will be recognized only if such a discovery would not have been obvious for a person well informed or trained in the specific technical field. There will be no inventive level if the invention would have been evidently derived from the state of the art. An invention is susceptible of an **industrial application** when its object can be produced in any sort of industry related to any productive activity, including services.

Certain discoveries are not considered to be inventions or are not susceptible to be patented according to articles 6 and 7 of Decision 344. Those discoveries are related mostly to scientific theories, mathematic methods, literary, scientific and artistic works, methods for the exercise of intellectual activities, surgery and therapeutic methods for human or animal treatment, etc.

Once a patent has been conferred upon a legal entity or individual, such person will be entitled to prevent third parties from using it without an express authorization (article 35). The inventor is also entitled to be mentioned in the patent as such or to exclude his or her name from the patent (article 11). The holder of a patent is entitled to confer upon third parties licenses for its exploitation, provided that a written contract is executed. All contracts for the license of a patent must be registered before the corresponding national office. The patent holder can also convey the rights pertaining to a patent by means of the corresponding registration before the national office Article 39).

A patent will be granted upon registration for a period of twenty years to be counted from the date of presentation of the corresponding request (Article 30). Nevertheless when the object patented is a model of utility, the period will be reduced to ten years in accordance with article 57 of Decision 344.

The patent holder is obligated to undertake directly or through a third party the exploitation of the patent within the member states' territories. If the owner does not exploit the patent within a period of three years counted from the date of its concession, the corresponding national office will be allowed to grant a mandatory license for the industrial production of the patented object (article 42).

7. Author rights and Copyright

a. General aspects

There is no specific regulation on author rights or copyright as it relates to electronic commerce. Nevertheless, the general protection granted by different rules and statutes is applicable to the digital information transmitted by the Internet and other forms of electronic communication. According to this same analogy, literary works, data, databases, fictional characters, photographs and still images, motion pictures and audiovisual works, musical works and sound recordings are protected. There is a specific regulation related to software protection granted by Decree 1360 of 1989.

Law 23 of 1982, modified by law 44 of 1993, regulates the field of author rights and determines the different legal protections granted to the owner of a copyright. Decree 1035 of 1984 governs the legal protection to video and the broadcasting of music. Colombia has subscribed several bilateral and multilateral treaties related to copyright and author rights. The most relevant of these conventions are the Washington Interamerican Convention on Author rights (1946), the Geneva Universal Convention on Author Rights (1952) and the Bern Convention for the Protection of Literary and artistic works (1886).

b. Levels of protection

The author right protection granted by the Colombian legislation is aimed at two levels: (a) moral rights, and (b) patrimonial rights. The former, which are personal and not voluntarily transferable, are related to the authorship the corresponding work; the latter are of an economic nature. Therefore are temporal and can be conveyed to third persons by contract. Copyright on artistic, literary, scientific or technical works can be considered to be part of the patrimonial rights derived from the regulation of author rights.

As different to the legal system provided for patents and trademarks, author rights are not acquired through registration. In accordance with the relevant legal provisions, authorial rights arise from the moment of the work's creation. However, the law provides for a system of registration of authorial rights in order to facilitate prove of their ownership. The registration occurs upon the filing of certain documents before the corresponding office of Author Rights in the Colombian Ministry of the Interior.

Article 2 of Law 23 of 1982, sets forth the object of protection of author rights. Pursuant to said provision, author rights include scientific, literary or artistic works, in which any all creation of the spirit are included, notwithstanding the media or form of expression utilized nor the work's destination". Among the specific forms protected are the books, brochures, lectures, speeches, dramatic works, musical composition with or without lyrics, cinematographic works or videos, paintings, drawings, sculptures, architectural models, engravings, lithographs, photographs, applied works of art, illustrations, maps, and plastic works related to topography, architecture or science.

Pursuant to Article 11 of Law 23 of 1982, provides that the literary and artistic property will be protected as a transferable property for the duration of the author's life and eighty years more, according to the formalities set forth in the law".

c. Software protection

Decree 1360 of 1989, defines software within the general scope of an intellectual creation, which is protected under the Law 23 of 1982. Likewise, Decision 351 of the Commission sets forth a specific protection for software. According to article 23 of said Decision, the protection is extended not only to operative programs but also to applications in the form of source codes or object codes.

Software applications can be registered in the same manner provided for in Law 23 of 1982 for books. The duration of such protection is the same granted for literary works (the author's life and eighty years more).

d. Criminal sanctions for copyright or author's rights infringement

Several different conducts related to author's rights are subject to criminal prosecution. The general sanction provided for in the relevant statute is imprisonment for a period of two to five years as well as fines. Among the punishable conducts the statute mentions the publication of a literary or artistic work without the authorization of the author, the registration of such a work in the Author's Registry on behalf of a person different to its author, the reproduction, compilation, conveyance, transformation or mutilation of any literary or artistic work, without the author's express authorization. The same punishment is applicable for the reproduction of phonograms, videos, logical support, software and cinematographic works, without the express authorization of the owner of the copyright.

VII. Taxation

1. Legal Framework

Two basic legal definitions are germane to the determination of applicable taxes in Colombia. The first one relates to the specific qualities of the taxpayer (nationality, residence and economic activity); the second one deals with the economic fact from which the relevant tax arises. The absence of a specific legislation regarding electronic commerce taxation, determines the applicability of said general concepts to electronic transactions. In fact, according to the prevailing opinion, the lack of specific rules determines the applicability of the general provisions contained in the so-called *Statute of Taxation* (Estatuto Tributario) for ordinary transactions (not carried out by electronic means).

On the other hand, since already quoted Law 527 of 1999 established a criterion whereby any data message must be assimilated to the legal definition of documents, the tax administration has considered that electronic commerce is subject to all the tax rules provided for in the general legislation. Therefore, as a general rule, any sort of direct electronic commerce entered into in Colombia regarding services, intangibles or technologies will be subject to taxation in this country. Direct international electronic commerce will also be taxed on the grounds of the general rules concerning importation and exportation of intangibles (Articles 24 and 481 of the ST). The afore-mentioned constructions may create a serious threat to electronic commerce in Colombia, for they implicitly signify that most of the transactions carried out by electronic media within the country will be taxed, notwithstanding the place in which the parties are located, their nationality or residence.

Tariffs and import duties are also applicable according to the harmonized classification adopted by Colombia (contained in Decree 2317 of 1995). This Decree is of paramount importance in the context of international indirect commerce of goods. In fact, most of the goods brought into Colombia are subject to an importation duty at the rate established in the above-mentioned decree.

On the other hand, Colombia is not a party to any bilateral or multilateral treaties for taxation. Therefore, current regulations concerning income tax, VAT, remittance tax and withholding taxes will be applicable to electronic business transactions. At the same time, it is foreseeable that the absence of such a treaty could imply the application of a system of double taxation in certain multinational business transactions.

2. International trade of intangibles

Several different taxes may be applicable to direct international electronic commerce. As it has been pointed out, most of the transactions carried out by electronic media will have tax implications in Colombia.

a. Technical assistance services

Technical assistance services rendered by a foreign individual or entity (not resident in this country) to a party located in Colombia are subject to a specific tax treatment. This sort of advising services subjects the person who renders it to a mere withholding income tax of 10% calculated on the total amount paid for the technical assistance or service

- b. Royalties paid for intellectual property rights (trademarks, patents, know how, franchises, etc).

Pursuant to Article 24 of the ST, all revenues derived from the exploitation or sale of intangible assets within the country are taxed. Therefore, both the royalties related to the concession of licenses as well as the ones concerning the conveyance of intellectual property rights are subject to an annual income tax at a rate of 35%. If said royalties are paid to a party located outside the country, the corresponding payment is also subject to a remittance tax levied at a rate of 7% calculated upon the total amount minus the already deducted 35% corresponding to the income tax. Such taxes will be withheld at the moment of remittance of the concerned funds.

There is however a special legal treatment for the taxation of software, authorial rights and cinematographic materials, which will be analyzed in further detail.

- c. Royalties payable on software licenses

Software licenses are a source of taxable income in Colombia. However, according to Article 411 of the ST the 35% rate is applicable only to the 80% of the total value of the software or to the partial amount paid. In the same manner described above if the beneficiary of such payment resides abroad, each remittance of funds will be subject to a withholding tax of 7%.

- d. Royalties for authorial rights

Authorial rights are subject to a special tax treatment in Colombia. Pursuant to Article 28 of Law 98 of 1993, all payments related to the first edition of books (even if they are contained in magnetic, optical or electronic media) will be exempted of income taxation. Authorial rights on ulterior editions of the same book will also be exempted of income tax for the author, provided that the amount paid does not exceed the sum of US\$7.000 (approximately). Nevertheless, if the corresponding amount is transferred to a party located outside the country, it will be subject to a 7% remittance tax.

- e. Importation of books

Although, pursuant to Decree 2317 of 1995, imported printed materials (position 49.01 of the harmonized system) are exempted from any importation duties and value added taxes. Nevertheless, if such materials are contained in magnetic media, their importation into the country will be subject to a 5% duty and a 15% VAT.

- f. Royalties for movies transmitted on line

All royalties payable to a foreign person (non-resident in Colombia) as a consideration for the on line transmission of movies will be subject to an income tax levied at a rate of 35% applicable only to the 80% of the total value of the movie or to the partial amount paid (Article 410 of the ST). A 7% withholding will also be applicable upon remittance of the corresponding currency.

g. Royalties or commissions for services rendered on line

Pursuant to Article 24-1 of the ST, services rendered within the country are legally considered to be a source of taxable income in Colombia. On the other hand, any payment for the rendering of services by a foreign person or entity to a party domiciled in Colombia will be subject to an income tax withholding of 35% applicable to the payment's full amount. A 7% additional remittance withholding tax will be deducted from the remaining amount. The Colombian buyer of the service will be bound to perform withholding of the above-mentioned taxes. Nevertheless, as already pointed out (letter a, above), in the event of technical assistance advising, the withholding income tax will be an amount equal to 10% of the total payment.

h. Payments for on line financial services rendered abroad

Interests paid as consideration for international finance operations (loans, export-import related credit transactions, leasing contracts, certain trusts) are treated as income of a foreign source. Therefore, such payments are generally exempted from income and remittance taxes and are exempted from withholding of any amounts.

i. Payments for satellite access to national and international communications

All payments pertaining to satellite access to national and international communications are considered to be of a national source. Therefore, such payments are subject to income taxation even if the provider of such services is domiciled outside the country. Nevertheless, as different from the general income taxation system, in this particular event a 10% withholding is the unique deductible rate. Said percentage includes both income and remittance tax.

3. Value Added Tax (VAT) on goods or services

The sale of goods creates taxable events related mostly to the value-added tax. Certain items like basic medicines and food are exempted from this tax. As an indirect tax, VAT has to be paid by the local importer or buyer at a rate of 15% calculated upon the total value of the merchandises purchased. If the sale involves items imported into the country, the above-mentioned percentage will be applied upon the price of the goods incremented in the amount of the insurance and freight as well as in the applicable duties according to the harmonized classification adopted by Decree 2317 of 1995.

Most of the services are also subject to VAT at the same 15% rate. Depending upon the qualities of the person or entity that pays for the services, a withholding on the payable VAT will be applicable at a rate of 50% of the applicable tax (i.e. 7.5%).

4. Stamp tax

Contracts performed in Colombia or having effects in this country are subject to a stamp tax assessed at the rate of 1,5% on the total amount thereof, provided that the value of the contract exceeds US\$23.000 (approximately), according to article 519 of the Statute of Taxation. If the worth of the contract cannot be determined from the beginning, as in the case where such amount depends on the purchases made by a distributor (or on the commissions paid to an agent) throughout the term of the agreement, the stamp tax will be payable according to each payment made within the term of the contract.

Without the evidence of the payment of the stamp tax, the payments made under the contract are not deductible by the buyer, agent or distributor for income tax purposes, and the agreement will not be accepted as evidence in any court proceeding in Colombia (Article 522 ST).

There may be some discussion regarding the applicability of the stamp tax to electronic commerce. In fact, such tax is levied on contracts, which are embodied in a document form. Since law 527 of 1999 considers that data messages are completely assimilated to documents for all legal purposes, the prevailing construction is oriented to the applicability of stamp tax to electronic transactions.

5. Filing taxes through electronic media

Decree 1487 of 1999 and resolution 832 of the same year have authorized the filing of tax declarations as well as the payment of national taxes through electronic media, provided that the proceedings set forth by the tax administration are followed. The previously quoted rules are complemented by Decree 266 of 2000, which allows for the presentation of any sort of petition before governmental authorities by electronic media. Accordingly, any claim for taxes paid in excess, petition for the correction of previous declarations or other proceedings can be presented through a data message.

XI. Role of the Notarial Function and Perspectives

As explained in previous paragraphs, the notarial function has a long-standing tradition in Colombia as well as in other Latin American countries. The continental European legacy of this institution has crafted an important part of the local legal culture, usually characterized by veneration to the authenticity of all kinds of documents. The large number of civil and commercial transactions subject to the formality of a public deed granted before a notary public is both costly and inefficient.

It has been difficult to eradicate the presence of public deeds and authenticated documents from commercial transactions in the near past. In fact, Congressional Project 119 of 1993, regarding corporations, contained a motion to suppress the public deed for the incorporation of business associations. Said proposition was based upon the scheme of a simple incorporation in which a private document was filed before the Mercantile Registry for public record. Congress disregarded the proposition and the requirement of public deed subsisted. However, a minimum advancement was made regarding the creation of one-man corporations in which the suggested scheme became a legal rule (Law 222 of 1995, article 72).

Apart from economical reasons, there are theoretical justifications to the continuity of the notarial function. It is said to provide legal certainty due to the authenticity regarding the subscribing parties and their signatures. Certain publicity is also said to be germane to these instruments, for everyone is entitled to consult them and request authentic copies. Furthermore, the notarial function is considered to guarantee the legality of the acts subject to that formality. This is supposed to occur in light of the requirement provided for in article 21 of Decree 960 of 1970. Pursuant to this rule, the notary public must refuse to grant a public deed when the underlying contract or act to be notarized is potentially affected by any legal cause, which could result in the nullification of the contract. Therefore, the aforementioned officer is obligated to perform a verification of legality regarding the declarations expressed by the subscribing parties. Said function is, nevertheless, rarely observed in a rigorous manner.

Law 527 has granted the so-called certification authorities many faculties that could substitute the notarial function. In the terms provided for by Article 29 of said law, "Certification authorities will be any private or governmental juristic persons of a local or foreign origin as well as the chambers of commerce, provided that said persons or chambers are authorized by the Superintendency of Industry and Commerce, according to the legal requirements". Among the basic conditions determined in that statute, the certification authorities must have the economic and financial ability to render services as such. They are also required to have the basic technical capability in order to generate digital signatures; to issue authenticity certificates of said signatures and to have the ability to preserve electronic messages in accordance with the law. Furthermore, the statute requires a verification of the conformity of the higher officers' conduct pursuant to relevant legal provisions.

As to the faculties conferred upon certification authorities, the new statute contains a very comprehensive list, which relates to several verification and authentication activities. Article 30 of Law 527 of 1999, determines that once the certification authority has been approved by the Superintendency of Industry and Commerce, it will be entitled to perform the following activities:

1. To issue certificates regarding digital signatures of natural and juristic entities.
2. To issue certificates related to the possible alteration of a data message.
3. To issue certificates related to a person who holds a right or obligation in connection with documents associated to the transportation of merchandise.
4. To offer or facilitate the services of creation of digital signatures.
5. To offer or facilitate the services for date and time stamping.
6. To offer services for the filing and conservation of data messages.

Certification authorities are subject to a permanent governmental control exercised by the Superintendency of Industry and Commerce. Said agency is entitled to issue the relevant permit to operate as well as to revoke it upon the occurrence of a legal cause. The Superintendency is entitled to practice inspections on the certification authorities' books and records and to impose sanctions and fines to them.

The Superintendency also acts as the higher certification authority in the country. Therefore, it is empowered to issue certificates related to digital signatures issued by other certification authorities. The national network is therefore integrated by a two-tier system. It is initiated in the lower level with local certification authorities and completed with the participation of the above mentioned Superintendency. According to Article 41, this governmental agency is also empowered to appoint the corresponding repositories in the events provided for in the same statute.

It is foreseeable that the certification authorities will substitute the notarial function in the near future. The main legal obstacle in this respect is related to the subsistence of civil and commercial regulations providing for the mandatory requirement of public deeds for several acts and contracts. As explained before, these legal provisions maintain the traditional civil law approach, whereby a solemnity is required for certain important contracts to be proved in the event of conflict between the parties. Said formalistic approach denies all legal effect to such contracts if they have not been granted before a notary public. The local legal culture has been influenced by these traditional definitions to a high extent. This particular influence is notable within the judicial circuits in which reverence to the paper formality is still the general rule.

The enactment of Law 527 of 1999 offers an unparalleled opportunity to challenge old fashion constructions related to the law of contracts. It is clear that the most difficult legal problems in this respect could be dealt with by the amendment of all subsisting civil or commercial provisions establishing the requirement of public deed. The recommendation in this respect is not necessarily the suppression of the notaries or the impossibility of granting public deeds to formalize contracts. Instead, the proposition could be oriented to the voluntary nature of such requirements and the possibility of replacing them by other mechanisms to express the parties' consent. Data messages electronically signed could be

an appropriate alternative to the traditional public deeds. Their registration for public record should not be a problem either. Naturally, such filing requirements would also have to be performed by electronic means.

Most importantly, an appropriate diffusion of these new legal criteria will be necessary. This educational objective will have to be particularly attained within the judicial community. This objective is of paramount importance in light of the legal certainty requirement. Electronic evidences presented in any judicial proceeding will have to be duly acknowledged and given the appropriate weight in accordance with the new law.

It is also predictable that the initial application of these new developments will take place in the arbitration circles. Therefore, it will be recommendable to those engaging in electronic commerce in Colombia to provide for local or international arbitration.