

国政府如何扫清这些法律障碍,进一步推进中国电子商务的发展,便是中欧信息社会项目设立电子合同立法研究项目的初衷。

本着这样的目的,课题组专家和中外参与人员经过1年多调查研究,查阅大量的文献,同时跟踪了国际和主要国家最前沿的立法动态,形成这份研究报告。报告分析了我国电子合同应用现状,展示欧盟和美国电子合同立法规制经验,在此基础上形成中国电子合同解决方案:修订《合同法》并制订电子证据法或出台电子证据司法解释。

尽管本项目研究工作持续1年多时间,并由中外专家和成员的参与,但对于电子合同立法进行世界性的比较性研究,还是短暂的。不过,这份报告凝聚了项目负责人长期关注和研究电子商务法基础上形成的观点,同时还有在欧洲调研的基础。我们相信报告形成的观点和解决方案是科学的、合理的且具有前瞻性的。同时也希望报告提出的电子合同的解决方案,得到各级政府的认同。

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对调研和本子项目的大力支持!

Report on Electronic Contract Legislation in China: What Lessons to be Learned from EU?

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Table of Contents

Background and Introduction / 54

1. Introduction / 59

1.1 Objective / 59

1.2 Research method / 60

2. Legal Obstacles for Application of E-Contract / 61

2.1 Current situations / 61

2.1.1 *E-contract is the core of e-commerce* / 61

2.1.2 *Current situation* / 62

2.1.3 *Legal disputes related to e-contract* / 63

2.2 Analysis on the existing law: What kind of legal issues have been solved by Chinese law / 64

2.2.1 *PRC Contract Law* / 64

2.2.2 *The ESL* / 65

2.2.3 *Other legal instruments* / 66

2.3 Legal obstacles for implementing the PRC Contract Law / 67

2.3.1 *Legal obstacles of e-commerce in China: general analysis* / 68

2.3.2 *Rules for e-contract formation: possible problems* / 71

2.3.3 *Obstacles to judicial relief of e-contract disputes* / 74

3. Comparative Study of International Models to Remove E-contract Legal Obstacles / 78

3.1 E-contract legislation in the EU / 78

3.1.1 *The legal system of the European Union* / 78

3.1.2 *Regulatory framework for e-contracts* / 79

3.1.3 *Experiences and lessons from the e-contract regulation in Europe* / 89

3.2 E-contract legislation in USA / 90

3.2.1 *E-contract legislation in USA* / 90

3.2.2 *Comments on the e-contract legislation in USA* / 96

3.3 E-contract legislation in UN / 98

3.3.1 *E-commerce legislation in UN* / 98

3.3.2 *Comments on the ECC* / 101

4. Solutions for the E-contract Regulation in China / 105

4.1 Reasonable and feasible solutions for China to remove the legal obstacles of e-contracting / 105

4.1.1 *Solutions for the E-contract regulation in China* / 105

4.1.2 *Reasonable solutions for the e-contract regulation in China* / 107

4.1.3 *Feasibility solutions for the e-contract regulation in China* / 109

4.2 Solutions of amending the PRC Contract Law / 111

4.2.1 *Foundational solution of amending the PRC Contract Law* / 111

4.2.2 *Some thoughts on amendment of the PRC Contract Law* / 111

4.3 Solutions of the legislation of e-evidence / 112

4.3.1 *Foundational solution of enacting e-evidence law* / 112

4.3.2 *Framework of enacting e-evidence law* / 112

5. Conclusion / 114

Background and Introduction

The EU-China Information Society Project was set up between the EU and the Chinese Government in mid-2005 to support informatization^[1] in China. One of the Project's aims is to support the development of a regulatory framework for Information Society that provides for reliable investment, economic and social improvement and the maximization of benefits to Chinese citizens through the new opportunities that Information Society brings about.

The Project is designed to improve the process

[1] Informatization in China's context is defined as the transformation of an economy and society driven by ICT, involving the process of investments in economic and social infrastructure to facilitate the use of ICT by government, industry, civil society and the general public. The long-term goal of informatisation is to build an information society (source: Jim Adams, VP World Bank East Asia and Pacific Region).

of knowledge exchange between European and Chinese experts and decision-makers in Information Society regulation. The Project supports Chinese government agencies working on their specific pieces of policy and legislation. While this aspect is driven by the needs and requirements of respective Chinese government agencies, the Project aims at the same time to improve European knowledge about Chinese approaches to Information Society regulation and to commonly approach new challenges that are brought about through social and technological change.

A sound telecommunications policy is the backbone to the establishment of an Information Society. In this case, the Project was charged with providing specific input into the formulation of the Chinese Telecommunications Law which has been on the drawing board for over 10 years.

This research was carried out between October 2006 and spring 2007 with the following aims:

- * To support the Chinese Ministry of Information Industry (MII) in the drafting of a Chinese telecommunications law.
- * To support MII in preparing for the implementation period of such a law.
- * To provide EU experience relevant to establishing a competitive regulatory environment.
- * To prepare future government staff involved in regulatory activities in acquiring the relevant skills by offering them appropriate training sessions.

About the E-Contract Law in China

The current Contract Law of China is one of the first contract acts in the world recognizing electronic contracts. Those provisions provide the legal basis for recognition and validation of electronic contracts. The PRC Contract Law, however, only says that the electronic message itself is equal to writing. This is "simple equivalent", as opposed to the "functional equivalent approach". Legal uncertainty regarding the enforceability of electronic contracts has not been resolved. The Contract Act, by not providing detailed functional equivalent rules, is unable to clear the obstacle to electronic commerce. Therefore, the Chinese Ministry of Commerce (MOFCOM) is currently considering necessary modifications in the regulatory environment, in the form of a modification of the existing legal provisions or by drafting an independent "Electronic Contract Law".

Aim of the Research

The EU-China Information Society Project supports MOFCOM in the modernisation of its regulatory environment for electronic commerce and electronic contracts in particular by providing access to EU best practice examples and experts familiar with the EU history of drafting an E-Commerce legal framework and applying it in the member states. This means specifically to

- * Provide an overview over the EU implementation stage of electronic contracts (EU level and member states) and its regulatory

environment,

- * Collect examples for practical use in e-government, e-commerce, etc. and show how electronic contracts can be integrated in the regular workflows of a modern institution,
- * Show how relevant stakeholders/users find electronic contracts,
- * Identify weaknesses of existing frameworks and provide suggestions on how to improve on this,
- * Suggest relevant components for Chinese e-contract law based upon the EU experience,
- * Present a draft for an E-Contract Law for China and the necessary by-laws and regulations.

Content of the Research

The research was structured in a way that ensures the findings from the EU do contribute relevant know-how to the Chinese analysis and decision-making process. To this end, the following elements and key questions were defined at the outset of the analysis process:

- * Definition: what are electronic contracts? What are the key defining elements?
- * Where do electronic contracts already exist? What is the current EU regulatory framework? How does it link to the wider issue of e-commerce and the broader e-commerce regulation?
- * Lessons learnt from law-making process: have there been particular debates / difficulties around the legislation in EU or member states? How did they get resolved?

* Description: Where are e-contracts actually in use? In which areas are they being used? What are successful models for practical use?

* What is the stakeholder opinion: are they pleased with the solutions as they are now? Are further revisions of the EU situation necessary / foreseen?

* Syntheses "Relevance for China". How can an "E-Contract Law" fit together with existing laws and regulations?

In 2006, through research conducted in Muenster and Shanghai, the necessary information was collected by the respective institutes, leading to two sets of materials, describing the respective regulatory environment in the EU and China. Workshops conducted in China on September 25, 2006 and May 30, 2007 completed the analysis. After a junior researcher spent a one-month research internship at Muenster university (with visits at the Commission headquarters in Brussels, among others), these materials were combined into a synthesis and led to this report. The key findings were presented at a workshop in Shanghai on November 20, 2007.

1. Introduction

1.1 Objective

The fundamental objective of the research is to create practical and feasible market environments in the sectors of e-government and e-commerce, and to ensure online and offline transactions to fit together seamlessly and allow for fostering of e-commerce.

The main content of this report is as follows:

Firstly, practical benefits of electronic contracts; Secondly, legislation and application experience from EU in e-contract regulation; Thirdly, thoughts for China's Contract Law from the UN Convention on the use of Electronic Communications in International Contracts ("ECC")^[1].

[1] For more details, see Chapter 3.3 of this report.

The research of this Project may include whole commerce law; this report, however, covers merely the legal issues relate to e-contract.

1.2 Research method

This Project aims to find out a resolution to legal issues of e-contract application in China. The basic research method of the Project is to study what kind of legal issues have been solved by the current laws in China, and what other legal issues remain unsolved, and how these unsolved issues have been coped with by other countries (e. g. legislation model and relevant specific rules), and what regulatory resolutions should China make to remove the legal obstacles to e-contract.

This research is done on the basis of comparison of the relevant legislations in respect of e-contract in EU countries as well as international society, which includes: (1) what kind of issues have been regulated by international instruments or foreign laws, whether China faces or will face the same issues and explore the necessity to regulate them in consideration of China's economic and legal environment; (2) which rules in this area in China are not consistent with International Instruments or those in other countries' legislations, what China should learn to update the current laws or whether specific rules of application are needed to promote the enforceability of laws based on the analysis on them; (3) what legal obstacles still exist in the process of e-contract formation and application in China; (4) whether those issues can be overcome by a new legislation or interpretation of current laws. If a new legislation is needed, how to make it; if the interpretation is necessary, how to interpret the current laws to regulate e-transaction.

2. Legal Obstacles for Application of E-contract

2.1 Current situations

2.1.1 E-contract is the core of e-commerce

E-commerce is generally understood as a business using electronic communications.^[1] Transaction, which is generally conducted through a

[1] As specified by the note to Article 1 of the Model Law, the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road. Such definition is generally accepted by the international society.

contract, is the core of business in any circumstance. In this sense, we believe that e-contract is the core of e-commerce.

“E-communication” is broadly defined as any distance communications by electronic means, which includes not only traditional electronic communications (such as telegraph and faxes), but also communications by means of computer network, particularly Internet. Transactions conducted through Internet are also called online transactions.

Generally, online transaction has three basic features: (1) undertaking trade or service activities; (2) based on e-contracts; and (3) through computer network or Internet.

Accordingly, to regulate e-transaction, especially online transaction, is the core of e-commerce law. The main task of the regulations of e-commerce is to solve relevant legal issues of e-contract.

The objective of regulation on e-contract is to make e-contract have the same effectiveness as paper-based contract so as to be recognized and enforced by the court.

2.1.2 Current situation

The 1997 Contract Law of People's Republic of China (the “PRC Contract Law”) is the first legal instrument around the world to recognize the legal effectiveness of e-contract. However, the application of e-contract in China is not as popular as expected.

Under the strategic guideline of promoting industrialization by informatization, China has made great achievements in both establishment and application of infrastructure of e-commerce.

China and those developed countries may be at the same level in

terms of development speed, scale and quantity of enterprise informatization and websites, platforms for online transaction and service providers of online transaction.^[1] That is to say, the application of ICT (informatization) in China especially in eastern areas has been in line with the practice of the world.

It is natural that the e-transaction and e-contract are used universally with the extensive application of ICT. E-contract is mainly used in the area of information service or network service since all the contracts of information network service between service providers (e.g. websites and platforms) and relevant customers fall in the category of e-contract. In addition, e-contract has been used popularly in most of CtoC online transactions. However the scale of e-transaction in those businesses through network (such as BtoB and BtoC which used to be conducted by traditional means) is not as large as expected.^[2] In other words, the application of e-contract in large-scale transaction always falls behind the application of network. In the areas of BtoB and BtoC, network has been used universally (functioned as a means of communication or promotion), but the proportion of e-transaction using e-contract remains very small, which reflects the current situation of the application of e-contract in China.

2.1.3 Legal disputes related to e-contract

Since computer network has been used in business, cases related to

[1] See 2007 Report on the Development of the Internet in China.

[2] For further information, see <http://www.okokok.com.cn/Shop/Class6/Class88/200708/15386.html>.

network tort have become the hottest ones in connection to network. There are also cases related to e-contract from time to time. To clarify, such cases show that there were legal disputes on e-contract early in 1999 in China; the number of which, however, dose not increase with the dynamic development of e-commerce. Furthermore, there are few significant cases about e-contract in recent years. The reasons of such situation remain unclear.

By analysing those judicial decisions on e-contract disputes, we may see that the effectiveness of the contract in the form of traditional electronic form, such as e-mails, is recognized by courts despite so many other special e-commerce issues are not solved in most of those decisions. But there are no persuading arguments in terms of evidence recognition due to the lack of a set of generally accepted e-evidence rules in China. No cases regarding e-contract have been gathered by the Supreme Court as typical cases. Further, even after the implementation of the Electronic Signature Law of the People's Republic of China (the ESL) there is no case related to the implement of the ESL. Thus, generally speaking, the regulatory rules of e-contract remain uncertain and unclear, and some local courts do not even recognize e-evidence due to various reasons, resulting in doubt and distrust to e-contract from relevant groups and industrial communities.

2.2 Analysis on the existing law: What kind of legal issues have been solved by Chinese law

2.2.1 PRC Contract Law

As we previously mentioned, the PRC Contract Law is the first

contract law around the world to recognize contracts in data message as contracts in writing, establishing the foundation of e-contract application as well as e-commerce legislation.

The following achievements related to e-contract are gained by the PRC Contract Law:

1. Data message is recognized as the written form of contracts in Article 11 of the PRC Contract Law, which provides that "the term "in writing" refers to a form which is capable of tangibly representing its content, such as written instruments, letters or electronically transmitted documents (including telegrams, telexes, facsimiles, electronic data interchange and e-mail), etc. "

2. The time and place of contract formed by data message is also specified in Articles 16 and 34 of the PRC Contract Law respectively.

However, Article 11 merely recognizes data message as written form of contract and does not provide how to recognize such. Articles 16 and 34 are the special rules of e-contract formation, helping parties conclude e-contract and determine the time of e-contract formation. Nevertheless, those simple rules in the PRC Contract Law are not enough to guarantee the application and security of e-contract or to solve all the issues related to formation, performance or disputes of e-contract, since the contracts in data message are not simply equal to paper-based contracts.

2.2.2 The ESL

The ESL, which was adopted at the 11th Meeting of the Standing Committee of the 10th National People's Congress on August 28, 2004, recognizes the legal effectiveness of data message for the first time, confirms that a reliable electronic signature has the same effectiveness as a

handwritten signature or an affixed seal, establishes the market entrance system for electronic certificate service in China. The ESL, including 36 articles in 5 chapters, has solved fundamental legal issues for data message and electronic signature. The achievements of the ESL are as mainly follows:

1. Recognizing the legal effectiveness of data message and electronic signature in line with the functional equivalence principle.
2. Establishing the general principles of e-evidence and providing the examining rules for information attribution, authenticity and integrity where the e-signature is not used.
3. Solving the issues for legal effectiveness of e-communication and e-contract by recognizing the legal effectiveness of e-signature and data message where e-signature is used.

Many people thought that the ESL, regarded as the first e-commerce law in China, would improve legal environment for e-commerce, create a safe and reliable environment for e-transaction, and promote e-commerce development in China. However, the ESL has actually attracted the attention of some Certificate Authority (CA) service providers as well as governmental authorities in charge of CA service merely. It has not attracted much attention of lawyers, judges or scholars, and thus seems to be a half-sleeping law on the shelf.

2.2.3 Other legal instruments

The Customs Law of the People's Republic of China amended in 2000 specifies in Article 25 that "Customs declaration for imported and exported goods shall be completed using paper declaration forms and electronic data declaration forms", which establishes the legal status of the electronic

declaration form by entitling it the same legal effectiveness as the writing declaration form. However, relevant parties making declaration in electronic form are still required to hand in paper form later in current practice.

Similarly, the 2002 PRC Administration of the Levy and Collection of Taxes Law Implementing Rules specifies in the Article 30 that "taxpayers and withholding agents may file tax returns, and submit reports on withholdings and collections, by post or electronic data transfer" and "The term "electronic data transfer" refers to electronic means such as telephone voice processing, electronic data interchange and network transmission, etc., as determined by the tax authorities." Meanwhile, Article 31 still requires that "Taxpayers filing tax returns by electronic means shall preserve the relevant materials for the time, and in accordance with the requirements stipulated by the tax authorities and periodically submit the relevant materials to the competent tax authorities."

Allowing the use of electronic form is for the purpose of efficiency, while using writing form is for the sake of safety. Due to other issues and obstacles (such as technical problems), it does not seem to be possible to completely use electronic declaration forms until the legal effectiveness of e-evidence is recognized by PRC legislations.

2.3 Legal obstacles for implementing the PRC Contract Law

What are legal obstacles for application of the e-contract? E-commerce involves many issues such as technical issues, commercial

issues as well as legal issues, the first two of which have not constituted the obstacles for application of the PRC Contract Law despite that there are some problems in operation, while the third of which are considered as the main obstacles for the development of e-commerce.

The analysis of e-contract practice and legislation shows that the legislation is to some extent separated from the practice of e-contract. Although there have been cases recognizing the legal effectiveness of e-contract, the current rules have not been universally accepted to deal with e-contract legal disputes, thus legal uncertainty is still remained in the application of e-contract. Those legal obstacles, we believe, do not result from the unclear rules of e-contract formation but from the unsolved issues of e-evidence effective.

2.3.1 Legal obstacles of e-commerce in China: general analysis

The development of e-commerce in China begins almost as early as many other developed countries except the United States, but China falls well behind those developed countries. On the early stage of e-commerce development the main obstacles lay mostly in infrastructure establishing and external environment building of e-commerce. For example, as one scholar specified in 2002, the main obstacles of e-commerce in China came from the following four aspects: (1) More cooperation is needed among many sections, including such as customs, bank, insurance, transportation, commodity inspection etc., whose receipts and documents are required to fit together seamlessly. (2) Informatization of enterprises are not able to meet the requirements of e-commerce in terms of Internet popularity, technique management, communication speed, safety etc. (3) The backward logistic system hindered e-commerce development.

(4) Relevant legislation falls behind the development of e-commerce and a powerful organization which would correspond with different regions and sections is needed. (5) The support from financial system was weak.

A report issued in August 2004 by the research department of PRC Ministry of Commerce holds that the development of e-commerce lies on IT infrastructure, legal environment and social credit. Accordingly, the underdevelopment of online payment, taxation system and logistic transportation constitute the main obstacles for application of e-commerce.^[1]

As for the legal obstacles of e-commerce, one author summarized in his article that there are four legal obstacles including e-contract formation, writing form, effectiveness of e-evidence and e-signature.^[2] As we understand, those four legal obstacles can be categorized into two groups: the first obstacle, e-contract formation can be solved under the PRC Contract Law or other substantial laws, while the rest of obstacles are legal issues resulting from the use of electronic means, and thus need be solved under evidence law. Although contract formation becomes more speedy and automatic by using e-communication, the basic rules (e.g. rules for offer or acceptance) under traditional contract law can also be used under e-communication circumstances in addition to amendments to those rules or new rules. In this connection, even if there is no new legislations, legal issues for e-contract formation can be well dealt with under fundamental principles of traditional contract law. However, the

[1] See <http://www.people.com.cn/GB/it/1067/2686437.html>.

[2] See http://www.it-law.cn/data/2006/0201/article_9210_1.htm.

legal effectiveness of e-record is a new legal area, which has great impact on e-commerce, and thus has been regarded as the most important issue to the e-commerce development by UN legislation.

The significant function of law is to ensure that people perform their promises so as to form a fundamental economic system. For this sake, the promises and transaction facts have to be proved by some means. Because the main feature of e-commerce is paperless, how can e-record be recognized as effective evidence is of most importance in e-commerce development. Mr. Ji Jinkui, the former director of informatization promoting section of the Ministry of Information Industry, for example, specifies this issue as follows:^[1]

1. Writing form. According to the current laws, important commercial documents, such as contracts and commercial notes, have legal effectiveness unless writing form exists. In the electronic environment, however, traditional paper-based writing form is substituted by data message. The problem is thus whether the transaction information in form of data message has legal effective.

2. Original form and its reservation. Original form is required in major business activities as well as in arbitration or litigation as evidence. However, in electronic environment the information transmitted through computer network exists in form of data message which is kept in computer. Therefore, the document from a printer may only be regarded as "duplicate". In this regard, how to recognize a data message as "original" becomes the core issue in a dispute regarding e-transaction.

[1] See <http://e.chinabyte.com/20/2098020.shtml>.

3. Signature. In traditional business, both parties sign their names or affix relevant seals in paper document for two purposes: one is to identify themselves, the other is to express their approval for the information contained in the signed document as well as their consent to be refrained. Due to its significant value to transaction safety, important commercial document such as contract in writing will not take effect until it is signed or sealed by parties according to relevant laws. While in e-commerce, it is impossible to sign or seal by traditional means, electronic signature is thus used so as to guarantee the safety of online transaction. The problem is whether such e-signature can be recognized by the legislation.

In this regard, the obstacles of e-commerce are comprehensive ones, among which the legal effectiveness of data message is one of the biggest legal issues.

2.3.2 Rules for e-contract formation: possible problems

E-communication changes merely the way of information transmission and record other than the traditional rules for contract formation which can also be applied to e-contract formation. However the use of e-communication will give rise to some special legal issues which are not mentioned or can not be solved by traditional contract law.

1. Judgement of offer

Contract formation generally includes two steps: offer and acceptance. Contract is formed when the offeree accept the offer and the acceptance is communicated to the offeror. In this sense, it is of significant importance to make judgement for an offer. However, in e-environment the criterion to determine whether a piece of business

information is an offer or an invitation for offer remains unclear. Rules for offer and invitation to offer are stipulated respectively in Articles 14 and 15 of the PRC Contract Law, that is, "An offer is a party's declaration of his intent to conclude a contract with another party." and "An invitation to offer is a party's declaration of his intent to have another party make him an offer." Nevertheless, an offer or an invitation to offer is difficult to distinguish from each other in e-environment. There is a popular rule for such differentiation in international society, that is, the commodity or service information issued through network or e-communication can be regarded as an offer unless it (1) meets the requirement of an offer and (2) expresses the party's intention to be obligated by the other party's acceptance, otherwise it will be treated as an invitation to offer. If China decides to accept such rules, then it is necessary to recognize them expressly in legislation.

2. The time of arrival of a data message

Rules for the time and place of receiving a data message are promulgated in the PRC Contract Law and the ESL. However the problem is whether the current laws shall be further interpreted. For example, what systems are included in "any of the systems" and what is the criterion to determine "initial enters". In addition, acknowledgement of receipt is used popularly in practice, the effectiveness of which needs to be clarified by legislation so as to guide business to contract through electronic communication.

3. Standard contract in online transaction

Network provides not only convenient channels for manufacturers to sell directly their products, but also platforms for manufacturers and

dealers to conduct business. As a result, the number of online transaction platforms providing network service has been growing fast. Those network service providers generally set down transaction rules for consumers, which are accepted when the consumer completes registration other than as a result of the negotiation between consumers and service providers. The collective standard contract is thus formed which is a general form of contracts in online transaction. As we understand, the effectiveness and formation of such standard contract shall be regulated in line with the rules for standard contract in the PRC Contract Law. However it is necessary that the effectiveness of standard contract provided by the third party should be recognized expressly by legislation.

4. Automatic transaction

In electronic automated transaction the party sets beforehand a set of process which may receive and sent certain information automatically and make judgement so as to enter into relevant e-contract. Automated transaction system or electronic communication system used to be called e-agent universally, which has been replaced by "automated message systems" in the ECC, giving rise to many issues for e-transaction including (1) how to determine who is responsible for the transaction using automated message systems and (2) how to deal with electronic error in automated message systems. Unfortunately the PRC Contract Law does not touch upon automated message systems, though the attribution rules of data message in the ESL can be used as attribution rules of automated message systems.

5. Electronic error

Error goes always with human activities and there are rules for error

in traditional contract law. In e-commerce environment, errors may occur in e-communications from time to time. Such errors are called e-error, which may be the result of human behaviour (e.g. input error) or the result of message system malfunction; the former is man-made error and the latter, similar to accidents.

Error by accident shall be dealt with according to different causes. If error takes place in real accident, the party who is not able to perform contract or delay in performance due to system or network malfunction shall be exempted from liability according to Article 117 of the PRC Contract Law; if error occurs due to man-made mistake, special rules for such error are necessary which still remain vacant in the legislation in China.^[1]

Some of the above-mentioned issues related to e-communication can be settled down under the PRC Contract Law and the ESL while the others need be clarified by amendment of the PRC Contract Law or other new legislation. However those issues are not the fundamental issues or obstacles for e-contract application.

2.3.3 Obstacles to judicial relief of e-contract disputes

We believe that the main obstacles for e-contract application come from difficulties in settling e-contract legal disputes. The important destination of contract law is to prevent parties to the contract from

[1] Article 117 of PRC Contract Law is read as: If the contract cannot be performed due to an event of force majeure, liability is partially or wholly exempted depending on the effect of the event of force majeure, unless the law provides otherwise. An event of force majeure occurring after a party has defaulted on his performance does not exempt him from liability. The term "force majeure" hereto refers to objective circumstances which cannot be foreseen, avoided and overcome.

breaking their promises and to entitle the non-breaching party to claim recognition and enforcement of the contract or for compensation by proving that there has been an effective contract with sufficient evidence. However, if e-contract is not able to be enforced by courts, e-contract would not be used by sellers or would be merely used as a means of communication and parties prefer to execute contract in writing when they reach an agreement. Therefore e-contract will not be accepted universally until there are no problems in the enforcement of e-contract by courts.

Generally speaking, the legal obstacles for e-commerce lie in its main feature: electronic and paperless. In this regard, we believe that the obstacles to judicial relief of e-contract include:

1. Party identity

When e-contract dispute occurs, the party who intends to seek judicial relief first has to identify the other party is "specific defendant", Which is a precondition for courts to accept a lawsuit. In fact, most of online transactions are conducted by parties with user names, despite that real name authentication of buyers or sellers is required when they register themselves by some of online transaction platform providers, but it is very hard to realize one to one correlation between user name and real name due to complicated situations. In practice, the one to one correlation issue is not able to be solved well by authentication of ID, address, mobile SIM card or credit card, which increases legal uncertainty and risk of online transaction. In this connection, this obstacle may encumber e-commerce development.

2. Jurisdiction

Jurisdiction of ordinary civil litigation is to solve the issue which level

and territorial of court should have the jurisdiction over a specific lawsuit. Needless to say, jurisdiction over legal disputes of e-transaction should comply with those general rules. However, the problem is how to identify the location of relevant party and the place where relevant act took place in Internet environment, which has great impact on territorial jurisdiction.

The cyberspace shall not be and is impossible to be regarded as "territory" as stipulated in procedure law. As a matter of fact, Internet functions merely as a means or channel to transmit information. That is to say, Internet is served as a tool or manner for human behavior, a communication form, as well as a channel for the embodiment of behavior and its consequence. In this regard, all of the legal activities on Internet are conducted by ordinary civil subjects and the person who acts in "virtual world" must exist in "real world" and must have connections with some certain geographic location in "real world". Therefore jurisdiction of e-commerce disputes has to deal with the issue how traditional rules for jurisdiction should be applied to e-contract disputes.

3. E-evidence

Almost all of the e-commerce or network disputes include the issue whether and how a data message can be recognized as an effective evidence. The effectiveness of e-evidence in China currently is insured by external procedural measures, such as notarization of data messages and e-evidence preservation. However these measures are not able to solve the issue fundamentally, e-evidence rules are thus necessary to direct merchants to keep e-record so as to prove relevant facts when a dispute occurs.

The ordinary computer data or e-document can hardly be used as

direct evidence because it is easy to be tampered and the relevance between the information and sender is not strong. Furthermore, the application of e-signature is not popular in e-commerce and it is also impossible that all e-communications use e-signature. Therefore, we have to set up rules for effectiveness of data messages when e-signature is not used in e-commerce. In fact, e-evidence rules have already been established in the ESL Whether e-signature is used or not. However, those rules have not been accepted and applied universally.

The above-mentioned legal obstacles, i. e., party identity, jurisdiction and e-evidence, need to be researched and solved properly. Among these obstacles the issue of e-evidence is the most crucial obstacle for e-transaction that we should remove. In this regard, we believe that both the issue of effectiveness of e-record (data message) and the issue of e-evidence should be solved so as to smooth legal obstacles for the development of e-commerce.

3. Comparative Study of International Models to Remove E-contract Legal Obstacles

3.1 E-contract legislation in the EU

3.1.1 The legal system of the European Union

To understand the current EU regulatory framework one should have a glance at the current legal situation in the EU. The EU consists of 27 sovereign nations which have different legal traditions. As a result, the process of law making depends on the conveyance of responsibilities by the Member States to the EU. The EU does not intend to create a uniform legal order. In fact the Community goals are to facilitate trade, investments and mobility of the citizens. To achieve these goals the EU

principally uses regulations and directives. As the regulations are binding on states when adopted and therefore limit the sovereignty of the Member States, directives are used more frequently. They only set out a binding result that must be achieved within a certain time but leaves a wide margin of discretion to the Member States with regard to the actual transposition.

3.1.2 Regulatory framework for e-contracts

At the moment, the EU regulatory framework for e-contracts mainly consists of three directives. The two basic ones are the Electronic Commerce Directive 2000 (ECD, 2000/31/EC) and the Electronic Signature Directive 1999 (ESD, 1999/93/EC). [1] Another very important directive is the Distance Selling Directive (DSD, 1997/7/EC) but this one does not apply to e-contracts only.

A. The ECD

The ECD is aimed at facilitating electronic commerce. As specified by the EU official, it takes quite long time to draft the ECD, which is interactive in the market between the member states only. For Article by Article Comments to Directive 2000/31/EC, please follow this link: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009945.

One main aspect of this directive is the principle of the country of origin. Explain the principle in a few words! This aspect also concerns a prohibition of any restrictions imposed on information society services offered by other Member States and a commitment to supervise the

[1] For detailed introduction of relevant European experience on drafting ECD and ESD, see the Research Report on Electronic Contract Regulation in Europe developed by Ms Yu Difei in 2007 for the EU-China Information Society Project.

compliance with legal guidelines. In addition, the directive emphasizes aspects of information requirements, the liability of intermediary service providers and the electronic conclusion of contracts.

The last aspect, the electronic conclusion of contracts, is regulated in the 3rd part, Articles 9 to 11.

Article 9 discusses the question how to render e-contracts and how to put them into operation. Here the Member States are bound to create the background for the conclusion of electronic contracts. Since the civil law in the distinct states knows different obstacles, in particular the written form, which cannot be directed in total, the requirements are kept very abstract.^[1] This Article also names the exceptions to the ECD, namely contracts concerning the creation or the transfer of rights in real estate (a), contracts requiring by law the involvement of courts, public authorities or professions exercising public authority (b), contracts of surety granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession (c), contracts governed by family law or by the law of succession (d).^[2]

Article 10 deals with aspects of consumer protection. It clarifies how information has to be presented and according to paragraph 3 the user must have the possibility to save and reproduce the general terms just as the terms of contract.

The third article having to do with electronic contracts is article 11.

[1] Wellbrock, Ein kohärenter Rechtsrahmen für den elektronischen Geschäftsverkehr in Europa § 6 A I.

[2] Art. 9 para 2 ECD 2000/31/EC.

It regards the issue of placing the offer.^[1]

As stated above the directives issued by the European Union have to be transposed into national law by the legislation of the Member States. Since there are several different legal systems in the EU, the transpositions differ a lot. These legal systems basically could be divided into four groups. These are the German section (Germany, Austria, Greece), the droit civil (France, Spain, Portugal, Italy, Belgium, Netherlands, Luxembourg), the Common Law (United Kingdom, Ireland) and the Scandinavian section (Denmark, Sweden, Finland).^[2] In the following we will turn the attention to Germany, France and the United Kingdom.^[3]

Germany

In Germany the legislation decided to transpose the directives by altering the Teledienstgesetz (TDG) and the Teledienstschutzgesetz (TDDSG). In TDG one can find regulation concerning the area of application, definitions, the country of origin principle, duties to inform and the responsibility of providers.^[4] Section 4 TDG rules that service provider settled in Germany will be judged under German law and transposes in so far the country of origin principle into German law. In

[1] Art. 11 ECD 2000/31/EC.

[2] Müller/Roessler, DuD 1999, p. 497; note that after the accession of ten new Member States in May 2004 these groups might have to reassessed and altered in the future.

[3] For detailed introduction of national implementation of ECD, see the Research Report on Electronic Contract Regulation in Europe developed by Ms Yu Difei in 2007 for the EU-China Information Society Project.

[4] Wellbrock, Ein kohärenter Rechtsrahmen für den elektronischen Geschäftsverkehr in Europa § 3 A p. 38.

Germany there are some exceptions to the country of origin principle. This principle is not applicable to anti-trust law, conflicts of law in insurance policies, surveillance law of insurance companies, data privacy laws and intellectual property law.^[1]

Another change affects the civil process order and guarantees a more efficient legal protection. According to section 1031 para. 5 civil process order an arbitration agreement including a consumer can be provided in electronic form.^[2]

Most changes concern consumer protection. The German Civil Code (GCC) has been amended by section 312 e, whereby an entrepreneur has to fulfill several duties while concluding a contract by electronic means. This is the transformation of the articles 10 and 11 ECD.^[3] This transformation may be, in addition to the regulations concerning the country of origin principle and those transposing article 9 ECD, the most important one regarding the issues of electronic contracts. The section 312 e GCC is applicable if an entrepreneur uses tele or media services for the delivery of goods or the rendering of services.^[4] Relevant services are according to the Teledienstgesetz for example online banking, online shops or online auctions. The entrepreneur's duties are in detail to provide adequate technical means in order to correct mistakes, to inform the consumer and to approve the consumer's orders.^[5] However this approval

[1] RIW 2002, p. 184; Schack MMR 2000, p. 53.

[2] EGG Art. 2.

[3] Palandt section 312 e para 1.

[4] Palandt section 312 e para 2.

[5] Palandt section 312 e para 3.

is no acceptance of a contract.^[1] If the entrepreneur fails to fulfill these duties the contractual partner is entitled to damages.

France

In France it took a bit longer to transpose the ECD into national law, but in the end the Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique was passed.^[2] Articles 1 – 4 concern general regulations, articles 5-9 regulate the provider responsibility, by amending the Loi relative à la liberté de la communication and the Code de postes et télécommunication, and the articles 10-28 affect the remaining transformation of the ECD.

United kingdom

After some difficulties the British parliament passed the Electronic Commerce Regulations 2002.^[3] So they transposed the majority of the aspects of the ECD. Two months later the extension of the Stop Now Orders (EC Directive) Regulations 2001^[4] included consumer protecting elements of the ECD. The main aspects of the Electronic Commerce Regulations 2002 consider the Country of Origin Principle. So the online sellers and advertisers are subject to the laws of the UK if the trader is established in the UK. Contracts with consumers and contracts where another law has been chosen are excepted. Online traders have a duty to render clearly defined information about the trader, the nature of

[1] AG Hamburg NJW-RR 04, 1284.

[2] J. O. n° 143 du 22 juin 2004, p. 11168.

[3] <http://www.opsi.gov.uk/si/si2002/20022013.htm>.

[4] <http://www.opsi.gov.uk/si/si2001/20011422.htm>.

中欧电子合同立法比较研究

commercial communications and how to complete an online transaction.^[1]

B. The ESD

The ESD has the ambition to secure the acceptance of electronic signatures across national boundaries.^[2] It regulates difficulties associated to security levels of electronic signatures as well as questions about liabilities.^[3] In Article 2 of the directive three levels of security are defined, in particular the "electronic signature", the advanced electronic signature and the "qualified electronic signature".^[4]

The first one comprises data in electronic form that may serve as method of authentication; the second one is reached when the signature can be related to only one single person and to comply with the third level; the electronic signature has to meet further requirements. In Article 5 the directive rules that qualified electronic signatures are equal to a handwritten one and may even be presented in front of court as evidence.^[5] Another main aspect of the ESD is the question of liabilities in each Member State. This aspect is dealt with in Article 6 ESD. According to paragraph 1 it has to be ensured that a certification-service-provider is liable for damage by issuing a certificate as a qualified certificate to the public or by guaranteeing such a certificate to the

[1] <http://www.dti.gov.uk/sectors/ictpolicy/ecommsdirective/page10133.html>.

[2] Hoeren - Skript Internetrecht, p. 259 - <http://www.uni-muenster.de/Jura.itm/hoeren/>.

[3] <http://europa.eu/scadplus/leg/de/lvb/l24118.htm>.

[4] Art. 2 ESD 1999/93/EC.

[5] Art. 5 ESD 1999/93/EC.

public.^[1] This liability applies to issues of content, ownership and the use of data.^[2] In the following we will turn the attention to Germany, France and the United Kingdom.^[3]

Germany

The German legislator already passed a signature law in 1997^[4], but unfortunately this law contradicted the ESD in some points. So Germany transposed the directive by adapting several rules of the GCC, the civil Process Order and this signature law. The new section 4 of para 1 SigG^[5] rules that operators of certificate services do not need an authorisation. However these providers have to satisfy certain criteria and are obliged to notify the appropriate authorities. Furthermore the SigG transposes the definitions of Article 2 ESD into German law and regulates the provider's liability.^[6] Outside the SigG, section 126 a GCC introduces the electronic form of signatures and section 126 a para 3 GCC equates the electronic form with the handwritten one. The Civil Process Order was amended and now contains adopted rules concerning prima facie evidence (section 292a) and demonstrative evidence (section 371 phrase 2).

[1] Art. 6 para 1 ESD 1999/93/EC.

[2] Art. 6 para 1 a-c ESD 1999/93/EC.

[3] For detailed introduction of national implementation of ESD, see the Research Report on Electronic Contract Regulation in Europe developed by Ms Yu Difei in 2007 for the EU-China Information Society Project.

[4] <http://www.online-recht.de/vorges.html> SigG.

[5] http://bundesrecht.juris.de/sigg_2001/index.html.

[6] www.uni-leipzig.de/~urheber/ressrc/material/seminare/infos/seidel-digitalSignatur.pdf.

France

The two important laws in France regarding the ESD are the Loi 2000-230 du 13 mars 2000^[1] and the Décret n°2001-272 du 30 mars 2001.^[2] The former law alters the French regulations concerning documents of evidence. It acknowledges the jurisprudence of the French Supreme Court (Cour de cassation) which accepted in 1997 a fax as document of evidence and stated that a "written" declaration of intent does not have to match any formalities.^[3] Therefore e-mails are admissible in front of court as documents of evidence. The latter law defines requirements of electronic signatures so that these are treated equally to normal signatures. In contrast to many other countries France abstained from an accreditation of certificate providers. The COFRAC (Comité français d'accréditation) which is a system of accreditation founded in 1994 inherited this task.

United Kingdom

In the UK the process of transposition of the ESD was carried out in two steps. The first one was the Electronic Communications Act 2000 (ECA),^[4] the second one the Electronic Signatures Regulations 2002.^[5] The first one rules in section 7 para 1 that documents with an electronic signature are admissible as evidence in respect of authenticity and integrity of the document.

[1] J. O. n° 62 du 14 mars 2000, p. 3968.

[2] J. O. n° 77 du 31 mars 2001, p. 5070.

[3] Cour de cassation, Chambre commerciale, JCP.1998, Jurisprudence, p. 178.

[4] <http://www.legislation.hmso.gov.uk/acts/acts2000/20000007.htm>.

[5] <http://www.legislation.hmso.gov.uk/si/si2002/20020318.htm>.

In sections 8 and 9 the responsible secretary is authorized to pass regulations in order to regulate details. These regulations are the Electronic Signatures Regulations 2002. This regulation comprises definitions (section 2), the surveillance of the certificate providers (section 3), the liability (section 4) and the provider's duty to data protection (section 5). Since formalities are very uncommon in the UK the British transposition mainly deals with the clarification of procedural aspects of the law.

C. The DSD

The third important directive, the DSD, regulates problems related to distance selling as for example protection against demands for payments of unsolicited goods and high pressure selling methods. In addition the buyer gets a special right of withdrawal since he has no chance to inspect the goods before the purchase.

The exclusive use of means of distance communication in the whole period of concluding of a contract is essential to apply the DSD.

Since a special directive exists for financial services, it is important to distinguish whether goods and services are related to financial services or not.

Germany

The DSD first has been transposed into German law outside the GCC. The legislator created a separate law concerning contracts of distance selling.^[1] Later, this law has been introduced into the GCC. Sections 13 and 14 GCC are now defining the consumer and the entrepreneur.

[1] Fernabsatzgesetz; <http://dejure.org/gesetze/FernAbsG>.

Sections 361 a, b GCC is about the consumer's right to withdrawals. During the modernization of the law of obligations in 2001,^[1] the legislator had introduced the regulations of the Fernabsatzgesetz into the GCC. Now sections 312 b to d GCC constitute the German rules in respect of contracts of distance selling. Whereas section 312 b GCC represents a definition of contracts to which these rules are applicable sections 312 c and d GCC regulates the duties of entrepreneurs using distance selling contracts and the consumer's rights.

France

A general problem in French consumer protection law is that it is not exactly clarified who is consumer and who is entrepreneur. This has always been an issue in front of the courts. Unfortunately even the French Cour de Cassation has decided in ambiguous ways. For example an estate agent who buys an alarm device is considered as a consumer^[2] but a jeweler who bought a fire extinguisher was considered as an entrepreneur.^[3] These problems of definition have not been solved until now.^[4] Since the former French regulation was almost identical with the provisions of the DSD, there has not been a successful attempt to transpose the DSD into French law. Now, the LSI^[5] adopts some

[1] BGBl. 2001, p. 3138.

[2] Cass. civ. lère 28.04.1987, J. C. P. 1987 II, 20893, note paisant, but contra, Cass. civ. lère 18.04.1986, R. T. D. 1987 Vol. 2, p. 86.

[3] Cass. crim. 27.06.1989, D. 1990. Som. p. 360.

[4] Lilian Edwards, The New legal Framework for E-Commerce in Europe, 2005, p. 102.

[5] Projet de loi sur la Société de l'information, Doc. Assemblée Nationale Nr. 3143.

regulations of the DSD to clarify individual aspects.^[1]

England

The issue of the Consumer Protection (Distance Selling) Reg. 2000 was the British transposition of the DSD.^[2] It covers among other things aspects of e-commerce, mail, telephone and fax. The withdrawal from a contractual obligation has to be presented in written or another durable form.^[3]

3.1.3 Experiences and lessons from the e-contract regulation in Europe

Generally speaking, the e-contract regulation in Europe, based on both e-commerce practice and the traditional legal system, covers all the relevant legal issues regarding electronic transaction.

With regard to the validity of e-contracts, the regulation in Europe is similar to that in China; and the effect of the electronic signature law of most Member States is also similar to the situation in China, that is, no huge influence to the current practice. However, their traditional laws and regulations may probably regulate, in a reasonable way, the electronic transaction without using electronic signatures, which is actually much common in practice. Further, some Member States, such as Esthonia, provide good experience regarding practice of electronic signatures.

As for the formation of the e-contracts, we believe China can follow the regulation in some Member States, such as Germany. Specifically, we

[1] Lilian Edwards, The New legal Framework for E-Commerce in Europe, 2005, p. 104.

[2] Statutory Instrument 2000/2334.

[3] Lilian Edwards, The New legal Framework for E-Commerce in Europe, 2005, p. 285.

may adopt the same criteria for offer in the electronic transaction as well as the commonly-accepted definition of electronic errors (i. e., excluding any input mistakes), and regulate the electronic standard form contract in a proper way.

The regulation on performance of e-contracts in Europe is basically connected with the regulation regarding consumer protection. For instance, Germany adopts the regulation for cooling-off period as specified in the EU directive. Further, the insurance companies actually play an important role in the electronic transaction since they will effectively minimize both risks and disputes during the performance of e-contracts.

In addition, the regulation on electronic evidence is practical and helpful. Based on the current regulatory framework, Chinese regulation may also set up specific evidence rules for the evidence at different levels. For instance, there are different requirements for different evidences; the third party service company can be used to prove some evidences, etc.

Last but not the least, it is feasible for China to learn the aforementioned experiences/lessons from Europe since we have solid ground for further development regarding e-contract regulation.

3.2 E-contract legislation in USA

3.2.1 E-contract legislation in USA

1. E-commerce legislation

USA is the leading country in the e-commerce legislation. USA promulgated the plan of National Information Infrastructure Plan in January 1994 and A Framework for Global Electronic Commerce was issued on

July 1, 1997, which formed the policy and legislative plan of systematic e-commerce development by the government.

In 1995, the first Digital Signature Law in the world was enacted in Utah. In 1999, The Uniform Electronic Transaction Act (the "UETA") was promulgated by National Conference of Commissioners of Uniform State Law ("NCCUSL"), which has been accepted by most of States. The UETA applies to any electronic records and electronic signatures relating to transaction. The UETA governs transferable records, electronic records and electronic signature by governmental agencies, which respects most provisions of the UNCITRAL Model Law on Electronic Commerce (the "Model Law").

On September 29 2000, NCCUSL also issued Uniform Computer Information Transaction Act (the "UCITA") which focuses on the transaction of computer information or information products. UCITA is a commercial law adapted to the information economy. But unfortunately, since UCITA is out of enforcement, and was aborted for strong opposite opinion, it was adopted by only two states.

The USA Congress issued Electronic Signature in Global and National Commerce Act (the "E-SIGN") on September 9, 1999 to promote application of e-record and e-signature in interstate commerce. The main principles of the Model law are adopted by the Act so as to overcome the legal obstacles to e-record with no "writing". Further, such Act insists the principles of technological neutrality or non-discrimination, and agrees the parties to decide the service of certification and the form of transaction themselves. It also gives chances to the parties to prove the valid of the certification and transaction to the court.

Because of the duality of legislative system in USA, the core provisions of the UETA and the E-SIGN are almost the same. Both of them aim at overcoming the legal obstacle of e-commerce, but the federal legislation mainly regulates the interstate commerce. Therefore, the two acts above are consistent with two model laws issued by UNCITRAL.

2. Amendment of UCC Article 2

The Uniform Commercial Code (the "UCC") is drafted and amended by NCCUSL and the American Law Institute (the "ALI"). Actually, UCC Article 2 "Sale" is deemed to be equal to the contract law of USA, which constitutes the most important origins of law in contract.

With the development of electronic communication, not only the method, but also the object of commercial transaction, have changed a lot. Therefore, NCCUSL set up Drafting Committee and began to amend Article 2 in 1991.

As we previously said, such laws made by both federal government and state government focused to overcome the obstacle of e-commerce, however, the laws were all special laws in solving the problems of commercial transactions, which merely existed outside the commercial law system. In order to incorporate the principles of e-commerce law to the commercial law system to face the new challenges in the twenty-first century, NCCUSL finished the amendment of UCC Article 2 "sale" in 2003.

The revisions of UCC Article 2 include two aspects: the substantial amendments and formal amendments. The substantial amendments relate to the definition of "goods", the statute of anti-frauds, and damages for breach of contract. In respect of electronic contract, the amendment of

UCC Article 2 lay a foundation of e-contract law system, including the scope of e-contract, the agreement of e-contract, the validity of e-contract, the implementation of e-contract, and the enforcement of e-contract, etc. The following are the major contents revised regarding e-contract:

A. Definition of "Goods"

The primary definition of goods based on the concept of movability (a tangible physical good) was changed to expressly exclude the term "information" merely. This exclusion of information was meant only to encompass "information not associated with goods". Therefore, the revised definition includes the goods combined with computer programs, which names "smart goods". The new definition of "goods", including "smart goods", is applicable to the development of commercial law.

B. E-record and attribution

To harmonize with UETA and E-SIGN, and to promote the development of e-commerce, the amendment of UCC Article 2 adopted such terms as "electron", "e-agent", "e-record", "record", and "signature", etc. What should be most notable is the term "writing", and it is replaced by the term "record" in the amendment, which is significant in the development of e-commerce.

According to the new article, "RECORD" means: "Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form". So the term "record" expresses the connotation of paper-based documents more accurately.

C. E-agency rule

Nowadays, automated message system, which is called "e-agency",

are applied to the practice of commerce extensively. Both of UETA and E-SIGN adopted the idea "e-agency", thus the amendment of UCC Article 2 adopted the provisions of "e-agency" from UETA, recognizing e-agency's ability to conclude contracts, and attributed the consequence of contracts to the parties.

D. Definition of signature

There were no special provisions of electronic signature in the primary UCC Article 2, and the definition of signature was general. That is, signature refers to a present intent to authenticate or adopt a record: (i) to execute or adopt a tangible symbol; or (ii) to attach to or logically associate with the record, an electronic sound, symbol, or process. Obviously, such definition not only contained the form of traditional handwritten signature, but also included any kind of signature that could prove certification or prove records accepted, of course the electronic signature. There is no doubt that such definition of signature including traditional handwritten signature and electronic signature weakened the particularity of e-signature. Therefore, the revision of signature recognizes electronic signature more directly and emphasizes the effectiveness of legal impact.

Actually, the principles of e-record and attribution, signature, e-agency are the basic principles of e-commerce law. The adoption of such principles in the amendment of UCC Article 2, founded the basis of e-commerce transaction.

E. Way of contract formation

The provisions of contract formation of UCC followed traditional principles. When the parties come to an agreement, the contract takes

effect. Subject to 2-204(1): A contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of a contract, the interaction of electronic agents, and the interaction of an electronic agent and an individual. According to the authoritative explanation, this article means that in addition to the traditional forms of contract (oral form, written form, or being implemented already), the contracts can be concluded by electronic form. Whatever the form of the contract is, the total legal obligations resulting from the contracts are affected by this chapter and other applicable law. Such provisions emphasize that whether a contract is concluded depends on whether there exist right-obligation relations between the parties. Therefore, the provision of UCC 2-204 sets up uniform rules of contract formation so as to overcome the obstacle of electronic contracts.

F. Effectiveness of received e-information

In traditional legal environment, the rules of offer and acceptance of the contract adopt the letter of acceptance and mailbox rule respectively applied to two legal systems globally. America, as common law system, adopt mailbox rule, which has encountered new challenges under electronic environment. Therefore, the laws such as UETA regulate the effectiveness of received e-information. The amendment of UCC Article 2 also adopts the regulations of UETA and the effectiveness of received e-information are stipulated as: (1) If the receipt of an electronic communication has legal effect, it has such effect even if no individual is aware of its receipt. (2) Acknowledgement of receipt of an electronic communication establishes that the communication has been received but,

in itself, does not establish that the content sent corresponds to the content received. In this way, the provisions of the amendment of UCC Article 2 is consistent with UETA in respect of the effectiveness of received e-information, which deal with the new problems of contract under electronic environment in the form of commercial code.

G. Disclosure of online contract terms

The contract concluded online will meet new issues of standard clauses, since large numbers of contracts formed via Internet are standard ones. The e-contracts can be concluded by clicking the button of "yes" or "I agree" on Internet. Therefore, on the basis of 2-204 of UCC Article 2, the amendment added (b) term in 2-103, which confirms the request for "conspicuous" in disclosing online contract terms. The new term not only specifies the standard of being "conspicuous", but also prescribes the meaning of "conspicuous" of e-record: "conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the record by an individual. According to such provision, the information about the contract issued by website must be able to attract the intention of the receiver, and redound the parties who trust the articles of contracts to foresee the consequence so as to act reasonably.

3.2.2 Comments on the e-contract legislation in USA

In the early time of the legislation of e-contract, the United States followed the step of the world. The states exercised an integrative

legislation mode, while the federal issued the Electronic Signature Act. However, such laws were all special laws, and merely existed outside the contract law. Fortunately, the amendment of UCC Article 2 is an integrated resolution for e-contract regulation, e. g. to adapt contract law (even whole commerce law) to e-commerce by integrating achievement of e-commerce legislation into the current contract law.

E-commerce really brings challenges to traditional law system, but we believe that the resolution is not to rebuild a new system outside traditional legal system; instead, we should solve the problems of e-commerce under traditional legal frame. Further, the resolution should be based on the application of traditional legal theory, and be consistent with the traditional legal system. The resolution of UCC Article 2 is acceptable for harmonizing the traditional contract law with e-commerce law, and it is a way to look for a solution in the current legal system and make e-commerce law enforceable for this harmonization.

The ESL, taking effect as of 1 April 2005, adopts a single mode of legislation. However, there is still a problem of how to harmonize the e-commerce law with traditional law. We believe the solution is that in the legislation of e-commerce, we should not issue single law merely. On the contrary, with reference of the amendment of UCC Article 2, we could adopt the provisions of e-contract formation into traditional contract law, and supplement regulations of special principles (e. g. e-signature principle) related to electronic transactions. Of course, there is no need to transplant the model law form of UCC; we could embody the principles of e-contract in PRC Contract Law, and supplement the legislation by ESL. Such legislation form can clarify and carry out the principles of e-

contract formation so as to overcome the obstacle of e-contract finally.

What we can learn from the amendment of UCC Article 2 is not only the legislation of e-contract, but also the rationalization of the legislation. In order to deal with the contract concluded in electronic form, the amendment of PRC Contract Law is necessary and important. To make the legislation of e-contract more reasonable, the understanding of ESL from the view of e-contract regulation and the determination of relevant rules of evidence are also essential. In this connection, the amendment of UCC Article 2 is helpful to the revision of PRC Contract.

3.3 E-contract legislation in UN

3.3.1 E-commerce legislation in UN

1. Initial exploration

The international legislation of e-commerce began in the 80's of 20 century with the development of information technology, and focused on the regulation of electronic data interchange ("EDI") at first. In 1984, UNCITRAL issued the report of automated data processing problems that suggested to review the legal requests of computer record and system, which started the international legislation of e-commerce.

In March 1990, UN promulgated UN/EDIFACT standard, which was adopted into ISO9735 by International Standardization Organization. United Nations Electronic Data Interchange for Administration Commerce and Transport Regulation ("UN/EDIFACT") unified the standards of digital exchange in international trade and made it possible to do business in the use of electronic technology around the world. Later, UN issued

such documents as UN/EDIFACT and UNCID thereafter, and in December 1993, the electronic exchange group of UNCITRAL discussed Draft uniform rules on the legal aspects of EDI and related means of trade data communication^[1] on the 26th conference, which formed the legal basis of EDI.

2. The Model Law

In the early 90's of the 20 century, with the development of Internet, the traditional structure of industry and the form of market operation has changed a lot. While merchants were seeking the utilization of Internet, some nations and international organizations were also exploring principles for regulating electronic trades so as to create a secure environment for the development of economic. The legislative work was leaded by UN.

In June 1996, UNCITRAL issued Model law on Electronic Commerce (the "Model Law") which was discussed by experts many times. The purpose of the Model Law is to provide principles and framework of e-commerce legislation (most importantly, the Model Law created the provisions of e-contract formation and e-contract effectiveness) to congresses and executive departments over the world. The Model Law is an example for a country to make e-commerce law.

To carry out the principles of the Model Law, UNCITRAL, Working Group on Electronic Commerce issued Draft Uniform Rules on Electronic Signatures on 17 September 1999, which aims to solve the basic problems

[1] A/CN.9/WG.IV/WP.57 - Draft uniform rules on the legal aspects of electronic data interchange (EDI) and related means of trade data communication, see http://www.uncitral.org/uncitral/en/commission/working_groups/4Data_Interchange.html.

of promoting electronic trade—the security, liability, and authenticity of e-signature. On 23 March 2001, the Model Law on Electronic Signatures was promulgated on the basis of absorbing experience from other legal instruments.

3. The ECC

The ECC is actually the replacement of two model laws.

UNCITRAL presented the draft of the ECC in 2002 for public comments. The drafting group believed that an absolute convention can promote the stability and prediction of international e-commerce legislation. The ECC focuses on the uniform of e-contract formation regulations so as to eliminate the uncertainty of electronic commercial law.

The Model law and 2002 Model Law on Electronic Signatures have become the framework of forming and promoting e-contract legislation. However, these two legal instruments are not effective international laws; they are just the model laws for countries to accept. There is no responsibility for a country to declare acceptance of model laws to UN or other countries while the ECC must be authorized and accepted by its member state before being effective.

The ECC adopts foundational principles of two Model Laws: the functional equivalence principle and the technology/media neutrality principle. (The functional equivalence principle means: if the information contained in an electronic communication is accessible to the requirements, it meets the functions of a paper, but a data message, in and of itself, cannot be regarded as an equivalent of a paper document. The technology/media neutrality principle means: the validity or enforceability of a contract will not be denied on the sole ground that it is

formed via electronic communications.) The ECC insists the principle of party autonomy, which is not only the foundational principle of the model laws, but also the basic principle of CISG (1980).

In addition, the ECC revised some principles of international laws, including time and place of dispatch and receipt of contracts, invitations to make offers, automated message system, and electronic errors, etc.

On 4-15 July 2005, UNCITRAL passed the final documents of the ECC on the 38th Assembly in Vienna. The United Nations General Assembly adopted the ECC on 23 November 2005 and opened for members to sign since 16 January 2006. As the delegate of China, Wu Zhengguo, Vice Director of Convention and Law Section of Ministry of Commerce signed the ECC on 6 July 2006.

The ECC has followed most of the principles adopted in the aforesaid two model laws. The aims of the ECC are to remove obstacles to the use of electronic communications in international contracts, to enhance legal certainty and commercial predictability for international contracts, and to help the member states gain access to modern trade routes.

3.3.2 Comments on the ECC

The ECC has four chapters:

Chapter I Sphere of application: Scope of application, Exclusions, Party autonomy.

Chapter II General Provisions: Definitions, Interpretation, Location of the parties, Information requirements.

Chapter III Use of electronic communications in international contracts: Legal recognition of electronic communications, Form requirements, Time and place of dispatch and receipt of electronic

communications, Invitations to make offers, Use of automated message systems for contract formation, Availability of contract terms, Error in electronic communications.

Chapter IV Final provisions: Depositary, Signature, ratification, acceptance or approval, Participation by regional economic integration organizations, Effect in domestic territorial units, Declarations on the scope of application, Communications exchanged under other international conventions, Procedure and effects of declarations, Reservations, Entry into force, Time of application, Denunciations.

1. Status of the ECC

With respect to the regulations of e-contract, we believe the status of the ECC is: (1) only applicable to deal with the legal problems of contract formation; it does not handle all problems related to contracts. (2) only applicable to deal with the issues of e-contract in international commerce; it does not handle all issues related to e-contract.

The ECC does not handle all issues of contract law, recognizing that both international laws and domestic laws exist mature regulations and theories of contract. Thus, on the principle of not influencing and destroying the existed rules and theories, the ECC deals with the special problems of using electronic communication in e-contract. Therefore, the ECC's regulations on e-contract are focused on four parts: the judgment of offers or invitations to make offers online, time and place of dispatch and receipt of electronic communications, use of automated message systems and electronic errors.

The ECC does not handle all problems of e-contract. In respect of provisions on special issues of e-contract, international law and domestic

law obviously have different functions; some issues should be solved by domestic law while others should be solved by uniformed international rules. Even regarding the provisions of electronic communication, the ECC just determines the time of arrival, and leaves the problem of the effectiveness of the arrival of message to the domestic law or substantial law to regulate. Therefore, the ECC leaves dozens of problems in e-contract formation to the domestic law, and it just provides principles on the level of international law.

2. Experience of the ECC

The ECC is not only an instrument for international e-contract disputes but also common rules for member states, including China, to learn and embody it into national legal system. The functions of the ECC are: first, it provides acceptable rules in contracting through e-communication; second, the ECC leaves space for signatory states to make some national rules to regulate e-contracting.

On the one hand, the ECC is an international legal instrument on the basis of two model laws. The aims of the ECC are to solve the legal obstacle to international electronic trade, and to determine fundamental principles of e-contract formation by adopting mature regulations of e-commerce from international laws. For example, such provisions as the judgment of offer and invitations to make offers, the regulations of electronic errors, are all worthy to be adopted into the PRC Contract Law.

On the other hand, the ECC actually keeps silent to the rules of e-communication or e-contract due to its international trait, which shall be governed by relevant national laws. For example, the principle of

disclosure (Article 7), the availability of contract terms (Article 13), etc., could be all regulated by domestic law. In the amendment of the PRC Contract Law, these articles can be considered to adopt.

4. Solutions for the E-contract Regulation in China

4.1 Reasonable and feasible solutions for China to remove the legal obstacles to e-contracting

4.1.1 Solutions for the e-contract regulation in China

The legislation of e-commerce has been discussed for 10 years since the promulgation of the Model Law in 1996. By the model effect of two model laws, many organizations and countries around the world have made a great effort to deal with legal obstacles to electronic commerce with various acts. Especially, the issue of the ECC symbolizes the maturity of regulations on e-contract in the international society.

According to the legislations of e-commerce

around the world, the prevalent method of solving the special problems brought by contracting through e-communication is to make single law or special law as e-commerce law or e-signature law. The core of such laws is to deal with problems of electronic evidence by equating electronic records with paper, and equating electronic signatures with written signatures under the principles of functional equivalent and integrity of information. Further, the regulations of the arrival of e-communication and the electronic error can solve special problems brought by contracting through e-communication. However, these regulations all exist outside current contract law so that the e-commerce law is regarded as the special law which merely attracts attention of businessmen.

In this connection, we believe that e-commerce law should be integrated into traditional contract law system, in which e-contract is also a contract that needs to integrate the special rule into traditional contract law to form harmonizing rules to make it enforceable. In this regard, the amendment of UCC Article 2 has made a great progress in essential, while in Europe, the legislation of e-commerce is still in the level of making single law without absorbing e-commerce law into contract law, but commonly in the judicial practice, the regulations of e-commerce or e-signature can be applied^[1].

In China, we have taken the first step of e-commerce legislation with the promulgation of ESL, and what we need to do now is to adopt the regulations of ESL and other international e-commerce laws into the PRC Contract Law. The main purpose of such absorption is to solve the

[1] The amendment of Obligation Law of Holland is an exception.

problems of concluding and performing e-contract, but the enforcement of e-contract still depends on the procedure laws as evidence law. In order to solve the problems of the legal validity of e-contract thoroughly, we should firstly establish the rules of electronic evidence. Therefore, we believe that the reasonable and feasible solution for the e-contract regulation in China is to amend the PRC Contract Law and enact e-evidence law.

4.1.2 Reasonable solutions for the e-contract regulation in China

1. Reasons for Amending PRC Contract Law

According to the form of e-contract, the PRC Contract Law initially adopted e-contract into traditional legal system, recognized the legal validity of data message, and established foundational principles of the time and place of the contract formation. However, compared to detail provisions of e-contract formation in other countries, such principles of Contract Law are rough and unclear. By reviewing the e-contract legislation of Europe and USA, especially the amendment of UCC Article 2 and the ECC, we think that the PRC Contract Law should be amended to adapt to the development of e-commerce.

The project of e-contract legislation seems to predict the establishment of single e-contract law, but after the research work, we believe it's not feasible to prepare a new separate e-contract law, since there's no precedent in EU or in USA as well as in other countries, and the e-contract still has to follow the foundational principles of contract law. Further, some special problems resulted from the application of e-communication into commerce also should be settled under the traditional framework of contract law. Therefore, the harmonization of current regulation is the best choice to adapt contract law to e-commerce.

2. Reasons for promulgating e-evidence law

To cope with challenges of e-commerce, UN took the lead in seeking methods to confirm the validity of evidence for electronic records. As a result, a single law of e-commerce was established to enable electronic records equal to a paper-based document on the basis of distinguishing data message from oral and written form, and a new system of data message principles was set up. These principles constituted the Model Law.

The Model Law was classified as international trade laws. The Model Law created a new word of "data message", but no words related to electronic evidence was mentioned, which seemed that e-commerce law is only applied to ensure the validity of data message in business. However, the core of e-commerce legislation is to regulate the effectiveness of e-evidences. The Model Law is an evidence-related law in essence, since it established fundamental principles, such as "writing", "signature", and "originality" rules for data messages.

However, in the process of nationalizing the Model Law, nearly no country transplanted or legislated laws from the view of e-evidence; instead, such laws similar to the Model Law as e-commerce laws or e-signatures laws were established. Moreover, these special laws just exist outside the whole legal system since lacking of study and absorption. Since the principles of the Model Law have not been converted into implementation rules, let alone evidence rule in court, which caused the failure of nationalization of the Model Law. Therefore, the legislation of e-evidence is a good way to harmonize ESL with the current legal system, and only when the ESL integrates into current legal system, is it an

active law.

Actually, e-evidence law is not only the method to deal with the effectiveness of e-contracts, but also the legal foundation to solve legal problems in digital age. E-communication has been extensively used in business, government affairs, company's operation, and the communication between individuals, so the e-evidence principles are the foundation to solve disputes (including contract, tort, administration, and criminal, etc.).

4.1.3 Feasibility solutions for the e-contract regulation in China

1. Feasibility regarding amendment of PRC Contract Law

The PRC Contract Law, as the first law that equals e-contract to written contract, harmonizes e-contract with other forms of contract in essential, adopts the experience of e-commerce legislation preceding UCC. However, since the Model Law was issued just during the time of lawmaking of the PRC Contract Law, the adoption of e-commerce in the PRC Contract Law was advanced but rough. The PRC Contract Law does not touch upon the problem of how to equal e-records to paper-based documents in judicial practice, and the problems of the formation and implementation of e-contract. Nowadays, the Model Law has been issued for 10 years, and China has transplanted the Model Law and enacted ESL as well, so it's time to adopt the principles of e-commerce into the PRC Contract Law systemically. The promulgation of ESL and the experience of UCC Article 2 amendment provide good reference and create feasibility for the amendment of PRC Contract Law.

From the point of the enforcement of statutory, it's always easier to revise laws than to make new laws or regulations. This is also the

experience from European legislation regarding e-contracts. Therefore, it's feasible to amend the PRC Contract Law and make it applicable in the digital age.

2. Feasibility regarding promulgation of e-evidence law

First, the ESL is the legal foundation for e-evidence legislation. Actually, the ESL creates the principles of functional equivalence to enable the data message to be equivalent to paper-based document, but the provisions in the ESL are just fundamental principles that need to be supplemented by relevant implementing rules or regulations. For example, article 4 (data messages functions as written form), article 5 (the conditions for a data message to function as an original document), and article 8 (the examining rule for the authenticity of a data message as evidence) are all general legal principles, which need to be supplemented by specific implementing rules.

Second, judicial practice provides experience to the legislation of e-evidence. To date, the application of e-evidence in court is still difficult, but there exist many cases such as Internet tort and e-contract dispute, which need to be judged by e-evidence. Therefore, it's necessary to specify evidence rules for the effectiveness of e-records and e-communications. These cases are helpful for lawmakers to find problems in legislation and adopt rules into law.

Legislation of e-evidence law is more difficult than the amendment of the PRC Contract Law. Practically speaking, judicial explanation by the Supreme Court is currently an alternative solution to establish an e-evidence rule in China.

4.2 Solutions of amending the PRC Contract Law

4.2.1 Foundational solution of amending the PRC Contract Law

1. Legislation Plan: to persuade the Standing Committee of National People's Congress to list them in legislative agenda.
2. Drafting: to authorize the State Council or relevant agencies to conduct preliminary legislative investigation and to draft laws.
3. Academic research: to appoint qualified academic institutes to do preliminary research.

4.2.2 Some thoughts on amendment of the PRC Contract Law

In the amendment of the PRC Contract Law, it is advisable to apply the following rules:

1. To separate electronic contracts from traditional written contracts, and to set up a set of rules that enable electronic record to be equivalent to written record.
2. To amend the principles of offer and acceptance-information attribution rule in electronic communication. The PRC Contract Law has specified the arrival time of offer and acceptance in the form of data message, but not mentioned the arrival time of the data message transmitted to recipient's special information system.
3. To follow the UCC Article 2, and define e-signature included in signature.
4. To adopt the legal validity of acknowledgement of receipt. Supplement the provision of the legal validity of confirmation of receipt in the ESL by implementing rules and adopt it in the PRC Contract Law.

5. The effectiveness of automated transaction. Legislation should confirm the attribution and validity of automated transaction applied in business, since the use of automated transaction has become popular.

6. Electronic error. To create supplementary principles of how to deal with electronic errors and how to guide parties to avoid disputes of electronic errors.

7. Amendment of standard clauses. China also needs supplement principles such as the scope of standard clauses online, and the demand of disclosure, etc., so as to protect the rights of accepters.

Needless to say, the rules above are high-level. We believe that much more problems of e-communication need further discussion in the future.

4.3 Solutions of the legislation of e-evidence

4.3.1 Foundational solution of enacting e-evidence law

1. Legislation Plan: to convince the Standing Committee of National People's Congress to list the enactment of e-evidence in legislative agenda. If necessary, China may establish an electronic evidence rule in the form of judicial interpretation.

2. Drafting: to authorize the State Council or relevant agencies to conduct preliminary legislative investigation and to draft laws.

3. Academic research: to appoint qualified academic institutes to do preliminary research.

4.3.2 Framework of enacting e-evidence law

Part One: General principles. To establish foundational principles of

e-evidence such as the principle of following current evidence rule, the principle of technological neutrality, etc. and to define relevant terms.

Part Two: Definition and recognition of electronic signature.

Part Three: The effectiveness of electronic communications using digital signature.

Part Four: The effectiveness of electronic communications without using digital signature.

Part Five: Discovery and forensic examination of e-evidences.

Part Six: Verification of e-evidences.

5. Conclusion

In 1996, the Model Law initiated the legislation of e-commerce in the world. By the effect of the Model Law, many countries have been exploring methods to face the challenges of e-commerce for 10 years. Nowadays, it's significant to propose the suggestions of promoting the application of e-contract in China through learning the experience of international society and other countries, especially USA and EU countries.

That promoting industrialization by informatization is the fundamental strategy for economy development in China. Under such instruction, the ESL was promulgated in 2004. However, the legal obstacles have not been cleared by the ESL as people expected. To study the obstacles and measures that Chinese government should take to remove such obstacles are basic aims

of this project.

For this purpose, we prepared this report based on our research and study for over one year, and we also tracked the legislative activities all over the world. Moreover, we analyzed the situation of the application of e-contract in China, and showed the experience in e-commerce legislation of USA and EN. Accordingly, we proposed a resolution for e-contract legislation based on the comparative research: amendment of Contract Law and enactment of e-evidence law.

This report concludes the viewpoints of experts both from China and Europe. We believe this resolution is reasonable, feasible, and foreseeable, hoping that this resolution will be recognized and accepted by relevant authorities.

欧洲电子合同规制研究报告

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目 录

1. 欧盟电子商务立法简介 / 121
 - 1.1 电子合同立法——传统民法构架 / 121
 - 1.1.1 一般合同 / 121
 - 1.1.2 意思表示的电子化 / 122
 1. 数字方式形成的意思表示(自动数据处理) / 122
 2. 数字方式传输的数字化意思表示 / 123
 3. 数字化意思表示的处理 / 123
 - 1.1.3 要约 / 125
 - 1.1.4 承诺 / 125
 - 1.1.5 电子合同的效力 / 126
 - 1.1.5.1 电子合同的生效时间 / 126
 - 1.1.5.2 电子合同的撤销 / 127
 - 1.1.6 因欠缺行为能力而无效 / 128
 - 1.2 欧盟现行的法规框架 / 129
 - 1.2.1 欧盟的法律体系 / 129
 - 1.2.2 电子合同的法律构架 / 129
 - 1.2.2.1 《电子商务指令》(ECD) / 129
 - 1.2.2.2 《电子签名指令》(ESD) / 133
 - 1.2.2.3 《远程销售指令》(DSD) / 136
2. 欧洲关于电子合同立法的相关经验 / 138
 - 2.1 《电子商务指令》 / 139
 - 2.1.1 定义 / 139
 1. 信息社会服务 / 139

- 2. 服务提供者 / 141
- 3. 服务接受者 / 142
- 4. 协作领域 / 142
- 5. 国内市场与进入自由 / 142
- 6. 告知义务和商业往来 / 144
 - 2.1.2 小结 / 145
- 2.2 电子签名指令 / 145
 - 2.2.1 适用范围 / 146
 - 2.2.2 定义 / 146
 - 2.2.3 电子签名的定位 / 147
 - 2.2.4 电子签名的责任 / 148
 - 2.2.5 他国认证证书的认可 / 148
 - 2.2.6 小结 / 149
- 3. 欧洲各国关于电子合同立法的执行 / 150
 - 3.1 各国对《电子商务指令》的执行 / 150
 - 3.1.1 《电子商务指令》实施前的法律框架 / 150
 - 3.1.1.1 《电子商务指令》在德国的执行情况 / 150
 - 3.1.1.2 《电子商务指令》在英国的执行情况 / 159
 - 3.1.1.3 《电子商务指令》在法国的执行情况 / 163
 - 3.1.2 欧盟成员国对于《电子商务指令》的纳入与转化 / 166
 - 3.1.2.1 德国 / 166
 - 3.1.2.2 英国 / 170
 - 3.1.2.3 法国 / 172
 - 3.1.2.4 小结 / 174
 - 3.2 各国对《电子签名指令》的执行 / 175
 - 3.2.1 德国 / 176

- 3.2.2 法国 / 178
- 3.2.3 英国 / 179
- 3.2.4 使用电子签名的经验与展望 / 180
- 4. 结论: 欧盟的进一步立法与对中国电子合同立法的启示 / 182
 - 4.1 欧盟的进一步立法 / 182
 - 4.2 对我国电子合同立法的启示 / 184
 - 4.2.1 立足于传统法律体系 / 184
 - 4.2.2 修订现行法实现对电子合同的规制 / 185
 - 4.2.3 现行法修订的重点 / 186
 - 4.2.3.1 市场准入 / 186
 - 4.2.3.2 电子合同的法律效力及相关法律责任 / 186
 - 4.2.3.3 电子签名 / 187
 - 4.2.3.4 电子合同的法律规范 / 188
 - 4.2.3.5 证据规则的解决方案 / 189
 - 4.2.4 为电子商务的推行营造更好的环境 / 190

本人受中华人民共和国商务部委托,在欧洲联盟欧洲委员会驻中国代表团的大力支持下,代表华东政法大学电子商务法研究所于2007年4月至10月期间,参与了中国—欧盟信息社会项目的课题工作,并于2007年8月至10月访欧,在实地调研和访问交流的基础上完成了本调研报告。欧洲调研以德国明斯特大学信息媒体法律研究所(ITM)为研究基地,有幸受 Thomas Hoeren 教授和 Esther Pfaff 博士大力支持,并得到欧盟总部官员的热情接见和专家协助。调研报告涵盖了电子商务立法的多个方面,重点探究了电子合同的有关法律法规。可以说,本报告是在分析 ITM 报告的基础上,并通过实地访问、调研和座谈等形式总结德国、比利时、荷兰等国关于欧盟电子合同立法的基础上完成的。此外,本人还在调研期间跟随高富平教授参加了联合国在德国汉诺威举行的关于联合国电子通信公约(“the United Nations Convention on the Use of Electronic Communications in International Contracts”)的会议,就本报告与全球业内学者和专家进行了充分沟通。

1. 欧盟电子商务立法简介

1.1 电子合同立法——传统民法构架

在欧盟各国,几乎所有的电子商务领域的专家和相关领域的政府官员都认同这样的观点,即在一般交易活动中,电子合同与普通合同具备同样的特征,电子合同具备了普通合同的功能。但二者的主要区别在于:电子合同采用的是“电子”形式,是通过互联网和数据记录的形式缔结的,是一种电子化的合同。

1.1.1 一般合同

一般合同是电子合同的基础,是电子合同的起点,我们有必要在此就普通合同缔结的主要特征做一些简要阐述,这也有助于我们明确电子合同的核心要件。据《德国民法典》(BGB)第145条之规定,向他人发出订立合同的要约的人,受要约的约束。也就是说,合同必须有双方当事人

人,且在双方意思表示一致时,合同成立。先表示其缔约意思的为要约,表示接受的即为承诺。^[1]

1.1.2 意思表示的电子化

意思表示是旨在产生法律效果的意志表现行为。^[2] 在意思表示的过程中,表意人应当具备追求一定法律效果的表示行为,且该表示行为必须建立于个人意志的基础上。电子化的意思表示,其特点则在于表意人(发件人)和收件人都是通过电脑等电子设备来进行意思表示的发出与接收的,而且,电子化的意思表示的形成也是通过电子设备予以实现。^[3] 所以,电子化的意思表示或数字化的意思表示可以分为两类:

1. 数字方式形成的意思表示(自动数据处理)

数字化的意思表示可以通过特定的计算机程序而自动生成。若采这种形式,则意思表示的内容及发送时间都将由计算机的一个自动程序主动生成。基于这种自动化形式,人们或许会怀疑通过计算机自动形成的意思表示并不能体现表意人的意志,所以电子化的意思表示不具备意思表示的必备条件,不是真正意义的意思表示。然而,我们必须谨记,计算机程序事实上就是人为预先设定的一种运算法则,任何计算机程序都能最终还原成人所设定的规则模式^[4]。因此,自动生成的意思表示(电子化的意思表示)也是人的意志的体现,完全满足传统意义上意思表示的要求^[5]。

[1] Brox, Allgemeiner Teil des BGB, Rn. 165.

[2] Brox, Allgemeiner Teil des BGB, Rn. 82.

[3] Heun, CR 1994, 595.

[4] Heun, CR 1994, 595 (596).

[5] Köhler, AcP 182 (1982), 126.

2. 数字方式传输的数字化意思表示

电子化的意思表示是由表意人通过电子设备设置并发送的,如:电子邮件、传真等。由此可见,通过电子化形式传递的意思表示与普通的意思表示相比,最根本的区别仅在于二者的传输途径不同。事实上,仅仅介质的改变并不影响意思表示的实质内容,所以,毫无疑问,电子化的意思表示完全能够体现当事人的意志,具备意思表示的要件。^[1]

3. 数字化意思表示的处理

意思表示必须向相对人发出才能生效,即意思表示必须具有表示行为。从某种程度而言,表意人的意志最终是要通过外在的行为予以体现的,因此,表意人要使其意志具有法律约束力,就必须有表示行为。^[2] 在网络环境下,表示行为是通过点击鼠标或向相对人发送表明确切意图的电子邮件的形式实现的。^[3] 举例而言,如果一封邮件具有意思表示的完整内容,那么一经发送,这封邮件即毫无疑问地被赋予了商业意义。^[4] 但事实上,在此表意过程中,也出现了许多亟待解决的问题:

问题一:系统过失。即如果表意人并没有发出其意思的意图,但计算机系统却自动发送了,应当如何处理? 例如,就某项被“偶然”发送的要约而言,该意思表示是否能被认为一种过失呢?^[5] 通说认为,^[6] 在这种偶然发送的情况下,收件人所收到的电子邮件并不是发

[1] Heun, CR 1994, 595.

[2] Palandt/Heinrichs, § 130 Rn. 4.

[3] Deville/Kahlthegener, NJW - CoR 1997, 168.

[4] Fritzsche/Malzer, DNotZ 1995, 3 (11).

[5] Ultsch, DZWIR 1997, 466 (469).

[6] Palandt/Heinrichs, § 130 Rn. 4.

件人意志的体现,这些邮件应被视为缺乏表示意思,不能构成有效的意思表示。但如果这些“偶然”发送的电子邮件是由发件人的过错所致,那么我们认为这些非体现发件人意愿的意思表示与自愿发送的意思表示具有同样的法律效力。^[1]此外,也有观点认为,^[2]对非体现发件人意志的意思表示,应当以客观解释的标准来探求其真意,再行判断其法律效果。但如果收件人有理由相信该意思表示体现了发件人的意志,并基于对发件人信赖而确信该意思表示的存在,那么法律应当对收件人予以保护。此观点的优势在于赋予了发件人以撤销权,对非依其意愿发送的意思表示,发件人可通过撤销权的行使阻却其法律效力。一旦发件人行使了此项权利,那么对收件人因信赖此意思表示而遭受的损失,发件人应当依照《德国民法典》第122条的规定给予收件人以补偿。

问题二:时间的认定。意思表示的确切时间是判断撤回权是否适时行使的关键。电子邮件也是一种计算机程序,在电子邮件发送前,该程序会将电子邮件移转于队列中,等待发出。按通常理解,电子邮件发送的时间节点就是电子邮件被置于“待发箱”之时,因为在这个时间点上,发件人已经完成了使其意思表示具备商业意义的一切要件,而且发送程序已经自动完成了发送过程。但是,在真正完成所有的发送程序前,发件人仍然可能改变其意思表示,举例而言,发件人可以取消电子邮件的“发送”状态,修改甚至删除电子邮件。因此,意思表示的确切时间是由电子邮件的发送时间点决定的,事实上,这时间点应当是电子邮件从“待发箱”移转于收件人“收件箱”的那

[1] BGHZ 65, 13 (14).

[2] Koch, Internet-Recht, S. 137.

个时间点。^[1]

1.1.3 要约

现在,许多网页都提供了商品及服务信息,顾客可以从网站上直接购买特定的货品及服务。但由此也带来了一些问题,首先,我们该如何确定网站上的商品及服务信息是否构成要约。是应当依据《德国民法典》第145条的规定,将商品及服务的介绍视为一种要约,还是应将其仅视为一种要约邀请,这需要有一个标准化的解释,例如,以意思表示的目的作为判断标准,这应当在法律上予以明确。^[2]网站是向世界各地的人们开放的,而且从理论上来说,如果商品及服务的介绍就能被视为一项要约的话,那么世界各地的人们都能通过点击“购买”按钮来接受要约,但这显然已经超越了在线商店的能力范围。因此,网站上的出价只能被视为一种要约邀请,邀请访问者发出要约。^[3]访问者发出要约后,网站负责人则可依据其能力决定是否接受该要约。

1.1.4 承诺

在收到消费者的要约后,网站信息的提供者可以决定是否接受该要约,即是否作出承诺。承诺可以通过多种途径予以表示。一种传统的形式是向消费者发送确认邮件。此外,由独立运行的电子代理机构自动生成的声明也被视为承诺,因为事实上电子代理机构的声明也是由使用人预先设定的程序决定的,因此,电子代理机构的行为可归于使用人的行为。^[4]与此相似的是,如果在电子邮件中表示将履行订

[1] Härtling, Internetrecht, S. 43 Rn. 73.

[2] OLG Oldenburg, CR 1993, 558.

[3] OLG Oldenburg, CR 1993, 558; Ernst, NJW-CoR 1997, 165.

[4] Hoeren, Skript Internetrecht, S. 249; Heun, CR 1994, 595 (596); Köhler, AcP 182 (1982), 126.

单要求的,那么该电子邮件即被认为是意思表示,从而构成承诺。但是,若电子邮件仅是表示了订单的有效性,而未有其他明确表示的,该电子邮件不被视为承诺。

1.1.5 电子合同的效力

1.1.5.1 电子合同的生效时间

对于通过互联网缔结的电子合同应于何时生效也是需要明确的问题。德国法中,对于当场意思表示与非当场意思表示适用不同的法律规定。其一,对于当场的意思表示,一旦收件人认识到该表示行为的存在,那么该意思表示就被视为有效,即意思表示的生效的时间为相对人“明知”该意思表示的时间。^[1]其二,对于非当场的意思表示,参照《德国民法典》第130条的规定,^[2]其生效时间为到达相对人时生效,即当意思表示到达收件人时,意思表示为生效。在这种情况下,收件人负有对意思表示的注意义务。如果收件人怠于行使其注意义务,那么即推定意思表示的生效时间为通常情况下,收件人能够收到意思表示的时间。^[3]其三,对在线通信——在线洽谈,仍被视为当面交易的一种形式,适用当面意思表示的规定。^[4]但相反地,对于通过在线商店缔结的合同,则适用非当面意思表示的规定。而对于电子邮件形式的意思表示,其生效时间则为通常情况下,合理预期收件人对邮件进行收取检索的时间。^[5]在此,应当要区分商业收件人和私人收件人。^[6]对从事商事活动的人而言,我们有理由相信他们应当

[1] Brox, Allgemeiner Teil des BGB, Rn. 156.

[2] Brox, Allgemeiner Teil des BGB, Rn. 149.

[3] Hoeren, Skript Internetrecht, S. 256; Brox, Allgemeiner Teil des BGB, Rn. 150.

[4] Hoeren, Skript Internetrecht, S. 256; Fritzsche/Malzer, DNotZ 1995, 3 (9).

[5] Hoeren, Skript Internetrecht, S. 256; Fritzsche/Malzer, DNotZ 1995, 3 (11).

[6] Hoeren, Skript Internetrecht, S. 256; Ernst, NJW - CoR 1997, 165 (166).

随时对邮件进行检索,因此,如果邮件是于工作时间发送至收件人的邮箱,那么该意思表示一经到达,即生效力;如果邮件于非工作时间发送至收件人的邮箱,那么该意思表示将于通常情况下,商业活动开始时发生效力。而对于私人收件人,一般也认为他们至少应当每天对邮件进行收取检索。但由于法律并没有明确规定收取邮件的确切时间点,因此通常认为,意思表示应于实际到达相对人“收件箱”的第二天起生效。

1.1.5.2 电子合同的撤销

通常而言,对于通过互联网缔结的电子合同,即使满足了普通合同的撤销的要件,一般也不能予以撤销。依据《德国民法典》第119条第1款的规定,只有当意思表示在发送过程中出现误传的情况下,才适用撤销的规定。因此,在意思表示发送前产生的错误,都不能适用撤销的规定。^[1]在网络环境下,数据输入错误和数据传输错误是最易产生的两种错误形式。

a) 表示错误

依据《德国民法典》第119条第1款的规定:“在作出意思表示时,就意思表示的内容发生错误或根本无意作出包含这一内容的意思表示的人,如须认为表意人在知道事情的状况或合理地评价情况时就不会作出该意思表示,则可以撤销该意思表示。”这种情况就可能于数据输入时产生,例如,消费者可能在输入意思表示或者进行数字转换时出了差错,点击了错误的按钮也可能造成同样的错误。在上述情况下,表意人可以撤销其错误的意思表示,但依照《德国民法典》第122条第1款的规定,表意人应当对收件人因信赖该意思表示有效而遭受的损失承担赔偿责任。

[1] Mehrings, MMR 1998, 30 (32).

b) 传输错误

根据《德国民法典》第 120 条的规定,在发生误传的情况下,表意人有权撤销其意思表示。通过电子邮箱系统的运作,发件人可以以发送电子邮件的形式来传递其意思表示,因此,如果发件人在发送电子邮件时,由于其邮箱系统发生了差错以致发送错误的,发件人应当有权取消错误发送的意思表示。相反地,如果有效的意思表示发送时并无差错,但由于收件人使用的邮箱系统发生了故障,即错误产生于意思表示发送之后,那么撤销规定不再适用。对于因传输错误情况下,行使撤销权所造成的损失,适用与普通合同相同的补偿规则。

1.1.6 因欠缺行为能力而无效

由于在网络中合同双方当事人都可采取匿名的方式,因而在网络环境下,产生了保护未成年人利益与保护当事人信赖利益的平衡问题。举例而言,我们并不能依据网络商店所提供的内容来判断合同缔结者的身份。如果一个只有六岁的未成年人在网站上点击了“购买”按钮,进行了“意思表示”,那么该“意思表示”无疑是无效的(《德国民法典》第 104 条、第 105 条)。同样,在互联网上,我们也无法正确判断合同相对人的行为能力,因而合同内容的提供者并不能毫无保留地信赖相对人,也不因信赖相对人而当然受保护。限制行为能力人也适用同样的规定,即在监护人或法定代理人追认前,无行为能力或限制行为能力人在网络上所缔结的合同不发生效力,该合同无效。如果合同一方因信赖相对人而行为的,也不当然受法律保护。在网络环境下,合同相对人的身份是未知的,很可能缔结合同的相对人是未成年人或限制行为能力人,^[1]因而合同提供者要承担由此产生的风险。

[1] BGHZ 120, 170 (174).

1.2 欧盟现行的法规框架

1.2.1 欧盟的法律体系

为了了解欧盟现行的法律框架,我们首先应当对欧盟的法律地位有所认识。欧盟现由 27 个主权国家组成,这 27 个国家有着不同的法律传统。因此,欧盟制定的法律,取决于成员国立法权的让渡。欧盟并不致力于建立一个统一的法律秩序。事实上,欧盟委员会的目标在于促进欧盟各国公民的贸易往来、投资活动及人员流动。为了实现上述目标,欧盟主要采用了制定法律和颁布指令的方式。欧盟所制定的法律仍必须经由成员国承认后始生效力,但这也在一定程度上限制了成员国的主权。因此,与制定法律相比,颁布指令的手段使用得更频繁,考虑到实际转化的需要,指令仅仅设定了在一定期限内所必须达成的结果,从而给予了成员国更为充分的自由裁量余地。

1.2.2 电子合同的法律构架

现在,欧盟电子合同的法律框架主要由三部指令组成。其中,两个为基础性指令:《电子商务指令》[the *Electronic Commerce Directive* 2000 (ECD, 2000/31/EC)]和《电子签名指令》[the *Electronic Signature Directive* 1999 (ESD, 1999/93/EC)],另一个重要的指令是《远程销售指令》[(the *Distance Selling Directive*, DSD, 1997/7/EC)],该指令并不仅在电子合同领域适用。

1.2.2.1 《电子商务指令》(ECD)

《电子商务指令》的目标在于推动电子商务的发展。据欧盟官员所言,《电子商务指令》的起草颇费周章,该指令可在成员国市场之间

适用。^[1]《电子商务指令》的主要内容在于:第一,规定了来源国原则(the country of origin)。即明确规定了禁止对其他成员国提供的信息服务设定任何限制,同时规定了各国须承担监督该禁止贯彻情况的义务。第二,规定了信息标准,对中介服务提供者的责任及电子合同的法律责任予以了明确规定。第三,规定了电子合同的缔结。指令的第三部分,第9至11条对电子合同的缔结予以了规定。

该指令第9条规定了电子合同的发送方式及实现形式。为适用该条,各成员国必须为电子合同的缔结建立良好的法律背景。但由于在不同国家有着不同的民法规范,所以该条的适用在各成员国也遇到了不同的障碍,这尤以“书面方式”的规定最为突出,因为各国对“书面形式”的理解截然不同,所以该指令只能对此做抽象性规定,而无法制定完整明确的规定。^[2]该条也规定了该指令的适用例外:(a)不动产所有权的取得与转让;(b)法律规定必须经法庭、公共权力机关或者政府权力行使才可缔结的合同;(c)非基于贸易、商业或职业目的,必须由保证人保证或担保人提供担保物的合同;(d)由婚姻家庭法或继承法调整的合同^[3]。

第10条则对消费者保护予以了规定。该条明确规定了网站所应当提供的信息,根据该条第3款,电子合同的使用者应像普通合同当事人一样,承担妥善保存合同,以备查阅的义务,对合同应以适当的处置。

[1] 欲了解《电子商务指令》(ECD, 2000/31/EC)的具体条款和条款解释,请浏览该链接:http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009945。

[2] Wellbrock, Ein kohärenter Rechtsrahmen für den elektronischen Geschäftsverkehr in Europa § 6 A I.

[3] Art. 9 para 2 ECD 2000/31/EC.

第11条则是关于电子合同要约的发出问题。^[1]

如前文所述,《电子商务指令》在实施过程中遇到的最大困难在于欧盟制定的法律必须经由各成员国的立法活动将其转化为国内法,才能得以适用。由于欧盟各国存在着不同的法律体系,所以其转化的途径也截然不同。一般而言,欧盟各国的法律体系可归为四类:德国法体系(德国、奥地利、希腊)、民法体系(法国、西班牙、葡萄牙、意大利、比利时、荷兰、卢森堡)、普通法体系(英国、爱尔兰)、北欧法律体系(丹麦、瑞典、芬兰)。^[2]在下文中,将着重介绍德国、法国和英国的法律体系。

a) 德国

德国法是以修订《德国电信服务法》(Teledienstgesetz, TDG)和《电信服务数据保护法》(Teledienstschutzgesetz, TDDSG)的方式将《电子商务指令》转变为国内法的。TDG对电子合同的定义、适用范围、来源国原则、告知义务、合同提供者的责任等问题都作出了规定。^[3]TDG的第四条吸纳了来源国原则,规定了凡进入德国境内的服务商均受德国法的制约。在德国,对来源国法的适用也存在例外规定,对于反垄断、保单冲突、保险公司监管、数据库保护、知识产权等领域,只能适用德国法,而不再适用本国法。^[4]

依据TDG第1031条第5款之规定,当事人(包括消费者)达成仲裁协议的,民事仲裁程序可以通过电子形式进行。这样的改变对德国

[1] Art. 11 ECD 2000/31/EC.

[2] Müller/Roessler, DuD 1999, p. 497; note that after the accession of ten new Member States in May 2004 these groups might have to reassessed and altered in the future.

[3] Wellbrock, Ein kohärenter Rechtsrahmen für den elektronischen Geschäftsverkehr in Europa § 3 A p. 38.

[4] RIW 2002, p. 184; Schack MMR 2000, p. 53.

法的民事程序产生了重要影响,同时也为消费者提供了更有效的法律保护。^[1]

德国法在消费者保护领域进行了最大的修订。基于《电子商务指引》第10条和第11条的规定,《德国民法典》第312e条已进行了修正,明确规定了经营者在缔结电子商务合同时必须承担一定的义务。^[2]《德国民法典》除了对来源国原则做出规定外,还参照《电子商务指令》第9条之规定,对电子合同的相关问题做出了重要规定。且第312e对于使用远程服务或媒体服务订立关于供应货物或提供服务的合同,同样适用。^[3]相关的服务种类可参照TDG,具体包括:网上银行、网络商店、网上拍卖等。《德国民法典》第312e条规定的经营者义务包括:提供顾客在预定前能够借以辨认和更正输入错误的适当、有效和便利的技术条件;适时地在顾客预定前简明地告知法律规定的信息内容;通过电子途径不迟延地证明顾客订单的到达;^[4]但需要明确的是,对消费者订单的批准并不构成合同的承诺。^[5]如果网站设立人怠于履行相关义务的,电子合同的相对人有权请求赔偿损失。

b) 法国

法国将《电子商务指令》转变为国内法的历程比较漫长,但最终在2004年,经过修订的“Loi n° 2004 - 575”得以正式实施。该法第1~4条对电子合同作了一般规定,第5~9条规定了电子合同提供者的责任,第10~28条则实现了将《电子商务指令》其他内容转化为国

[1] EGG Art. 2.

[2] Palandt section 312 e para 1.

[3] Palandt section 312 e para 2.

[4] Palandt section 312 e para 3.

[5] AG Hamburg NJW - RR 04, 1284.

内法。

c) 英国

在克服一定障碍后,英国议会于2002年颁布了《电子商务法》,^[1]从而将《电子商务指令》的大部分内容转变为其国内法。2001年,在《电子商务指令》实行后两个月,英国颁布了《立即停止令》(Stop Now Orders),^[2]该法令包含了《电子商务指令》中关于消费者保护的基本内容。《电子商务法》则主要规定了来源国原则。因此,如果在线销售商和广告商设立于英国境内,那么就将受英国法的管辖(一方为消费者的合同或者合同已约定所适用法律的除外)。在线交易商必须清晰详细地提供身份信息,准确描述商事活动的性质,并对如何完成在线交易提供指引,这是在线交易商应当承担的义务。^[3]

1.2.2.2 《电子签名指令》(ESD)

《电子签名指令》的目标在于实现电子签名的越境承认。^[4]该指令对电子签名的安全标准以及责任承担的相关问题予以了规定。^[5]该指令第2条规定了三重安全标准,分别是“电子签名”、“高级电子签名”、“合格电子签名”。^[6]

“电子签名”指的是包含了可用以认证的电子化数据;“高级电子签名”是指该签名与其使用者存在着——对应的关系,即该电子化数据专属于某一主体;而“合格电子签名”较“高级电子签名”,须满足更

[1] <http://www.opsi.gov.uk/si/si2002/20022013.htm>.

[2] <http://www.opsi.gov.uk/si/si2001/20011422.htm>.

[3] <http://www.dti.gov.uk/sectors/ictpolicy/ecommsdirective/page10133.html>.

[4] Hoeren - Skript Internetrecht, p. 259 - <http://www.uni-muenster.de/Jura.itm/hoeren/>.

[5] <http://europa.eu/scadplus/leg/de/lvb/l24118.htm>.

[6] Art. 2 ESD 1999/93/EC.

多的条件。指令第5条规定了“合格电子签名”与手写签名具有同样的地位且可作为证据被法庭采信。^[1]《电子签名指令》的另一重要内容是关于各成员国的责任承担问题。第6条第1款即明确规定了有资质的服务提供者,应当对其发放的资格证书或保证书承担损害赔偿责任,^[2]责任范围及于资格证书或保证书的内容、所有者以及其中所使用的各项数据。^[3]

a) 德国

德国已于1997年通过了《电子签名法》,^[4]但该法与《电子签名指令》在某些问题上却存在着冲突,因此,德国对《德国民法典》、《民事程序规则》和《电子签名法》进行了修订,从而将指令转化为国内法。经修订的德国签名法第4条第1款虽然规定认证服务经营者无须得到任何授权,但它们必须符合一定的标准,且必须向相关管理部门履行通知的义务。^[5]德国的签名法还采纳了《电子签名指令》第2条的规定,对经营者的责任予以了明确。^[6]除了《电子签名法》,德国民法典第126a条介绍了各类电子化签名,该条第3款则明确规定了将电子签名的效力等同于手写签名。德国《民事程序规则》也已做出了修订,经修订后的该规则将初步证据(292a条)和待证证据都纳入其规定范围(371条第2款)。

[1] Art. 5 ESD 1999/93/EC.

[2] Art. 6 para 1 ESD 1999/93/EC.

[3] Art. 6 para 1 a-c ESD 1999/93/EC.

[4] <http://www.online-recht.de/vorges.html?SigG>.

[5] http://bundesrecht.juris.de/sigg_2001/index.html.

[6] www.uni-leipzig.de/~urheber/ressrc/material/seminare/infoges/seidel-digital-signatur.pdf.

b) 法国

在法国,与《电子签名指令》相关的两部重要法律分别是于2000年出台的“the Loi 2000-230 du 13 mars 2000”^[1]和2001年出台的“the Décret n°2001-272 du 30 mars 2001”^[2]。前者对法国的证据规则进行了修正,承认了法国最高法院于1997年作出的判决:“传真”可作为证据使用。同时还规定了“书面”意思表示不再受限于任何形式要件,^[3]因此,对于可呈现于法庭的电子邮件,也可作为证据被采信。后者对电子签名的要求作出了规定,使电子签名等同于手写签名。与许多其他国家相比,法国并没有接受关于特许经营者的规定。法国认证委员会(COFRAC, Comité français d'accréditation)仍然沿用了1994年法国关于特许的有关规定。

c) 英国

英国对《电子签名指令》的采纳分两步进行。首先是于2000年颁布了《电子通讯法案》(the Electronic Communications Act 2000, ECA)^[4],其次是于2002年颁布了《电子签名规则》(the Electronic Signatures Regulations 2002)^[5]。《电子通讯法案》第7条第1款即明确规定:对于以电子签名形式签署的文件,同样可作为证明文件真实性和完整性的证据。

《电子通讯法案》第8条和第9条则要求有关部门尽快制定相应的详细规范。于是,英国于2002年颁布了《电子签名法》,内容包括:电子签名的定义(第2条)、认证服务的监管(第3条)、相关责任(第4

[1] J. O. n° 62 du 14 mars 2000, p. 3968.

[2] J. O. n° 77 du 31 mars 2001, p. 5070.

[3] Cour de cassation, Chambre commerciale, JCP 1998, Jurisprudence, p. 178.

[4] <http://www.legislation.hmso.gov.uk/acts/acts2000/20000007.htm>.

[5] <http://www.legislation.hmso.gov.uk/si/si2002/20020318.htm>.

条)和数据保护(第5条)等。由于英国法并不注重于形式要件,因此英国对《电子签名指令》的吸纳主要体现在认证程序方面。

1.2.2.3 《远程销售指令》(DSD)

第三个重要的指令是《远程销售指令》,主要用以规范各类远程销售行为,例如:对远程销售商通过自动销售手段销售的行为,或以倾力推销手段销售的行为,指令保护消费者享有否定其效力的权利。除此,鉴于购买者在购买远程销售的商品之前无法检查货物品质,因此该指令赋予了消费者以特殊撤销权。

《远程销售指令》的适用范围包括了所有在合同缔结的过程中,使用远程通信手段缔结的合同。

但《远程销售指令》所针对的是各类有偿服务,因此,在适用该指令时,首先应当判断商品或服务的性质。

a) 德国

一开始,德国立法者采用的是制定一部新法来规制远程销售合同,而不是直接将《远程销售指令》纳入《德国民法典》之中。^[1]但随后,立法者又将该部新制定的法律纳入了民法典范畴,实现了对指令的内国化。《德国民法典》第13、14条定义了消费者和经营者,第361a、b条项规定了消费者的撤销权。2001年,德国掀起了现代化立法的浪潮,^[2]立法者将《远程销售法》(Fernabsatzgesetz)的大量规定纳入了民法典。现在,《德国民法典》第312b-d条奠定了德国法关于远程销售合同的基础,成为了最根本的法律规范,b项规定的是远程销售规范所适用的合同类型,c项和d项则规定了经营者运用远程销售方式所需承担的义务及消费者的权利。

[1] Fernabsatzgesetz: <http://dejure.org/gesetze/FernAbsG>.

[2] BGBl. 2001, p. 3138.

b) 法国

在法国,存在一个根本问题在于未对“消费者”和“经营者”有过明确的定义,未将二者明确区分,即使是法国最高法院也仅是对这个进行了模糊的规定,所以这往往成为了法庭审理的焦点问题。例如,某房产经纪人购买了一个报警装置,那么他即被视为消费者;^[1]但若某珠宝商购买了一个灭火器,他却仍被视为一个经营者。^[2]诸如此类定义上的矛盾和问题,至今未予解决。^[3]由于法国法的规定与《远程销售指令》的规定基本一致,因而无须费力将指令融入法国的现行规定。现在,LSI^[4]已经吸收了指令的一些规范,对私人领域的问题作出了进一步的解释和规定。^[5]

c) 英国

《消费者保护(远程销售)规范2000》的颁布是英国将《远程销售指令》纳入其法律体系的表现。^[6]该法规同时还涵盖了进行电子商务往来的其他手段,如:电子邮件、电话交易和传真。关于合同义务的解除,该法则规定必须采用书面或其他可持久表现的方式。^[7]

[1] Cass. civ. lère 28.04.1987, J. C. P. 1987 II, 20893, note paisant, but contra, Cass. civ. lère 18.04.1986, R. T. D. 1987 Vol. 2, p. 86.

[2] Cass. crim. 27.06.1989. D. 1990. Som. p. 360.

[3] Lilian Edwards, The New legal Framework for E-Commerce in Europe, 2005, p. 102.

[4] Projet de loi sur la Société de l'information, Doc. Assemblée Nationale Nr. 3143.

[5] Lilian Edwards, The New legal Framework for E-Commerce in Europe, 2005, p. 104.

[6] Statutory Instrument 2000/2334.

[7] Lilian Edwards, The New legal Framework for E-Commerce in Europe, 2005, p. 285.

2. 欧洲关于电子合同立法的相关经验

如前文所述,现行欧洲关于电子合同的法律框架主要由三个指令组成:

* 《电子商务指令》(Directive 2000/31/EC)。该指令是由欧洲议会和欧洲理事会于2000年8月颁布,主要规定了信息服务的相关法律问题,尤其是国内市场上的电子商务活动。

* 《电子签名指令》(Directive 1999/93/EC)。该指令是由欧洲议会和欧洲理事会于1999年12月13日颁布,构建了电子关于电子签名的统一框架。

* 《远程销售指令》(Directive 1997/7/EC)。该指令是由欧洲议会和欧洲理事会于1997年5月20日颁布,规定了远程销售合同的消费者保护问题。

在这部分,我们将重点探讨《电子商务指令》和《电子签名指令》的有关规定。

2.1《电子商务指令》^[1]

《电子商务指令》^[2]的目标在于最大程度地推动电子商务的发展。其主要内容之一是“来源国原则”。即明确规定了禁止对其他成员国提供的信息服务设定任何限制,同时规定了各国须承担监督该法律指令执行情况的义务。此外,该指令还对信息标准、中介服务提供商责任、合同的电子化缔结等问题做了重点规定。

2.1.1 定义

在《电子商务指令》中,最为重要的术语在于电子合同的缔结,如:信息社会服务、服务提供者、服务接受者、消费者、协作领域等。这些定义在指令第2款中都有明确规定。

1. 信息社会服务

指令98/48/EC对指令98/34/EC第1条第2款的规定作出了修正,因此,对信息社会服务应当依照该条规定的含义作出解释。^[3]《电子商务指令》将信息社会服务定义为:为了获取报酬而提供的任何服务;将远程服务定义为:通过电子手段和依个人要求而接受的服务。^[4]

“远程”即意味着合同当事人并没有同时在场,没有进行面对面的磋商。服务的范围不包含在医生诊所接受的诊治服务或者是旅行社的订票服务,因为在提供上述服务的过程中,即使使用了电子设备,

[1] ECD, as referred to in the following.

[2] DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

[3] Art. 2 Directive 2000/31/EC.

[4] Art. 2 Nr. 2 lit. a Directive 1998/48/EC.

但委托人始终是亲自出现在现场的。另一个例子就是消费者通过商店的电子目录进行查询,这种情况下,消费者也必须出现在现场才能最终实现服务。^[1] 因此,有没有亲自出现在现场是判断是否构成远程服务的关键要素。

“通过电子手段”则表明了该项服务是经由电子方式进行最初发送,并在其目的地通过电子手段进行接收的。其中包括了技术处理(包含数据压缩)、数据保存以及整个发送过程,都是通过电报、广播、光学手段或者其他电子手段进行的。但对于自动取款机服务、自动售票机服务、电传服务以及依靠电话或传真提供的服务,都不构成远程服务。^[2]

“个人请求接受服务”是指当消费者通过其个人程序提出请求后,经营者则通过数据发送的方式为其提供服务。^[3] 所谓的“由一点发送至多点发送”则并不是信息社会服务的组成部分,一点发送至多点服务并非基于某个特定个人请求的,而是面向不特定公众提供的服务,任何个人接收者都可以享受。^[4] 这种服务包括:电视服务、电台广播服务、文字电子广播服务等。单从字面理解来看,“混合交易”(Hybrid Transactions,也发生在线下交易中)显然是排除于指令所规定的服务之外的,但是,即使是在线达成的合同,但其中绝大部分仍需要在线下履行,线下部分是在线合同的一部分内容,因而将混合交易排除在指令之外似乎并非起草者的原意。既然如此,那么为什么购买电子书和购买纸质书要适用不同的规则呢?虽然两者在内容上并没有实质性的区别。或者说混合交易规则的最初设计者在设计之

[1] Annex V 1 Directive 1998/48/EC.

[2] Annex V 2 Directive 1998/48/EC.

[3] Art. 2 Nr. 2 lit. a Directive 1998/48/EC.

[4] Annex V 3 Directive 1998/48/EC.

初就仅将其适用范围限定于在线交易呢?无论基于何种解释,显然都不符合欧盟的意旨,因而混合交易应当包含在指令所涵盖的服务范围之内。^[1] 许多欧盟成员国都直接采用了《电子商务指令》对于“个人请求接受服务”的定义,^[2]但考虑到该定义的复杂性,一些国家对此采用了不同的规定办法。例如,波兰的立法机构使用“以电子手段提供的服务”取代了“信息社会服务”的概念,^[3]指当个人请求接受服务时,服务提供者通过一个公共网络,使用电子信息系统收集和发送数据,从而向请求者提供服务,使双方免于面对面地进行该项服务。^[4]在保留了欧盟定义的大部分要素的基础上,波兰法还引进了“电子信息系统”的概念,该系统是指任何通过电报、无线电波、光学设备以及其他使用电磁手段,来保证通过网络进行数据处理、存储、传送和收集的共同运转的硬件和软件装备。此外,波兰的定义着重关注的是公众网络,因而局域网被排除在其范畴之外。然而,尽管定义不同,但波兰立法中所涉及的服务名目与欧盟所试图涵盖的广泛的服务类别,具有一致性。^[5]

2. 服务提供者

服务提供者是提供信息社会服务的自然人或法人。^[6]例如,在网上出售商品的零售商、数据仓库提供者或搜索引擎的经营者等。如

[1] Hörnle, International Journal of Law and Information Technology, p. 333 et sqq.

[2] e. g. England: Electronic Commerce (EC Directive) Regulations 2002 Sec. 2 lit. b; Finland: Act on Provision of Information Society Services 2002 Sec 2; Spain: Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico Annex a); Portugal: Decree - Law no. 7/2004, of 7 January Art. 3 1.

[3] Kryczka, International Journal of Law and Information Technology, p. 55 et sqq.

[4] Kryczka, International Journal of Law and Information Technology, p. 55.

[5] Kryczka, International Journal of Law and Information Technology, p. 55.

[6] Art. 2 lit b Directive 2000/31/EC.

果这些服务经营者无期限地使用其固定的设备,在网上从事经营活动,那么这些服务提供者即告成立。他们在现实中是否真实存在、是否使用了电子手段,都不是成为经营者的成立要件。^[1]

3. 服务接受者

任何自然人或法人,无论是否出于其职业目的,如果他希望通过信息社会服务获取或搜寻信息,又使用了信息社会服务的,即为服务的接受者。^[2]

4. 协作领域

据欧盟电子商务立法机构所言,成员国法律体系放弃采用的协作领域的规定,在电子商务(尤其是信息社会服务经营者或信息社会服务机构)中也可得到适用,而不论这些规定属一般规定还是特殊规定。^[3]但协作领域仅仅包含了与在线交易活动相关的领域,而不是与产品安全标准、产品的商标权或者产品责任等仅与商品相关的领域。^[4]具体而言,协作领域关注的是服务经营者从事信息社会服务活动所要求的资格、授权或者公示。除此,经营信息社会服务的行为、质量、服务内容以及责任等,都属协作领域所涵盖的范围。

5. 国内市场与进入自由

即使《电子商务指令》并无意在国际私法方面制定新的规范,但国内市场却迫切需要对成员国与成员国之间的服务行为和国外服务经营者的市场准入问题,制定新的适用规范。因此,指令第4条规定了“禁止限制”,允许国外的经营者进入成员国市场。但对于非专门

[1] Art. 2 lit. c Directive 2000/31/EC.

[2] Art. 2 lit. d Directive 2000/31/EC.

[3] Art. 2 lit. H Directive 2000/31/EC.

[4] Recital 21 Directive 2000/31/EC.

从事信息社会服务的经营者,则允许限制其进入。^[1]

第3条规定的“来源国原则”则较为复杂,该条也是整个指令最为重要的规定。如前文所述,当使用信息社会服务(包括混合交易)时,若出于保护公众、消费者以及投资者的健康与安全考虑,那么可对其他成员国的信息社会服务使用予以限制,各成员国必须受该条的制约。^[2]

“来源国原则”包含了两方面的内容。一方面,该原则规定了成员国负有不得限制建立在其他成员国的任何经营者提供的信息社会服务的义务。^[3]这就意味着成员国必须对其他成员国的立法进行了解。^[4]但似乎这样的要求并不可行,因为要实现真正的利益共同体或者在某些领域实现完全的一致,目前看来并不现实。^[5]为了避免出现这些难题,《电子商务指令》在附件中,列出了可排除适用来源国原则的特定情况,包括:版权法、电子货币的发放所适用的法律、人身保险所适用的法律^[6]、合同约定适用的法律、消费合同中的合同义务、不动产交易中产权移转的某些方面、是否允许垃圾邮件等。另一方面,来源国原则规定了成员国应当对服务提供者进行监管,使他们“在本国领域作出决定”,以遵守协作领域所规定的地方法律。相反地,英国的立法机构似乎将来源国原则理解为了一条强制性规定,要求必须保障欧共体范围内的服务提供自由。执行指令的指导性文件指出,指令第3条是在公约第49条的规定下,执行关于服务提供自由

[1] Wellbrock, p. 33.

[2] Art. 3 para 4 Directive 2000/31/EC.

[3] Haubold in Gebauer/Wiedman, Chapter 8 Mn. 22.

[4] Tettenborn, Europaeischer Rechtsrahmen fuer den elektronischen Rechtsverkehr, K&R1999 p. 252 et sqq.

[5] Wellbrock, p. 46.

[6] Wellbrock, p. 45.

的规定。^[1] 因此,来源国原则在不同的成员国,其适用范围是不同的。因而很可能最终执行的只是该原则的最低标准。^[2]

尽管序言 7 声明,上述规则并不会为国际私法设定新的规则,但该规则与国际私法间的关系仍然存在争议。^[3]

6. 告知义务和商业往来

依照《电子商务指令》的规定,经营者必须以简单、直接的方式提供他们的各类信息,^[4]尤其应包括:名称、注册地、电子邮箱、商业登记簿的号码(如果可行)、VAT 号码、责任机关。商品价格和运费也应当可供方便获取。^[5] 但《电子商务指令》仅仅规定了信息应当能够“方便、直接、永久”地被获取,因而对于只有相关信息供链接是否满足该条的规定,并不明确。法国的立法机构是第一个着手对信息提供做强制性规定的,它明确规定了经营者必须在其主页和每一个可能缔结合同的站点上都提供充分的信息。^[6] 尽管这样的规定可以对某些不确定的方面予以明确,但最终法国立法机构仍然决定采纳《电子商务指令》的措辞。英国和德国的立法机构也都采用了指令的原文。对此,英国的专家们只是建议使用超链接^[7],而在德国,就此问题却引发了激烈的争论。一种观点认为,使用超链接已经充分满足了法律

[1] Hörnle, International Journal of Law and Information Technology, p. 333; Waelde in Edwards/Waelde, p. 6.

[2] Haubold in Gebauer/Wiedman, Chapter 8 Mn. 22.

[3] See next part I 3 a.

[4] Art. 5 Directive 2000/31/EC.

[5] Wellbrock, p. 91.

[6] See Art. 9 in the original version of the “Projet de loi pour la confiance dans l'économie numérique, n° 528”, déposé le 15 janvier 2003, on <http://www.assemblee-nationale.fr/12/projets/pl0528.asp>.

[7] Rigby/Marsden, p. 8 et sqq.

所要求的“足以显著以致可毫无延迟地轻松发现”^[1];另一种观点则认为,根据“远离双击原则”(Two - Clicks - Away - Principle),超链接并不能提供直接的信息获取。^[2] 德国法院最后认定,超链接是因特网上频繁使用的技术,完全能够通过第二次点击获取信息^[3],因而超链接符合指令的规定。^[4]

对于服务接受者保护的另一方面在于商业往来的范围。该指令第 6 条规定了服务提供者的信息提供义务。接受者必须能够判断服务提供者的行为是否属于商业行为,服务提供者也应当对接受者的意图可以察觉。该原则在电子广告和电子博彩上也可适用。^[5]

2.1.2 小结

《电子商务指令》出台的目的在于最大限度地促进电子商务发展。这样的努力在很多方面都获得了成功。指令就责任领域的重要问题、电子合同和电子广告等都作出了规定。但遗憾的是,指令对于来源国原则的规定,对于个人消费者和服务经营者的特殊规定都还存在许多的不确定性。然而,除了所存在的问题,指令已经实现了在欧洲建立一个电子商务法律框架的目标。

2.2 电子签名指令

《电子签名指令》主要规定了下列几方面的内容:

[1] BT - Drucksache 14/6098, p. 21; Hoenicke/Hulsdunk, MMR 2002 p. 415 et sqq.

[2] Steins, WM 2002 p. 53 et sqq.

[3] OLG Hamburg NJW - RR 2003, p. 985 et sqq.

[4] OLG München, MMR 2004, p. 36 et sqq.; see also OLG Hamburg, MMR 2006, p. 675.

[5] Wellbrock, p. 95.

2.2.1 适用范围

《电子签名指令》的目标在于,推动电子签名的使用,并建立起一个关于欧盟市场自由流动的法律框架。^[1] 但如果成员国已经存在着关于公共政策和公共安全的规定,那么对于各国有关提供机密信息服务的规定,指令也无意将其统一化,作出一致的规定,强制电子签名的适用。^[2] 但指令的适用存在一个重要例外,即对于合同是否成立、是否有效、是否符合法定形式要件等问题,不属于该指令的调整范围,不适用该指令的规定。^[3]

2.2.2 定义

《电子签名指令》第2条规定了三个层次的安全标准:“电子签名”、“高级电子签名”、“合格电子签名”。^[4]

电子签名是最低水平的一种签名形式,它包含了以电子形式存在的数据,并可用以进行认证服务。但电子签名并不能杜绝欺诈,因此它们并无法对安全性做出任何保证。

“高级电子签名”是指该签名与其使用者存在着——对应的关系,即该电子化数据专属于某一主体。如果签名者的电子签名发生了变化,他也可通过电子手段予以识别。对于法律明文要求采用手写形式的,高级电子签名不予适用,不可取代手写签名。^[5]

合格的电子签名必须附有认证证书。认证证书是通过非对称密码系统的运作实现的,非对称技术采用的是一对“钥匙”,认证机构使

[1] Art. 1 Directive, 1999/93/EC, OJ L 13, p. 12.
[2] Recital 6 Directive, 1999/93/EC.
[3] Art. 1 Directive, 1999/93/EC.
[4] Art. 5 para 1 Directive 1999/93/EC.
[5] Lammich in Moritz/Dreier, Rechtshandbuch zum E - Commerce, p. 120 Mn. 323.

用“密钥”对数据进行加密,签名的接收者则可通过“公钥”对加密数据予以解密,公钥是与私钥相对应的概念。^[1] 因此,只有采用了非对称技术进行认证的电子签名才是合格的电子签名。^[2] 此外,认证证书必须经由安全签名创制设备设计发放,认证机构必须保证经由该设备的硬件或软件产生发放的电子签名数据具备唯一性,即特定数据只产生一次,不会重复,而且该数据不致被非法获取或伪造,该签名的使用人可以排除他人使用该数据来对其电子签名予以保护。^[3]

总之,电子签名和高级电子签名并不需要特殊技术手段的支持,但合格电子签名必须依靠特殊技术的应用。

2.2.3 电子签名的定位

合格电子签名被认为与手写签名具备同等的效力,且可在法庭出示作为证据。^[4] 为了符合手写签名的安全标准,合格电子签名必须满足一定的条件,且这些要求也应当尽可能地准确。^[5] 《电子签名指令》对于合格电子签名的基本技术要求进行了进一步规定,要求这些技术应当是机密且值得信赖的,能够防止他人恶意操控,并能够保证该技术和密码的安全,但这些规定似乎都只是抽象性的规定。^[6] 尽管指令试图建立一个独立于当前现存技术标准,但由于技术能力的限制,认证证书也只能受制于非对称技术,只能依靠现存的技术操作。^[7] 基于立法原意,如果将来的技术手段能够符合现行的非对称加密系统的安全标准,那么指令对电子签名的技术手段应做相应

[1] Strömer, p. 304.
[2] Gravesen/Dumortier/Van Eecke, MMR 1999 p. 577 et sqq.
[3] Art. 2 Nos 4 - 5, Annex 3 Directive 1999/93/EC.
[4] Art. 5 Directive 1999/93/EC.
[5] Schwemmer, DuD 2000 p. 70.
[6] Annex II f) Directive 1999/93/EC.
[7] Recital 8 Directive 1999/93/EC.

的调整,采用新技术替代非对称加密技术。^[1]

2.2.4 电子签名的责任

《电子签名指令》另一方面的主要内容是不同成员国的责任承担。根据该指令第6条第1款的规定,认证服务的提供者应当对其向公众发放的认证证书或者向公众承诺的证书所造成的损害承担责任。^[2]即如果受害人合理信赖该认证证书的,认证服务提供者应当对证书内容、证书归属以及证书数据使用的争议承担法律规定的责任。^[3]出于安全方面的考虑,只有当认证机构是合法建立的前提下,受害人受到的损害才能获得赔偿。^[4]另一方面,认证机构为了减轻自身责任,可以对证书的使用进行一定限制,从而对使用人因违反限制而遭到的损害,免于承担责任。

2.2.5 他国认证证书的认可

《电子签名指令》第7条规定了成员国应当对第三国发放的认证证书予以承认。如果他国发放的证书符合本指令附件一和附件二的要求,那么该证书应当得到公认。但遗憾的是,现在的控制体系显然不能采纳这样的承认要求。就现在的状况来看,证书提供者要么在某个成员国能够得到自动承认,要么是基于双边或多边条约而被缔约国公认,要求无条件地承认显然不符合现实。此外,另一个能够得到承认的前提在于认证机构对其认证的可靠性提供担保。^[5]德国的立法机构认为应当对第三国发放的认证证书设定一定的要求,并在列表中对这些要求进行完整的罗列,从而在欧盟与第三国未订立条约的基础

[1] Rosnagel, K&R 2000 p. 313 et sqq.

[2] Art. 6 para 1 Directive 1999/93/EC.

[3] Art. 6 para 1 a - c Directive 1999/93/EC.

[4] Annex II h) Directive 1999/93/EC.

[5] Art. 7 para 1 lit. a - c Directive 1999/93/EC.

上,也可对第三国的认证证书进行承认;与此同时,英国的立法者甚至都决定不实行指令的这项规定,因为他们觉得这项规定并不必要。他们认为《电子签名指令》第5条的规定并不基于认证机构的设立地位于何处,^[1]根据这样的特殊理解,那么对于高级电子签名或安全签名设计装置的认定将会简单得多。但事实上,欧盟并没有公布这样的操作办法。

2.2.6 小结

《电子签名指令》的目标在于建立一个电子签名的法律框架。但直至今日,电子签名还未成为商业活动中普遍使用的手段,因而很难说这样的目标是否已经实现。然而,我们也不能就此否认电子商务统一立法的努力,更不能怀疑接受他国发放的电子签名是建立电子签名使用体系的一个基本要求。因此,《电子签名指令》为推动电子签名的发展奠定了良好的基础,我们也坚信电子签名在将来一定可以得到更多的使用。

[1] <http://www.dti.gov.uk/sectors/infosec/electronic/sig/Note/page10058.html>.

3. 欧洲各国关于电子合同立法的执行

3.1 各国对《电子商务指令》的执行

在上文中,我们主要论述了《电子商务指令》的特点,在这部分我们将详细分析电子合同的缔结以及在《电子商务指令》实施前,各成员国(以德国、英国、法国为例)对电子合同的特殊法律构架。电子合同的缔结有着重要的经济意义,因而须独立成章予以探讨。第二部分则将对该指令中有关电子合同的规定予以归纳。最后,我们则将关注于各成员国《电子商务指令》的执行情况。

3.1.1 《电子商务指令》实施前的法律框架

3.1.1.1 《电子商务指令》在德国的执行情况

如前文所述,在普通商业买卖中,电子合同与普通合同具有同样的特征。这两者最主要的区别在于电子合同是“电子”世界的产物,是通过互联

网和数据记录的形式完成的。

既然一般合同是电子合同的出发点,电子合同是以普通合同为基础的,那么我们有必要在此简要阐述一下普通合同缔结的主要特征,从而明确电子合同缔结的关键要素。依照《德国民法典》第145条的规定,合同的成立必须有意思表示,且该意思表示必须形成双方的合意,因而合同必须有两方当事人。先发出的意思表示为“要约”,后发出的意思表示为“承诺”。^[1]

“要约”是内心意思的一种表现方式,要约必须向受要约人发出,只要受要约人同意该要约,那么合同即告成立。^[2] 受要约人的同意即构成承诺。^[3]

除了上文1.1.2至1.1.5部分所做的详细论述外,在《电子商务指令》施行前,德国法对合同的有关形式要件做了如下规定:

依照德国法,特殊合同必须满足特定的形式要件。例如,《德国民法典》第766条的规定,个人保险合同必须采用书面的形式。依照《德国民法典》311b条第1款规定,其他合同,如土地所有权转让合同,也必须做成公证证书。同样,依照第518条第1款的规定,赠与约定合同也需要做成公证证书。除此,根据126条第1款之规定,书面形式为法律所规定的,证书必须由做成证书的人以亲笔签名或借助于经公证认证的画押加以签押。^[4] 而根据德国法院的判例,以传真形式所进行的意思表示并不符合书面形式的要求。这意味着通过网络进行的意思表示同样不符合第126条规定形式要件。但随着《电子销售指令》的实施,德国的立法机构通过对现行法修正的方式解决了这

[1] Brox, Mn. 165.

[2] Brox, Mn. 165.

[3] Brox, Mn. 176.

[4] BGHZ 121, 224.

个问题,《德国民法典》第126条第3款、126 a条和126 b条的规定就是在签名指令(99/93/EC)和《合同形式要求调整法》(the Formality Requirements Adjustment Code)^[1]颁布实施的基础上,纳入到《德国民法典》之中的。依《德国民法典》第126(3)条的规定,除法律另有规定外,书面形式可以由电子形式代替。且《德国电子签名法》也明确规定,电子形式具备法律效力,为意思表示的行为人必须具有表示行为,且该标识必须采用符合规定的电子签名形式。^[2]据签名法第2条第3款之规定,有效的电子签名与其签名者具有确定的关系,即该电子签名可以与签名密钥的所有者相对应,通过此特殊的电子签名可达到证明签署人(密钥所有者)和排除其他人的效果。特定的电子签名必须与所签署的文件相对应,以保证之后文件上的任何更改都能予以发现。此外,电子签名还必须得到认证中心的认证,并由相关保障签名安全的电子签名创设机构发布承认。

因此,在《电子商务指令》实施前,合同所需满足形式要件在德国法中已经予以了规定。但对于某些合同,尤其是关于个人安全的合同(《德国民法典》第766条)和消费贷款合同(第492条第1款)仍然被明确地排除在电子签名的适用范围之外。

如果依照《德国认证法》(the Authentication Code, 德语为“Beurkundungsgesetz”)的有关规定,某文件必须采用公证证书的形式,那么做出公证证书的公证人必须承担特定的义务。例如:依据该法第17条的规定,公证人必须承担审查和引导的义务。此外,依据该法第8条之规定,公证证书必须保留副本,以备调阅、证明及签

[1] Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr from July 13 2001, BGBl. I, p. 1542.

[2] Gesetz über die Rahmenbedingungen für elektronische Signaturen (SigG) from May 16 2001, BGBl. I, p. 876.

署。由于上述认证程序并不能完全通过电子方式或互联网进行,所以对于那些必须以公证证书做成的合同,不能采用电子方式进行缔结。

所以,在《电子商务指令》施行前,对于某些法律明确规定了形式要件的合同,以及法律明确要求以公证证书做成的合同,都不能采用电子的方式缔结。

除上述问题外,考虑到“电子错误”问题的重要法律意义,我们将在下文中论述德国的成文法和案例法中关于电子错误处理的主要法律规范。

合同当事人在进行意思表示的过程中,可能会产生所表示的意思与其原意不相符合的情况,而这种现象极大程度上是由于他们自身表述错误所致。合同当事人可能在输入时打错了字或者犯了拼写的错误,也可能合同一方的表述无误,但是相对人却错误理解了其表示的内容,这种种现象都会导致合同的错误理解。德国判例法仅仅是对合同交换或者口头缔约中出现的错误进行了规定,未涉及电子环境下的错误。在电子环境下出现的新型错误和问题,传统法律框架都并没有做出任何规范,电子环境的发展对传统法律的规定提出了新的挑战。

a) 意思表示错误

传统上,意思表示的错误可分为四种类型:书写错误、意思错误、动机错误、传输错误。

* 书写错误。合同当事人对于合同条款的理解并无偏差,且对合同之订立已达成和议,但在打字或拼写时出了差错,导致所表示的意思产生了异议。

* 意思错误。合同当事人知道意思表示,但对该意思表示所表达的内容产生了错误理解。

* 动机错误。动机错误所关注的是意志的形成过程。例如:买受人原本打算为婚礼购买一件礼物,但事实上,婚礼并不存在,即婚礼根本未打算举行。事实上,动机错误在为意思表示前已经存在,因而动机错误一般不影响合同的成立。如果买受人的权利过度扩张,甚至可基于动机错误而使合同无效,这无疑将使出卖人陷于十分不利的境地,出卖人所要承担的风险显然会难以估量。因此,即使动机错误,合同也依然成立,不应无效。

* 传输错误。传统上,传输错误发生于通过代理传达意思表示的情况。即指合同的一方当事人虽然向相关代理准确地表述了其意思表示,但代理本身却在传达意思表示时错误输入或拼写了该意思表示的某些内容,以致所传达的意思表示与表意人的原意不符。在有些时候,传输错误并不被视为独立的错误形式,而是书写错误的一种类型。^[1]

对于合同形成过程中错误的处理将涉及三个法律问题:撤销权的行使、风险分担、证明责任。

* 撤销权的行使。如前文所述,对于某些类型的错误,当事人享有撤销权。当事人一旦行使撤销权的,合同自始无效。《德国民法典》第 199 条第 1 款规定了在发生书写错误和意思错误的情况下,表意人享有撤销权。第 120 条规定了发生误传时的撤销权。

* 风险分担。错误的发生原因有多种,可能是由于一方当事人在向相对人为通知时的疏忽所致,也可能是错误一方当事人未能充分考虑相对人所收到的信息内容,对所传达的信息有所疏忽。在发生上述疏忽的情况下,所造成的损害结果很可能会扩大,尤其体现在违反先合同义务(所谓的“culpa in contrahendo”)所导致的损害结果。为

[1] Palandt - Heinrichs, § 119, Rn 4.

了解决发生错误情况下的责任承担问题,我们应当对合同风险作出合理分配。

* 证明责任。与风险分担问题相类似,证明责任的归属问题也是一个程序法的问题。谁应当在法庭上承担证明其正确发送或准确通知了相对人的责任,也是我们需要认真考虑的问题。

b) 电子错误

在德国合同法中,合同错误是频繁出现的争议问题,近年来,德国的判例法已经发展出了一套可处理所有争议的判案规则。但是,电子合同的出现也引发了许多新型的错误类型,对于这些新的错误类型,之前所适用的法律都无从解决。在某些时候,数字技术的使用会增加合同形成中产生错误的风险,这种风险一部分是源于那些对在线技术的使用并不熟练的消费者,由于他们无法正确使用该项技术,从而增加了在线技术使用导致的错误发生。另一方面,在线技术本身还没有达到尽善尽美的程度,许多功能仍处于人们的期盼阶段,并没有成为现实。德国判例法中最常见的例子是在线商店的标价错误,在线商店往往都要使用特定的软件来显示商品的价格,而有些时候,这些软件可能会产生标价的错误,但显示的错误价格却经常使消费者得利。^[1]另一个例子是密码错误或登录系统错误,由于此种错误会导致交易的不安全,同时可能导致合同相对人的错误,即表意接收人发生了错误。^[2]对此,德国合同法已经着手试图寻找一条能整合这些新现象的方法,基于立法的基本原则,欧洲的立法机构并没有起草一个新的电子合同法,而是试图将已有的合同法的规范适用到电子合同领域中去。同样,对于电子错误,德国立法机构也是将传统的合同法关于

[1] Palandt - Heinrichs, § 120, Rn 1.

[2] See for example LG Bonn, MMR 2004, pp. 179, 180.

合同错误之规定适用于电子错误的情况。

ba) 风险分担

风险的分担问题,在解决因违反先合同义务而导致的损害赔偿的争议中,显得尤为重要。德国的立法机构并没有制定规范电子合同的一般规则,也没有列明新型的错误类型。对于责任的分担,是基于个案的基础上,以传统法律责任分担的一般性规定予以规制。法院认为,责任范围的界定应当依照他们所承受的风险。在线商店若使用电脑软件发出要约或者显示其标价的,那么在线商店应当承担风险,无论在线商店是否尽了勤勉义务来避免损害的发生,也就是说,在线商店不能主张其勤勉义务的履行而不承担责任。原因在于,首先,对软件及数字技术的使用始终是处于电子商店的支配下的;其次,如果在线商店希望从其电子商务贸易中获取收益,他就应当承担由此产生的风险。^[1]但我们必须牢记,欧盟的规定往往是基于消费者保护的政策需要,也就是说,这些规定往往都是倾向于消费者的,沿袭了消费者保护政策的立法宗旨。

2007年,德国 Hamm 地方法院就电子错误纠纷有一个判例,一个未成年人以其父亲的名义登录到 eBay 网,通过在线拍卖购买了一辆汽车,在此过程中,其父并无任何疏忽。其父随后即废除了合同,但出卖人却提出了损害赔偿要求,主张由于其父的解除行为使其丧失了可能获取的利益。法庭所要解决的争议是谁应当承担风险责任,因为网站的登录人都是已经获取注册的注册人。那么父亲是否对其通行密码要承担维护的义务呢?如果有人滥用通行码,他们是否也要承担相应的责任呢?又或者因为密码系统并不完善,对由此导致的风险,网站经营人是否应当承担由此产生的风险呢?法庭经审理后认为,用户

[1] LG Bonn, MMR 2004, pp. 179, 180.

对于通行密码并没有一般的保护义务,如果经营者使用的密码系统可以被第三方轻易滥用,那么经营者就应当承担由此产生的风险。^[1]这个判决在之后许多法院的判决中都被援用。^[2]但是,这个判决却遭到了学者的猛烈抨击,他们认为这样的判决破坏了电子手段通信的完整性。^[3]根据这样的思路,因为电子系统的使用者并不负有保证系统中呈现文件的真实性,所以任何电子邮件都不可绝对地归因于其真正作者。那么只要电子系统使用者没有使用电子签名,那么他就享有撤销电子合同的权利。因此,由此产生的主体风险分担问题就是一种程序性问题,系统使用者应当承担证明他没有使用其通行码的责任,也就是说,在发生密码被盗用使用的情况下,密码的真正所有者要承担证明他在那个特定时候并没有使用该密码的责任。

对于发生电子错误时的责任承担问题,欧洲的消费者保护法更倾向于采用预防性的规范。《电子商务指令》第10条和第11条规定,网站经营者应当履行为其网站装备足够硬件设备的义务,以保证消费者能准确核对其输入的内容。如果网站经营者已充分提供了这样的设备,那么因输入错误而产生的责任将由消费者自己承担。除此,依照《远程销售指令》,网站经营者还应当提供有关合同条款的充足信息。

bb) 证明责任

作为一项普遍性原则,若合同一方当事人欲解除合同或主张损害赔偿的,则应当承担证明责任。只有当发生主张解除或损害赔偿的一方当事人无法取得相关信息的前提下,即为主张的一方当事人因客观环境而根本不可能取得任何证明的时候,那么证明责任将移转于合同

[1] OLG Hamm, NJW 2007, S. 611.

[2] LG Bonn, MMR 2004, pp. 179, 180.

[3] Mankowski, NJW 2002, S. 2822, 2827. Compare also the comment of Mankowski on LG Bonn, MMR 2004, pp. 179, 182.

相对方(被告)承担。举例而言,在发生产品责任时,举证责任倒置,由产品的生产者或销售者承担举证责任,因为相对于生产者或销售者,消费者根本不具备证明产品生产过程不符合相关标准的能力。

上述风险承担的规则原则对于民事程序规范也产生了重要影响。例如,即使合同一方经注册且采用了特定密码,我们也不能当然地将该注册账户下的所有行为或文件内容归于该方当事人,也就是说,注册和通行码不构成证明相关行为或文件归属性的初步证据。从法院的判决我们也可以看出,对于诸如 eBay 通行密码等在线认证系统,法院并不完全采信任的态度。新型电子通信手段的使用者们往往承担着较高的证明责任。

bc) 撤销权

德国法对因发生电子错误而主张合同撤销的,适用与普通合同撤销相同的规则。对于意思表示的输入错误或点击错误,可适用《德国民法典》第 119 条关于书写错误的规定;^[1]对于因技术或软件问题而阻碍意思表示发送的,可适用第 120 条的规定。由此可知,德国法将通过电子通信手段订立的合同,等同于通过信使将意思表示由 A 传递给 B 而缔结的合同,德国法对这两者等同起来并适用同样的规定。

c) 小结

从前文的论述中我们可以看到,在德国传统法律框架内,许多规范对于电子错误也同样可予适用,德国法体现了极好的超前性,对于可能出现的新问题有着很好的准备。然而,更为棘手的问题在于发生电子错误情况下的风险分担责任,随着人们越来越多地使用电子通信手段,并将其视为一种可靠、安全的信息系统,由此引发的争议也日益增多,因而关于这方面的法律也伴随着电子通信的发展经受着持续性

[1] See for example BGH, MMR 2005, S. 233, 235.

的挑战。

3.1.1.2《电子商务指令》在英国的执行情况

a) 合同要件

根据 1979 年《英国货物买卖法》第 2 编第 2 条第 1 款对于买卖合同之定义:“买卖合同是由买方提供货币约因或称为价格,而由卖方转移或承诺转移货物所有权的一种合同。”虽然该项规定仅适用于货物买卖合同,但它描述了合同缔结的基本要件,即合同的成立必须有至少两方当事人,必须有双方的合意,必须有对价。由此我们也可以推断出,意思表示和交易形式并不是英国法中合同缔结的必要条件。合同缔结的核心要件在于“受约人的承诺”。因此,合同是由一方或多方当事人共同合意的结果。

所以,正如德国法所规定的,即使缺少了现实的人的参与,合同依然可以成立,只要达成意思的合意即可。例如:电子代理人所为的合同行为也具有法律效力。^[1]

在合同缔结上,英国法与大陆法最重要的区别在于对“对价”认定标准不同。根据英国法的理论,只要存在任何的对价形式,那么合同就具有法律效力,合同义务对当事人有约束力。对价可以是任何形式的权利、利益或者一方获取利益,另一方承担了由此产生的忍耐义务、不利益或权利妨碍。^[2]但必须谨记的是,只有特定受约人才可以主张撤销对价,其他任何第三人都无权主张撤销。且无论对价的价值是否对等,都不会影响到合同的效力。^[3]如果法律规定了合同必须

[1] Smith, p. 455; Thornton v. Shoe Lane Parking (1971) 2 Q.B. 163.

[2] Currie v. Misa (1875) L.R. 10 Ex. 153.

[3] Consideration need not be adequate, but must have some value, however slight [...], Thomas v. Thomas (1842) 2 Q.B. 851; William v. Roffey Bros & Nicholls (1991) 1 Q.B. 1.

采用签章的形式,那么对价就成为了唯一可由合同当事人自主决定的要件。在这种情况下,订立合同的真实意思已通过正式文件的形式予以表现,这即可视为对价的达成,对价的功能也就此实现。^[1]

作为合同要件之一的对价,在电子交易中很容易就能得到证明,因为电子交易就是商品或服务的买卖,买卖即为一种金钱对价。然而,在提供免费服务或免费商品的情况下(如:免费浏览网站,共享软件或免费软件),对价的证明就会遇到困难。为避免由此产生的争议,消费者为了获取免费服务或商品,必须首先同意非保证条款,或者同意不将所获取的商品或服务用于商业活动。^[2]

aa) 要约

英国法也同样严格区分要约和要约邀请。有效的要约必须包含明确的缔约意思。对此应当根据具体情况来判断是要约还是要约邀请。对于要约与要约邀请的判断标准,英国法与德国法的规定一致。与在商店橱窗展示商品^[3],在杂志上刊登商品信息^[4],向公众发放商品名录等行为一样,在网站上提供商品或服务信息也是一种要约邀请,而非要约。消费者发出的订约要求才是真正的要约。^[5]即使信息发布者承诺将会满足消费者的每一项要求,这样的表示也并不被视为一种缔约意思的表示,因为信息发布者在订立一份具有约束力的合同前,往往会试图核查消费者的履约能力(给付能力),这样的考量就不构成真正确定的缔约意思。一旦信息发布者在网站上明确表示对提供的商品或服务信息,一旦消费者承诺即受其约束,那么这些信息

[1] Von Bernstorff, p. 54 et sqq.

[2] Chissick/Kelman, p. 93.

[3] Fisher v. Bell (1961) 1 Q. B. 394, 399.

[4] Partridge v. Crittenden (1968) 1 W. L. R. 1204.

[5] Chissick/Kelman, p. 82.

可视为要约而不再是要约邀请。这种情况,在下载合同中体现得最为明显,因为对下载合同,一旦消费者下载完毕,合同即告终结,合同目的在瞬间即可满足,而不受外在条件的限制。

ab) 承诺

据 Anson 所言^[1]:“通常来说,表示承诺,不仅是内心对要约的同意,还必须以一定外在形式予以表现,沉默本身不是一种承诺。”受要约人必须以客观外在的行为来表示其意思。承诺应当以足以通知到要约人的方式进行,且所采用的这种方式,要约人可以感知,也就是说,对于受要约人的表示,要约人可以知道该表示行为即是一种承诺行为。承诺的表示方式包括:书面文件,口头声明,甚至是直接的履约行为。沉默一般并不足以成为承诺。^[2]

b) 生效时间

对于要约与承诺的生效时间,通常有两种规则:一种是送达主义,另一种是投邮主义。根据送达主义,意思表示于到达收件人处时生效;^[3]根据投邮主义,意思表示于发送时即告生效。^[4]

区别送达主义和投邮主义的主要规则在于:合同双方是否直接地、即时地进行意思表示。^[5]但似乎仅仅依靠此标准并不能足以将二者明确区分开来。尤其是在意思表示因某种原因没能到达的情况下,若适用上述规则来决定最终责任承担者或承担意思表示未能到达的责任,显然是存在困难的。^[6]

[1] Beatson, p. 41.

[2] Chitty, Chapter II, Mn. 84.

[3] Treitel, p. 12 et sqq.

[4] Adams v. Lindsell (1818) 1 B & Ald 681.

[5] Entores Ltd v. Miles Far Eastern Corp (1955) 2 Q. B. 326.

[6] Rowland/Macdonald, p. 304.

司法实践中,当承诺是通过电报或传真形式发送的,那么一般都适用送达主义规则。原因在于,现实中,发件人较之收件人,更容易发现意思表示的发送状况,更容易发现意思表示未能成功发送的情况,发件人应承担较多的责任。所以,发件人要承担传输中发生潜在错误的风险。^[1]

基于是否直接进行意思表示的区分标准,通过网络缔结的合同,应当适用送达主义规则。^[2] 但存在例外,即对于通过电子邮件缔结的合同,考虑到其生效时间,应当适用投邮主义的规则。^[3] 然而,在司法实践中明确对通过传真缔结的合同适用送达规则后,有越来越多的人认为对于电子邮件达成的合同也同样应适用送达规则。这随即引发了对电子邮件确切到达时间的讨论,即电子邮件的到达标准,究竟是于到达收件人服务器时即为到达,还是当收件人接收邮件时才算到达。^[4]

此外,在英国法中,允许服务供应商依据谈判或实际情况自行建立确切的接收规则。也正基于此,服务供应商往往会表示网站提供的信息只是要约邀请,消费者的购买请求是要约,不过对于他们向消费者要约进行确认的承诺,则一经发送即为生效。这样的话,消费者的撤回权行使期限被缩至最短,甚至都无从行使。^[5]

综上所述,在《电子商务指令》实施前,英国法对于要约或承诺确切生效时间的规定并不完善,需要进一步予以明确。但依据通常的规则,合同于承诺到达要约人时生效。

[1] Brinkibon v. Stahag Stahl - und Stahlwarenhandel GmbH (1982) 1 All ER 293.

[2] Rowland/Macdonald, p. 307.

[3] Chissick/Kelman, p. 80.

[4] Rowland/Macdonald, p. 306.

[5] Chissick/Kelman, p. 83.

c) 合同的形式要求

一般而言,英国法未对合同的形式进行任何限制。因此,通过电子手段缔结合同在法律上是得到允许的。但与德国法相同,对于某些合同,英国法也明确规定了必须采用书面的形式。例如:租期超过三年的土地租赁合同^[1],必须采用公证的形式;不动产买卖合同^[2]、著作权使用许可的合同^[3]、消费品信贷合同^[4]等都必须经当事人签字后始生效力。即使根据1978年《货物买卖法解释》第1编,明确了书面形式是指能够以可视形式再现文字的方式,包括计算机屏幕上的再现;^[5]但事实上,通常人们始终没有将计算机屏幕上文字的再现视为一种书面形式。这个规定只是将法律和计算机连接了起来,也没有真正将电子形式纳入了法律的范畴中去。^[6]

3.1.1.3《电子商务指令》在法国的执行情况

a) 合同缔结

根据《法国民法典》第1108条之规定,合同的成立必须达成合意。依照该法,并没有对要约和承诺作出明确规定,也就是说要约和承诺并不是认定合意的标准,但该法明确规定了合意必须达成意志上的一致。^[7] 法国法中并没有承诺条款,这意味着在要约被接受或拒绝前,始终具有法律效力和约束力。^[8] 但是,基于所谓的“对公众的要约”,即向不特定人(公众)发送的要约,只要发出要约的服务提供

[1] Law of Property Act, 1925, sec. 52 and 54(2).

[2] Law of Property Act (Miscellaneous Provisions) Act 1989, sec. 2 (1) and (3).

[3] Copyright, Designs and Patents Act 1988, sec. 90 (3).

[4] Bainbridge, p. 305.

[5] Bainbridge, p. 305.

[6] Lloyd in Edwards/Waelde, p. 139.

[7] Ferid/Sonnenberger, Vol. 1/1, Mn. 1 F 214.

[8] Ferid/Sonnenberger, Vol. 1/1, Mn. 1 F 222, p. 437.

商具有履约的能力,那么该要约就始终具有约束力。^[1]此外,法国法还规定了要约保留(*offers assorties d'une reserve*),根据解释,要约保留就相当于撤回权保留或情势变更,在这种情况下,要约人可以通过行使撤回权或适用情势变更之规定,而终止要约的约束力。然而,法国法还规定了要约的任意撤销权,因此,在要约被承诺前,必须首先考虑该意思表示是否真的已经发出,构成真正的要约,还是仅仅是要约邀请。^[2]

对于通过网络合同的分类问题,即网络合同究竟是当场合同还是非当场合同,法国从消费者保护的角度对此予以了探讨。网络合同作为远程销售的一种形式,法国的立法机构对此已经作出了规定,因为在网络合同争议产生之前,便已经存在着通过 Minitel 系统运作的在线商店,对于此类在线商店,法国的立法机构已经制定了相应的规则,这些规则对于网络合同同样可予适用。如前文所述,法国的《消费者法》已经引入了“国内销售”和“远程销售”的分类,因此,对于网络合同,也是在分析上述两种合同类型的基础上予以归类探讨。为了区分这两种合同类型,必须首先判定消费者在这两种合同的缔结过程中,扮演了主动的角色还是被动的角色。如果消费者主动键入了网络供应商的网站地址(拖动式媒体),寻找定约机会或要约,那么消费者就是一个积极的消费者,适用远程销售的规则。这些规则包括法国《消费者法》第 L126-16 条关于通知责任的规定,第 L 121-19 条关于所提供的合同文本要件的规定。这两个条款都已于《远程销售指令》的实施过程中通过并生效。

相反地,一个被动的消费者是指通过广播或电视(拖动式媒体),

[1] Ferid/Sonnenberger, Vol. 1/1, Mn. 1 F 221, p. 437.

[2] Ferid/Sonnenberger, Vol. 1/1, Mn. 1 F 219 and 1 F 223, p. 436 et sqq.

获知要约信息的消费者。对于这种情况,适用“国内销售(*vente à domicile*)”规则,包括《消费者法》第 121-21 条之规定。

若消费者通过网络缔结了合同,由于网络通常被视为拖动式媒体,因此,可适用《消费者法》远程销售(*vente à distance*)规定。但对于非消费者而言,则应适用《法国民法典》的一般规则。因为法国法未对要约邀请作出解释,在网站上提供商品或服务信息的,构成有效的要约,要约保留的情况除外。然而,根据“对公众要约”理论,网络信息提供者只能在其履约能力范围内发布要约。^[1]

b) 合同的生效时间

对于现场达成的合同,一旦合同当事人在主观上和客观上都满足了达成合同的基本要件,承诺即生效力,合同即具有约束力。对于非现场合同的成立,有四种不同的理论观点,分别是:意思表示理论(合同于意思表示时成立)、发送主义理论(合同于受要约人发出承诺时成立)、接收主义理论(合同于要约人收到承诺时成立)、注意理论(合同于受要约人注意到合同内容时起成立)。^[2]司法实践中,对于通过网络缔结的合同,往往采用的是发送主义理论,在某些特殊情况下,也适用接收主义理论。^[3]一般而言,发送主义为通说,依该理论,买受人的承诺一经发送,合同即告成立。这同样也可用来判断合同生效的时间点。

c) 形式要件

在法国,法律对于合同的形式也未有明确的限制,^[4]但同时也设定了例外。其中最重要的就是规定了公证证书。公证证书适用于:赠

[1] Bensoussan, <http://www.creda.cci.fr/colloque/10e-comm/10acolmel.pdf>.

[2] Ferid/Sonnenberger, Vol. 1/1, Mn. 1 F 233, p. 441 et sqq.

[3] Renard/Barberis in Spindler, E-Commerce Law in Europe and the USA, p. 78.

[4] Ferid/Sonnenberger, Vol. 1, Mn. 1 F 501.

与合同^[1]、为实现摘取人之债权而订立的合同(债务人与第三人约定,债务人向第三人借贷以偿还对债权人之债权)^[2]、设定抵押权合同^[3]以及约定婚姻财产的合同。^[4]此外,法国法还规定:如果法律明确要求采用书面形式的合同,未采用书面形式的,合同无效。例如:以消费者的信用为对价缔结的人身保险合同。^[5]

3.1.2 欧盟成员国对于《电子商务指令》的纳入与转化

3.1.2.1 德国

a) 采纳《电子商务指令》第9条——电子合同的效力

在德国的立法机构引入了电子形式和电子签名规则之前,^[6]他们并没有预见到所制定的规范应当与《电子商务指令》第9条之规定保持一致性。但在引入了电子形式之后,依照德国法,尽管已经规定了电子形式,但对于某些特殊种类合同而言,通过网络手段予以缔约仍然存在障碍。与此相似,《电子商务法》也规定了对某些合同,如果采用了电子形式,将不具有法律效力。如第9条第2款规定:对于涉及法院、政府当局或者公共权力行使的合同,不能采用电子形式。此例外规定与德国法要求公证证书的规定相一致,因为公证机关作为独立的政府机构,行使的是公共权力,制作公证证书本身就有了政府参与的成分,不能采用电子形式,二者在这点上的规定是一致的。除此,不动产买卖合同也不能采用电子形式,因为不动产买卖也必须有公证证书。根据《德国民法典》

[1] Article 1250 No. 2 Code Civil.

[2] Article 1250 No. 2 Code Civil.

[3] Article, 2127 Code Civil.

[4] Article, 1394 Code Civil.

[5] Article L 313 - 7 Code de la Consommation.

[6] Wellbrock, p. 128.

第766之规定,个人担保合同必须以书面作出保证的意思表示,不得以电子形式做出保证的意思表示。根据第492条第1款的规定,消费借贷合同也必须以书面形式作出,不得以电子形式订立该合同。德国法中的这些例外规定与《电子商务指令》第9条的规定相一致。

总之,德国法对于通过电子手段订立合同的类型范围,与《电子商务指令》中的规定相吻合。因此,关于电子合同效力并不需要制定新的规则。

b) 吸纳《电子商务指令》第10条——通知义务

参照《电子商务指令》第3条关于通知义务的规定,《德国民法典》第312e条(“电子商务中的义务”)即在其基础上进行修订的结果。由于《德国民法典》很好地结合了《电子商务指令》的规定,因而许多重要的规定都得以在一部法律中归纳总结,这大大简化了法律的实际操作过程,同时也避免了不同法律虽规定了同一条款,但却在理解和解释上产生争议的情况。修订后的《德国民法典》第312e条明确规定了经营者必须在消费者预订前,向其提供确切信息的义务。第312e条第(1)项第4点规定,经营者必须使消费者有可能在合同订立时调取包括一般交易条款在内的合同条款,并以可再现的方式存储。出于德国联邦委员会的考虑,为了符合《电子商务指令》的立法目的,第312e条第(1)项所规定的经营者义务在合同缔结时即应履行。^[1]第312e条第(2)项则规定了对于专门通过个别交流而订立合同(电子合同)的,以及消费者以外的合同当事人之间另有约定的,不适用该条第1项第1点至第3点的规定。因此,德国立法机构已经全面纳入了《电子商务指令》关于通知义务的规定。

[1] BT - Drs. 14/6857, p. 20.

《德国民法典》第312 e条第3项还规定了,对于以其他规定为依据的其他告知义务不受影响。与第355条第2款第1项不同,消费者依照第355条享有撤回权的,撤回期间不在本条第1条第1项第1点所规定的义务被履行之前起算。^[1]对于电子合同产生的其他法律责任问题,可适用《德国民法典》的一般规则予以处理。因此,如果消费者并没有以适当的形式被通知,或者基于错误的理解而致其非出于本意发送了意思表示,那么可依照《德国民法典》第119条之规定,以误解为由行使撤销权。^[2]依照《德国民法典》第311条第2项、第241条第2项以及第280条的规定,电子合同环境下另一种可能的责任是因为“违反合同义务”(culpa in contrahendo),如果经营者怠于履行其通知义务、保护义务或者照顾义务的,也应当承担责任。违反合同的义务的结果包括:损害赔偿,合同被解除,在特定情况下,也可能产生变更合同的结果。^[3]

c)《电子商务指令》第11条——发出要约

德国法对于合同的生效时间做了如下规定:一般来说,网站上的信息是要约邀请。在非现场缔约的情况下,适用到达主义的规定,即要约于到达受要约人时生效,当承诺到达要约人时,合同即生效力,对于合同相对人具有约束力。因此,是否注意到要约或承诺并不是合同的生效要件,只有在撤回意思表示时,注意才是必要条件。^[4]

德国《消费者货物买卖指令》(Purchase of Consumer Goods Directive)通过修订关于合同义务的规定,实现了对《电子商务指令》第11条的贯彻执行。根据《德国民法典》312 e条第1项第3点的规

[1] Wellbrock, p. 131.

[2] Grigoleit, WM 2001 p. 597.

[3] BT - Drs. 14/6040, p. 173.

[4] Compare: I 1 d.

定,对于从事电子商务的经营者,应当通过电子途径毫不迟延地证明顾客订单的到达。在通常情况下,意思表示一旦生效,消费者的撤回权也同时取得。第312 e条第1项第1点规定,电子商务的经营者,应当提供顾客在预订前能够借以辨认和更正输入错误的适当、有效和便利的技术手段。第2项规定了,专门通过个别交流而订立的合同以及非消费者之间订立的合同,不适用电子合同下的义务规定。

可以看出,德国的立法机构已经基本上在其立法中纳入了《电子商务指令》第11条的规定。对于合同的生效时间,作了明确的规定。当消费者能够接收到服务经营商发出的承诺时,合同成立。但是,在通过自动信息回复手段订立合同的情况下,自动回复的信息是否构成具有法律约束力的承诺,还仅仅是对消费者要约的收到确认,依然处于不确定状态。因此,基于对自动信息表示的不同解释,电子合同的生效时间也存在着不同的可能性。^[1]

经修订后,《德国民法典》采用了《电子商务指令》中的“消费者”概念取代了原来使用的“使用者”概念。事实上,德国联邦议院在先前的民法典草案中还使用了“接收者”的概念,但在最后的定稿中,这个概念也被取消了,只保留了“消费者”的概念。作出上述选择的原因在于,因为“接收者”既可能指服务经营者,也可能指买受人,由此可能产生不必要的歧义。能够避免这种混淆,取代“接收者”的唯一可行的概念就是“消费者”。而之所以放弃“使用者”的概念,是由于《德国民法典》675a和《电子商务指令》第12条关于通知义务的规定,都已经采用了消费者的概念,因此,为了保持法律用语的一致性,不当再引入新的概念。^[2]

[1] Compare: I 1 c.

[2] Rudolph, p. 49.

3.1.2.2 英国

a)《电子商务指令》第9条——电子合同的效力

与德国法一样,英国法律同样规定了合同的形式要件,这些形式要件使电子合同的生效更为复杂,甚至阻却了电子合同的生效。但是,在《电子商务指令》实施前,英国的立法机构已经对此问题作出了反应。在欧盟《电子签名指令》所规定的范围内,2000年的英国《电子通信法》第7条和第8条即对电子合同形式予以了规定。第7条规定了电子签名的强制认证,第8条则赋予了相关机构修改现存法律的权力,从而使通过电子手段订立的合同具备了法律效力。^[1] 这些修正并非绝对适用于一切情况,但在合同当事人为个人的情况下,则必须适用。因此,英国政府并没有像其他成员国那样,将通过电子手段缔结的合同与传统形式的合同同等对待。因为出于对各种情况考虑,无论所采用的合同形式是否符合《电子商务指令》第9条的规定,书面形式和签字的规则都已历经了几百年的发展,若突然间将电子合同等同于传统合同,这势必导致无法预计的后果。^[2]

英国并没有进一步纳入《电子商务指令》第9条的规定。因而,英国的相关部门正在考虑该采取何种方式,以使《电子商务指令》在英国法中得到贯彻落实。

b)第10条——告知义务

英国《电子商务条例2002》第9条完全吸纳了《电子商务指令》第10条关于告知义务的规定,明确了在电子合同缔结前,经营者应当承担向消费者进行告知的义务。根据英国《电子商务条例》第13条之

[1] Transposition Note for Directive 2000/31/EC, http://www.dti.gov.uk/industry_files/pdf/transposition.pdf (Oct 18, 2006); Wellbrock, p. 138.

[2] Pothmann, p. 259.

规定,如果经营者违反了合同约定,消费者可以经营者违反法定义务为由,主张损害赔偿。但“立即停止令”(《电子商务条例》第16条)除外。依《电子商务指令》第10条第2项之规定,如果经营者仅仅因未告知商品代码而违反了告知义务,消费者不能对此主张损害赔偿,只存在有“立即停止令”的可能。此项规定对于未告知合同条款和一般情况而发生的违反告知义务的行为,也同样适用。

c)第11条——下订单

英国《电子商务法》第11条对订单的发出进行了规定。根据第11条第1款a项,服务经营商必须毫不迟延地向消费者确认收到订单。第1款b项则规定了经营者应当提供一定的技术设备以使消费者能够识别并改正其输入错误。与此相对应,该条第2项明确规定,一旦收件人能够接收到发件人的意思表示,那么订单和订单确认即被视为已由相对人收到。如果合同双方并非消费者或者是专门通过个别交流而订立的合同,上述规则不予适用。

英国《电子商务法》第9条第1款对“订单”的概念进行了定义,第11条第1款b项则规定了技术设备要求,第12条规定合同要约的要件。但是,在其他规定中,则并未将“订单”视为合同要约的一种条件。^[1]

但是,在对该条例进行字面解释和体系解释的基础上,我们可以得出,并非每一次点击“下订单”都构成要约,如果经营者在网站上明确声明其提供的信息可作为要约的情况下,那么消费者点击“下订单”即可视为承诺。因此,对于网站上的信息是构成要约还是要约邀

[1] Reg. 12: “Except in relation to regulation 9(1)(c) and regulation 11(1)(b) where ‘order’ shall be the contractual offer, ‘order’ may be but need to be the contractual offer for the purpose of regulation 9 and 11.”

请,合同究竟于何时订立,都不能以通常的理解予以判断。我们只能假设网站的信息一般都被认定为要约邀请,但如果网站的建设与设计,都明确表明构成要约的,那么就应视其为合同的要约。

根据第11条第(2)款b项,对于通过电子邮件形式达成的合同,一旦承诺的表示到达要约人邮箱,从而可以被检索时起,该承诺即为生效。但是,为了正确判断某表示行为是构成要约还是承诺,我们有必要对电子邮件的内容进行分析考虑,因为并不是每一项自动发送的回复都表示着承诺的意思,很可能仅仅是对要约的确认收讫。^[1]

总之,即使在《电子商务指令》实施之后,在英国法中,对于电子合同的生效时间依然并完全明确,存在着歧义之处。但对于指令的其他规定,英国法很好地予以了纳入和转化。

3.1.2.3 法国

在法国,对于《电子商务指令》的吸纳表现为《数字经济信任法》(the law for the confidence in the digital economy)第25至27条的规定(“Loi pour la confiance dans l'économie numérique”)。

a)《电子商务指令》第9条——电子合同的效力

关于电子合同的效力,法国是通过将1108-1条和1108-2条的规定引入《法国民法典》,^[2]实现了电子合同的效力予以规范并整合。依据《法国民法典》第1108-1条的规定,如果电子合同符合该法第1316-1条至1316-4条(对《电子签名指令》的转化)的规定,那么电子形式缔结的合同即满足法律规定的书面合同的要件。《法国民法典》第1316-1条至1316-4条规定了合同的形式要件,如果电子合同能够像书面合同般被予以认证,那么电子合同即满足了合同的

[1] Compare German law: I 1 c.

[2] Wellbrock, pp. 144, 145.

形式要求。具体来说,电子合同当事人身份的可查性,电子合同形成具有可资证明的方式,电子合同内容能够得以完整的存储,这些都是电子合同所须符合的必备要件。如果合同签署人的身份能够得到明确,那么即可使用电子签名来代替手签签名(《法国民法典》第1108-1条第(2)款)。此外,《法国民法典》第1108-2条还列举了不适用电子形式的情况,这些排除性规定与《电子商务指令》第9条第2项所规定的范围相一致。因此,法国的立法机构已经在《电子商务指令》要求的范围内,使电子合同得以广泛使用。

b)《电子商务指令》第10条——告知义务

为了符合《电子商务指令》第10条的规定,法国在其民法典中新设了第七章(第1369-1条至1369-3条),名为“电子形式的合同”(“Des contrats sous forme électronique”)。《法国民法典》第1369-1条完整吸纳了《电子商务指令》第10条关于“告知义务”的规定。第1369-3条则同样将以个别交流方式的手段订立的合同排除在外。这些规定实现了对《电子商务指令》的纳入转化要求。除此,依据法国《消费者法》第L 134-2条的规定来看,除了告知义务,法国政府还规定了专业的服务经营者在与消费者订立合同时,应当承担存储交易记录的义务。

c)《电子商务指令》第11条——下订单

对于《电子商务指令》第11条的要求,法国的立法机构不仅吸取了该条规定,而且较之制定了更为严格的规则。《法国民法典》1369-2条规定了合同的确切生效时间。该条所构建的是一种双重确认的模式,^[1]该模式无疑非常严格,但因其复杂性并未被《电子商务指令》所采用。根据该条的规定,当消费者能够对其订单进行核对

[1] Compare: II 3 a.

或修改,并在检查后确认其订单时起,合同成立。^[1] 因此,电子形式合同的成立必须经历下述步骤:消费者发出订单,服务经营者接受订单,消费者对订单进行确认(消费者在确认过程中仍可对合同细节进行调整),服务经营者毫不迟延地向消费者表示收到确认。《法国民法典》第1369条第3款规定了当收件人能够对电子邮箱中的信件进行检索时起,视为收件人收到意思表示。即采用了接收主义理论。另外,由于《法国民法典》已经规定了消费者在订立合同的过程中可进行修改,因此便无须再单独规定经营者应当提供一定的技术设备以使消费者识别、改正其输入错误。

总而言之,法国立法机构对于《电子商务指令》的纳入和转化,是全面且值得肯定的,符合《电子商务指令》的要求。

3.1.2.4 小结

对于各成员国来说,将《电子商务指令》的规定吸收转化到其国内法中,并未带来太大的困难。其中,指令第9条关于全面推行电子合同的要求,由于其过大的范围而引起了最多争议。但各成员国都通过修改合同形式要件的方法,解决了这个问题。尤其是德国和法国,他们将电子形式视为了书面形式的一种,从而大大提升了电子合同的可行性。而英国却是通过保留给责任当局修改特别法的权力,试图通过对特别法修订的方式来实现该要求,因此,目前英国对于《电子商务指令》的转化并未完全实现,但却为将来进一步的转化奠定了基础。

对于《电子商务指令》第10条,各成员国都已经全面规定了经营者的告知义务,甚至在用词上都与指令相一致,因而不需再做进一步的转化。

[1] Wellbrock, pp. 144, 145.

同样,《电子商务指令》第11条(下订单)也得到了成功的转化。法国甚至还制定了较第11条的规定更为严谨的规则,采用了双重确认的模式。在德国,采用的基本规则是:服务经营者收到了消费者的要约从而做出承诺后,当消费者能够接收检索该承诺时起,合同成立。英国也做了同样的规定,但在特殊情况下,网站上的信息也可视为要约。

然而,对于合同效力的确切发生时间,无论双方是位于同一国家,在一国范围内达成合同,还是双方不在同一国家、分别位于两国的消费者和经营者之间的合同,法律依然存在一定的不确定性,这在发生后一种情况时,表现得更为突出。虽然本报告所列举的成员国对合同的生效时间做了基本相同的规定,因而对这个问题的解决可以达成一致,不会造成太大的冲突。但其他成员国对此问题可能有着不同的规定,如西班牙就规定网站信息视为要约,不仅如此,西班牙的立法还规定了当承诺发出时起,合同成立。^[1] 由于各国规定的不同,在具体适用相关规定时,无疑将导致另一个争议。^[2] 为了使消费者对其交易行为有更清晰的了解,在欧盟范围内形成统一的规则是必要且可行的,以使消费者能够知晓究竟从何时起,他们的意思表示会产生法律约束力。

3.2 各国对《电子签名指令》的执行

为了贯彻落实《电子签名指令》的规定^[3],各国都对其现有法律规范中有关书面形式的规定做了改变,同时还在程序法中,承认了以

[1] Lehmann, ZUM 1999 p. 180.

[2] Compare: II 3 a.

[3] In the next paragraphs referred to as the "Directive".

电子形式签署文件的有效性,并赋予其证据效力。如上文所述,《电子签名指令》的体系和表述是极为特殊和明确的。因此,只有在一些细节问题上,才留有各成员国对之实施进行探讨的余地。然而,各成员国对于《电子签名指令》贯彻实施的方式选择确是截然不同的,不同国家选择了不同的道路,各个国家间几乎没有任何的可比性。造成这种现象的原因可能在于各国本身法律体系的不同。

基于不同的法律传统,欧洲各国的法律体系也不尽相同。例如,法国的法律体系建之于“民事权利法”(droit civil)理念;德国法律体系则源于日耳曼法的传统规则;英国法则属普通法范畴,遵循判例法的传统。因此,欧洲各国对于法律的形式要求以及民事程序规则都有着不同的规定。

在下文中,我们将简要介绍法国、德国、英国为了贯彻施行《电子签名指令》的有关规定,对其国内法所作出的修正。

3.2.1 德国

在1999年《电子签名指令》颁布之前,德国就已经对电子签名做了规定。1997年,德国《签名法》正式实施,但由于该法对于电子签名的技术要求和认证机构标准规定得过于苛刻,因此在实践中很少被使用。

为了落实《电子签名指令》的规定,德国法有必要对其两方面内容做出修正。第一,《德国签名法》依照指令的要求,规定了使用电子签名的法律基础。^[1] 第二,德国的合同法对合同的形式要求做了修

[1] Gesetz über Rahmenbedingungen für elektronische Signaturen und zur Änderung weiterer Vorschriften, BGBl. 2001 - I Nr. 22 vom 21.05.2001.

订。^[1] 《德国民法典》第126章a条规定了电子签名的形式,根据该条的规定,对于采用经认证的电子签名所签署的电子文件,与《德国民法典》第126章规定的必须采用手写签名签署的书面文件,二者具有同等的地位。

德国《民事程序法》第371章第1节明确规定了在法庭上,电子文档与纸质文档一样,是被允许且具有证明效力的。如果某个文件以经认证的电子签名方式签署,那么法律就假定该文件归属于电子签名的签章人。

此外,《电子签名指令》允许各成员国采用自动发送系统。德国立法机构在立法中选择了接受该系统,并在《德国签名法》第15章对此进行规定。国家电子通信机构将对具备资质的电子签名认证机构予以监督。

在经过上述修订后,电子签名具备了与手写签名同等的法律效力。然而,即使法律已经承认了电子签名的效力,但在德国,电子签名的使用仍然很少。截止到现在,认证机构也仅仅发放了32,000个电子签名,这个数字相信远不能让人满意。对于造成这种情况的原因将在下段中予以论述。

通过分析过去几年的法庭判决,我们可以看到,在德国,真正由于电子签名所引发的争议极少,电子签名也并未得到广泛使用,因此,试图从判例中寻找具有说服力的原因极为困难。

但从最近的法庭判决中,我们可以推断,人们对于电子通信的接受和信任程度正在呈现上升的趋势。无论电子邮件中是否包含了经

[1] Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsverkehr (FormAnpG) of July 13, 2001, BGBl 2001 - I, p. 1542.

电子签名的文件,电子邮件确实已被越来越多的人视为一种可靠的通信手段。如果合同当事人主张因为电子邮件丢失,而使其无法收到确切信息的,法院对此抗辩一般都不会承认。^[1]

3.2.2 法国

法国同样分两步对其法律进行了修正。首先,是在民事的程序法中对新技术予以了肯定。其次,则是规定了电子签名的效力、电子签名的适用范围,等等。^[2]

在法国,法庭审理过程中,书证是最为重要的证据。法国民法典第1341条规定了,对于达成一定价金的合同,即使没有公证文书,书面文书也同样可以作为证据使用。^[3]对于超过法定最低金额的合同,必须采用书面形式缔结,而不能以环境制约为由不以书面方式为之。但法国在其原有的民事程序法中,却从未对“签名”进行定义,且该法任何部分都没有规定如果没有签名,将会导致怎样的法律后果。因而,对于这方面的规则,我们只能从判例中寻找依据。1997年,法国最高法院在审理中作出了如下的判决:即使传真上没有任何真实有效的签名,它也同样可以视为书证,作为证据使用。^[4]只要该传真以书面形式提交,并可归于特定的当事人,那么即得到法律承认。

基于上述司法实践的判定,关于形式要件的法律规定也相应做了完善。法律“The loi 2000-230”将书面形式定义为:任何能够呈现并

[1] Beschluss vom 20.04.2006 - 5 U 456/06 (LG Regensburg).

[2] Décret No 2001-272 du 30 mars 2001 pris pour l'application de l'article 1316-4 du code civil et relatif à la signature électronique, Journal Officiel, Nr. 77, March 31, 2001, p. 5070 ff.

[3] This rule of law goes back to Art. 54 of the “Ordonnance de Moulins” of 1566. The amount of money is adapted regularly through a regulation.

[4] Cour de Cassation, Chambre Commerciale (Cass. Com.), Decision of 02.12.1997, JCP 1997, p. 178 ff.

保存其所载信息的形式,即满足书面形式,签名并不是必要条件。因此,在法庭审理中,电子邮件也可被视为书证使用。

法国民法典第1316-3条规定了,电子文件与书面文件具有同样的法律效力。

法国民法典第1316-4条规定了,电子签名与手写签名具有同样的法律效力。

出于法律同一性的考虑,程序法中关于书面文件证据效力的规定,在民事实体法中也同样可以适用。因此,在法国合同法中,经验证的电子签名与手写签名一样,具有法律效力。

与德国法相比,法国法则主动规避了采纳自动发送系统,放弃了将该项规定引入法国立法中去。

关于电子签名的使用,法国法与德国法做了类似的规定,对此我们将在下文中做进一步探讨。

3.2.3 英国

为了执行《电子签名指令》,英国的立法机构同样采用了两步走的方针。《电子通信法案》^[1]第7条第1款规定了,如果采用了经认证的电子签名签署了文件,那么在法庭审理中,该文件可作为证据使用,电子签名与手写签名一样具有法律效力。第7条第2款则对电子签名进行了定义。第8条和第9条(1)(a)则对可采用电子形式的权限范围做了规定,该权限规定与英国的《电子签名法》的规定一致。^[2]而且,《电子签名法》基本上贯彻使用了指令中的用语,对于自动发送服务的监管以及自动发送服务经营者的责任等问题,都与指

[1] Available at <http://www.legislation.hmso.gov.uk/acts/acts2000/20000007.htm>.

[2] Available at <http://www.legislation.hmso.gov.uk/si/si2002/20020318.htm>.

令做了相似的规定。

与法国的情况相似,英国实施《电子签名指令》后,似乎也只对其程序法产生了影响。普通法体系对于合同的形式要件极少作出规定。^[1] 根据 1989 年的《英国财产法》,只有在订立赠与合同时,才必须采用书面的形式,必须经赠与人签字,必须有见证人的见证,这样合同才发生效力。而对于其他合同,法律并没有规定所必须采用的形式。但如果某合同未采用书面形式,也未经合同当事人签字的,合同有效,只是没有强制执行的效力。但这样的规定存在着明显的不足,即使这个规定仅是程序法上的规则,也无疑会对民事实体法产生影响。《电子通信法案》中关于形式要件的规定也同样对英国的合同法产生了重要影响。

3.2.4 使用电子签名的经验与展望

欧洲委员会于 2006 年 3 月对于电子签名在欧盟的实施情况出具了一份报告。^[2] 报告主要关注于高级电子签名和合格电子签名的使用状况,发现它们的使用情况与指令所要求的目标依然存在差距。直至今日,合格电子签名也仅仅只是在电子政务、公共服务机构以及银行部门得到使用。^[3] 但即便在这些机构,使用个人密码系统或者 PIN 码的也远多于使用电子签名的。原因在于,电子签名所存在的某些技术难题,致使签名加密系统的使用存在诸多不便,而且从经济考虑,推广电子签名依然存在困难。

首先,从经济角度来说,电子签名认证机构往往出于经济利益的

[1] See above.

[2] Report from the Commission to the European Parliament and the Council - Report on the operation of Directive 1999/93/EC on a Community framework for electronic signatures, Brussels, March 15, 2006, KOM (2006) 120 final.

[3] KOM (2006) 120 final, p. 6.

考虑,更愿意为自己发出的电子签名进行认证,而不愿对其他机构的电子签名进行认证。据欧盟委员会的报告,这似乎就是为什么网站要求用户得为每一项服务进行注册的主要原因。

其次,由于不同的认证机构间缺乏沟通协作,这也阻碍了电子签名的发展。同一国家存在着多种认证机构,从而导致了使用个人通行码来取代可通用的电子签名。

最后,使用合格电子签名的技术设备依然比较昂贵,而且操作起来也比较复杂。首先需要投资建造一个可用来发送和读取加密签名的基础设备,随后,还需要为电子文件的存档投入资金。根据法律规定,电子文档必须保留 30 年,这就要求更为复杂的技术来保证这些文档在 30 年里被妥善保存并可随时读取。上述这些都需要资金的支持。^[1]

总而言之,电子签名之所以未得到赞同,原因在于经济利益和技术手段的制约。在利益上,并不存在刺激电子签名认证机构为非自己发放的,但却适用于各类网络经营者的电子签名进行认证。技术上,电子签名所需的技术支持太过复杂,而且也太过于昂贵,这无疑加倍导致了电子签名少人问津。^[2]

[1] KOM (2006) 120 final, p. 6.

[2] See id., p. 11.

4. 结论：欧盟的进一步立法与对中国电子合同立法的启示

4.1 欧盟的进一步立法

为了解决上文所述的各种问题,欧盟于2000年5月发布了“E-Confidence-Initiative”;经济合作与发展组织(经合组织)分别于1999年和2003年发布了指导方针,对于如何处理电子商务,如何判断交易平台的可靠性等问题,提供了参考。通过特定的认证系统,消费者和商业代表可以对经营者提供的商品或服务的质量和可靠性进行评级,如果经营者能得到他们的肯定,就可被界定为高质量和高信誉,那么在国际市场上,他们的品牌将得到更广泛的使用和认同。^[1]

正如欧盟媒体与信息社会总司副司长所言,

[1] Point 4.3.4 of (2001/C 123/01).

各成员国对于电子签名的立法和推行还需进一步推进。鉴于电子签名的重要性,电子签名的立法对于提升电子商务的安全性具有十分重要的作用。例如,电子支付就可因电子签名的使用而变得更为安全。对此,一方面,欧盟各国应当积极采纳欧盟指令的规定,另一方面,各国也还必须不断完善构建电子交易的技术基础。举例而言,立法上可以对商品出售人设定一定义务,规定卖方应当为消费者提供核实订单错误的机会;同时也提醒消费者注意到错误可能发生的情况。试想,如果存在一个综合性的法规来规制电子支付,那么这无疑将推动整个市场的发展。在欧盟,一个综合性的指令有望在今年年底向公众推出,这将对电子支付的法律规制奠定基础。

另一个促进电子通信发展的途径在于发展“RAPEX”系统,通过该系统,政府能够及时地进行信息交换,发送紧急警报。^[1]与此同时,还需要建立起一个由训练有素的成员所组成的、构成良好的国家强制执行体系,使政府成为单一高效的行政机构,而不是职能多样却效率低下的行政组织。

通过收集现有的企业网络中企业交易的具体实例,我们发现在B2B的电子市场中的不公平交易行为,正在变得越来越多。这些企业网络包括:欧洲电子商务法律网^[2]、欧洲B2B电子市场交易网^[3]以及全国电子商务合同接入网^[4]等。

在线争议解决机制较之法庭判决,能够为电子商务中的因经营者

[1] Point 3.9.3 of (2003/C 95/01).

[2] Page 5 of SEC(2004) 930.

[3] <http://www.emarketservices.com>.

[4] http://europa.eu.int/comm/internal_market/en/ecommerce/contactpoints_en.htm.

的恶意或疏忽而利益受损的受害人提供更快捷、更经济的解决途径。^[1] 基于消费者对于电子商务的信任感正不断提升,因此需要更为快速易行的司法审理程序。^[2]

现在,欧盟并无意修订《电子商务指令》,相反地,欧盟正在有关学者和专家的协助下,回顾《电子商务指令》的规定,并会在不久的将来,对公众发布关于指令执行情况的报告。然而,欧盟官员也相信,就电子合同争议及其他电子商务的争议问题重新制定简单、公开的规则是不错的选择,从而为成员国就各国的实际情况,在国内法中吸纳转化指令的规定设定最基本的规则。

4.2 对我国电子合同立法的启示

4.2.1 立足于传统法律体系

正如欧盟的专家及官员所说,因为电子合同本身仅是合同的一种形式,所以没有必要制定单行的电子合同法。对我国而言,起草和颁布一部新的电子合同法并非明智之举。从法律规范的角度来看,我国现行的法律体系其实已经涵盖了电子合同。事实上,在线交易和离线交易有着许多的共同点,因而电子合同完全可以与一般合同适用于同一法律规范。

正是基于这样的考虑,一些欧盟的成员国并不情愿随着电子商务的发展来改变传统的法律体系。而作为非欧盟成员国的瑞士,经过多年讨论后,甚至认为不需要进行任何特别的电子合同立法。

[1] Point 3.9.4 of Economic and Social Committee - 397th plenary session, 26 and 27. February 2003 (2003/C 95/01).

[2] Point 3.6.1 (2003/C 95/01).

我们还应当注意到,欧洲的法院很少单独探讨电子合同或电子商务,相反地,他们更倾向于在综合分析整个案件的基础上对有关争议作出合理的、可以接受的判决。当法官认定该法律争议与电子合同有关时,他们则会在商业利益和消费者保护间寻求一个最佳的平衡点。因为从某种程度而言,规则越少,那么这些规则所发挥的作用就会越大。

因此,对于电子合同,我国应当充分利用现行的法律体系和相关的法律规定,而不是制定新的电子合同法。

4.2.2 修订现行法实现对电子合同的规制

考虑到电子商务市场正处于转型的过程中,因此,尽管现行法律制度并不完善,但维持现有的法律规定(如《电子签名法》等)并使其发挥效用,仍是有必要的。伴随着电子商务的发展,对电子商务的需求也呈上升趋势,因而我们可以根据电子合同的特征,对现行的法律进行修订。许多欧洲专家也认同,我们应当扩大合同法的适用范围,使之既适用于一般合同,同样也可适用于电子合同,并且对电子合同所引发的某些特殊问题制定必要的新规定。以荷兰为例,荷兰民法典可适用于所有交易形式,但同时针对电子交易,也制定了某些新的规定。

根据欧盟官员所言,电子合同立法之所以在欧盟取得了成功,原因在于几乎所有的成员国都愿意接受欧盟电子合同立法的一般原则,而且在成员国间不存在通行适用上的实质性困难。当然,要求所有成员国完全接受欧盟颁布的全部法律规范,也绝非易事。举例来说,某些成员国并不认同网站对其网站内容负有绝对的监控义务。据此,欧盟官员认为,对电子合同的规制也不应过于苛刻。事实上,欧洲委员会正在考虑制定一项可适用于 B2B 交易和 B2C 交易的统一、易行的法律,尽管这可能是一项艰巨的任务。

在电子合同立法上,我们应当吸取电子合同立法的基本原则,对现行法律作综合性修订,从而提升电子合同在实践中的统一性。

4.2.3 现行法修订的重点

通过修订现有法律,以使其包含可适用于电子合同的特殊规定,是电子合同规制必不可少的环节。通过对欧洲相关规定和经验进行分析,我们认为,对我国现行法律的修正,应高度重视下列法律问题:

4.2.3.1 市场准入

在欧洲,进行电子商务无须任何许可。即使是在线支付、BBS服务和在线销售行为,法律也未要求任何的特殊许可。在线交易和普通交易适用完全相同的准入门槛。举例而言,在绝大多数欧洲国家,博彩活动是受到严格限制的,而不论其是否在网上进行(英国除外)。为了保护在线交易行为,欧洲议会和部长理事会通过了第 98/84/ec 号指令,对欧盟内部的电子支付服务提供了最基本的法律保护,同时致力于推动欧盟成员国制定相关规定,以打击那些在未经授权的情况下,以非法设备获取受保护的服务资源行为。^[1]

尽管在现阶段,我国仍有必要保留现有的网络经营许可制度。然而,伴随着时代的发展,逐步淡化、取消现行的网络经营许可制乃是大势所趋。进一步来说,我国还应当借鉴欧洲的竞争法,以营造和谐的电子商务市场。

4.2.3.2 电子合同的法律效力及相关法律责任

无论在我国还是欧洲,都认为电子合同与传统的合同具有同等法律效力。但同时,对于电子合同的成立、签署及原件保留,应当制定特殊要求。

[1] For a detailed explanation of Directive 98/84/EC, please see: http://www.abgs.gov.tr/tarama/tarama_files/10/SC10EXP_Conditional%20Access.pdf.

我们也应当认识到,电子合同的责任承担也是一个非常重要的问题。正如德国哥廷根大学 Gerald Spindler 教授所言,在欧洲,关于电子代理人的相关责任分配问题,正在引发一场激烈的争论。德国和西班牙的专家不认为电子代理人是真正意义的代理人,他们认为电子代理人仅是一项单纯的技术或自动化系统,但意大利的法官们却持相反的立场。尽管对电子代理人有不同的观点,但对于电子代理所引发的法律责任承担问题,欧洲各国却有相同的法律规定——电子代理人的实际控制人(使用人)应当承担相关的法律责任。

因此,在我国,针对电子代理行为制定更多的特殊规范是必要的,并应当进一步完善电子通信法律承认的有关规定。

4.2.3.3 电子签名

电子签名对于明确电子通信的责任承担,保证在线交易的安全,具有举足轻重的作用。

德国于 1997 年颁布了《电子签名法》,并且通过相关程序法对电子签名的法律效力问题予以规制。瑞士 2005 年颁布的《电子签名法》,是值得借鉴的电子交易立法。

但我们也应当看到,在德国,电子签名技术的应用并没有先前想象的那样广泛。造成这种情况的原因在于:(1) 银行方面,银行出于其自身利益的考虑和保障安全的目的,否认电子签名的使用;(2) 政府方面,政府往往以缺少足够的资金支持为由,怠于推广电子签名的使用;(3) 保险公司方面,他们认为,保险公司不应当是推动电子签名广泛应用的主体,因此德国的保险公司对于电子签名并没有足够的热情;(4) 从消费者角度来说,由于使用电子签名必须投入一定的花费,而电子签名却又并非必须使用的,所以大多数消费者并不愿在实践中使用电子签名。

正如阿姆斯特丹大学法学院院长 Prof Dr Edgar Du Perron 在座谈

中所言,网络交易的安全是政府应当首要考虑的问题。对于电子签名的使用,也应逐步推广。举例来说,我国政府可以首先在企业间推广电子签名的使用,随后在完全行为能力人中推行。我国还应当规定,网上交易必须采用电子签名。这方面,可以借鉴瑞士关于电子签名的法律规范与操作实践,爱沙尼亚的相关经验也值得我们参考。

4.2.3.4 电子合同的法律规范

在欧洲,对电子交易类型的定义是极其灵活的,因而我国应当重新考虑 C2C 和 B2C 类型的定义。尤其是,在 eBay 上,“超级卖家”被认为是真正的商人,因此须为他们的在线业务缴纳增值税。如果我国政府决定在 B2C 框架下来规制这些超级卖家,那么政府便可以获得数目可观的,由“超级卖家”们所缴纳的税收收入。

对于电子合同的订立,欧洲的专家们通常认为,电子合同订立的过程中,网站上的信息应被视为要约邀请(关于软件下载的信息除外)。对于电子合同的履行,最为关键的法律问题在于如何保护消费者的权利和利益。网站所承担的责任应当由下述三个方面决定:接入服务提供商,缓存策略提供商和主机供应商。

德国的电子商务专家认为,对电子商务合同的规定与普通合同的标准,应当是类似的,但可以设定例外。如,德国高等法院便通过在电子商务领域增加责任限制的规定,来限定、排除德国民法典的适用。实践中,第 312e 条就作了如下规定:消费者必须能够下载相关的标准电子合同,否则,标准条款便不构成当事人间的协议。而荷兰对于标准合同的规定,也与其他欧盟成员国相类似,对于网站所提供的条款,一旦消费者表示同意,即被视为有效,除非存在不公平条款(在这种情况下,消费者和法院都可当然地使之无效)。挪威在这方面树立了良好的典范,根据其法律,在任何情况下,合同标准的规定都应当在保护消费者权益和促进企业发展间取得平衡。

此外,在对合同法进行修订的过程中,应包含电子错误的规定。根据欧洲国家的经验,传统法律对合同错误的处理规则,如赔偿相关损失的规定等,仍然可适用于电子错误引发的纠纷。在发生电子错误情况下,网站或服务供应商应当提供一个充分的技术方法,对任何的输入错误进行改正。而对发生电子合同误解的情况,不应适用电子错误来规范,而应由合同法进行调整。德国和法国对于电子错误,采用了不同的特殊规范手段。法国专家认为,如果电子合同中存在电子错误,那么该电子合同即被视为无效合同,而德国业界则认为此类合同依然是有效合同,但在进行一定补偿后,当事人可以协议撤销该合同。在这方面,我国应当根据实际需求并在借鉴其他国家有关经验的基础上,对电子错误作出规定,并使该内国法规定与联合国电子通信公约的规定相适应。

4.2.3.5 证据规则的解决方案

电子合同争议的解决方式,通常有三种类型:诉讼,仲裁与替代性纠纷解决机制(ADR)。

在德国和荷兰,涉及电子通信或电子合同的案例并不多见。即使有此类纠纷,法官也将行使其自由裁量权来对案件进行判决。

在德国,对电子合同争议,也罕有进行仲裁的案件,更不用说采用在线争端解决机制的做法。造成这种情况的原因在于,法院完全可以以低成本、公开的听审方式来处理绝大多数与电子商务有关的案件。当然,出于提高效率或隐私保护的目,在某些情况下也可能采用仲裁的解决方式,但对仲裁裁决的执行也是值得考虑的问题。

为了节省时间,提高效率,在荷兰,ADR 成为解决电子合同争议最常见的方式。据阿姆斯特丹大学的一位教授所言,在所有电子合同争议中,只有 5%~10% 的纠纷会由法院解决。但在荷兰,在线争端解决机制也并未十分普及,仅仅还处于迅速发展过程中。

在德国和某些国家,电子文档的证据价值是极为有限的。据汉诺威的一名法官所言,电子合同的案件为数很少,因而法官也很少接受关于电子商务特殊规范的培训。相反,在涉及技术争议的任何案件中,都必须由技术专家提供专业意见以供法官参考。而在荷兰,在线交易仍受荷兰民法典规范,不存在在线交易的证据规则。

4.2.4 为电子商务的推行营造更好的环境

一般说来,在线交易仅占有所有跨国交易的6%左右。因而我国有必要与欧盟加强电子合同领域的沟通与协作,以便寻找到一个提高在线交易比重的有效途径。

在欧盟和中国专家的指导下,开展电子合同或电子商务的培训活动是一个不错的建议。对此,欧盟有专门的部门负责。^[1]

同时,消费者对电子商务市场的信心也具有十分重要的意义。为了提升消费者对电子商务的信任,我们应当支持消费者与制造商、分销商进行建设性对话,也应支持消费者组织的咨询活动,以创造一种信任气氛。^[2]

最后,就像丘吉尔在不列颠空战结束后所说的:“这不是结束,这甚至不是开始的开始,这是开始的终结!”的确,根据实际情况完善现行法的修订,我们还有很长的路要走。

[1] 欲了解更多信息,请访问:http://ec.europa.eu/dgs/education_culture/index_en.html。

[2] Point 1.3 of (2001/C 123/01)。

Research Report on Electronic Contract Regulation in Europe

FOR
EU-China Information Society Project

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Table of Contents

1. General Introduction of EU Legislation on Electronic Contracts / 196
1.1 E-contracts-The Civil Law Framework / 196
1.1.1 Ordinary contract / 196
1.1.2 Electronic declaration of intent / 197
1.1.3 Offer / 200
1.1.4 Acceptance / 201
1.1.5 Effectiveness of electronic contracts / 202
1.1.5.1 Point in time of effectiveness / 202
1.1.5.2 Rescission of electronic contracts / 203
1.1.6 Nullity due to lack of legal capacity / 204
1.2 The Current EU Regulatory Framework / 205
1.2.1 The legal system of the European Union / 205
1.2.2 Regulatory framework for e-Contracts / 206
1.2.2.1 The ECD / 206
1.2.2.2 The ESD / 210
1.2.2.3 The DSD / 213
2. The Relevant European Experience on E-contract Regulation / 216
2.1 The ECD / 217
2.1.1 Definitions / 217
1. Information society services / 217
2. Service provider / 220
3. Recipient of the service / 220
4. Coordinated field / 221

5. The internal market and the freedom of admission / 221
6. Duties to inform and commercial communication / 223
2.1.2 Conclusion / 225
2.2 The Electronic Signature Directive / 225
2.2.1 Scope of application / 225
2.2.2 Definitions / 226
2.2.3 Status of electronic signatures / 227
2.2.4 Liability / 228
2.2.5 Accreditation of foreign certificates / 228
2.2.6 Conclusion / 229
3. The National Implementations of EU Regulation on E-contract / 231
3.1 The National Implementations of The E-commerce Directive / 231
3.1.1 The legal framework before implementation of the E-Commerce Directive / 232
3.1.1.1 Situation in Germany / 232
3.1.1.2 Situation in the United Kingdom / 241
3.1.1.3 Situation in France / 246
3.1.2 Transposition of the E-Commerce Directive by the Member States / 249
3.1.2.1 Germany / 249
3.1.2.2 United Kingdom / 253
3.1.2.3 France / 256
3.1.2.4 Conclusion / 259
3.2 The National Implementations of the Electronic Signature Directive / 260
3.2.1 Germany / 261

- 3.2.2 *France* / 263
- 3.2.3 *United Kingdom* / 265
- 3.2.4 *Experiences with the use of Electronic Signatures and Future Perspectives* / 266
- 4. Conclusion: Further Steps of EU Legislation and Inspiration to China's E-contract Regulation** / 268
 - 4.1 Further Steps of EU Legislation / 268
 - 4.2 Inspiration to China's E-contract Regulation / 271
 - 4.2.1 *To make full use of the traditional legal system in China* / 271
 - 4.2.2 *To revise some regulation on e-contracts with basic and comprehensive rules* / 272
 - 4.2.3 *To identify the outstanding issues for the revision of China's current laws* / 273
 - 4.2.3.1 *Market entry* / 273
 - 4.2.3.2 *Legal validity of e-contracts and relevant liabilities* / 274
 - 4.2.3.3 *E-signature* / 275
 - 4.2.3.4 *Regulation on e-contracting* / 276
 - 4.2.3.5 *Dispute resolution and evidential rules* / 277
 - 4.2.4 *To build a better environment for the development of e-commerce* / 278

As entrusted by the PRC Ministry of Commerce and supported by the European Commission delegation to China, I conducted an on-location research on electronic contract regulation in Europe for the EU-China Information Society Project during this April and October. The research was based in the Institute for Media and Telecommunications Law ("ITM") of Meunster University with the help of Prof Dr Thomas Hoeren and Ms Esther Pfaff according to the approved schedule. As specified by the topic list, the on-site research covered various aspects of e-commerce regulation, with special interests in e-contract regulation. This report is based on ITM's paper and report, relevant workshops and vis-a-vis interview in Germany, Belgium and Netherland, focusing on EU's regulation on e-contract.

In addition, the junior research took this chance to participate the United Nations Convention on the Use of Electronic Communications in International Contracts in Hannover so as to develop as many contacts as possible for the project purpose.

1. General Introduction of EU Legislation on Electronic Contracts

1.1 E-contracts - The Civil Law Framework

All of the e-commerce experts and officials in Europe agree that electronic contracts hold the same characteristics as ordinary contracts concluded in common business life. The main difference, as it is embedded in the word "electronic", is that these contracts are specifically concluded via internet and recorded digitally.

1.1.1 Ordinary contract

Since the ordinary contracts constitute the initial point of electronic contracts, it is inevitable to illustrate briefly the main features of the conclusion

of ordinary contracts, in order to specify the key defining elements of electronic contracts simultaneously.

Pursuant to sec. 145 et seq. of the German Civil Code (GCC) contract formation requires declarations of intent, which are concordant in their content, manifested by at least two persons. The declaration of intent which is expressed first is termed "offer" whereas the subsequent is an "acceptance"^[1].

1.1.2 Electronic declaration of intent

A declaration of intent is a manifestation of will directed towards a legal result^[2]. In the process, the expressing person has to act with the consciousness to emit a legally relevant declaration outwards. The premise is thereof, that the declaration is based on a human will. Electronic declarations of intent are characterized by the fact that the expressing person and the addressee help themselves with electronic devices such as computers not only for dispatching and receiving declarations but also for creating such a declaration^[3]. Due to this, electronic or digital declarations of intent can be divided into two sorts.

1. Digitally created declarations of intent / automated data processing

Digital declarations can be created automatically by a specific algorithm in the form of a computer program. In doing so, both the content and the time of dispatch of the declaration can be left to an automatic procedure. Consequently, one can suppose that these

[1] Brox, Allgemeiner Teil des BGB, Rn. 165.

[2] Brox, Allgemeiner Teil des BGB, Rn. 82.

[3] Heun, CR 1994, 595.

declarations uttered by a computer lack a specific human will which then would not fulfill the prerequisites for a declaration of intent. However, it has to be borne in mind that the computerized process can eventually be traced back to a human will by previously setting up the algorithm^[1]. Therefore automated declarations suffice the premises of an ordinary declaration of intent^[2].

2. Digitally transmitted declarations of intent

These are declarations which are drafted by the expressing person and transmitted via electronic devices, for example via e-mails or via fax. Such an electronically transmitted declaration distinguishes itself from an ordinary declaration only by its way of conveyance. Thus, there is no doubt that it fulfills the requirement of a human will^[3].

3. Disposal of digital declarations of intent

In order to have a declaration of intent to become effective it has to be emitted. For this it is necessary, that the expressing person has uttered his will to be legally bound in a way that there is no doubt about the finality of his manifestation^[4]. In the internet such a disposal is carried out by clicking the mouse or in case of e-mails by giving the definite order to send^[5]. If for example such an e-mail containing a declaration of intent is sent, it can be undoubtedly assumed that this e-mail has been

[1] Heun, CR 1994, 595 (596).

[2] Köhler, AcP 182 (1982), 126.

[3] Heun, CR 1994, 595.

[4] Palandt/Heinrichs, § 130 Rn. 4.

[5] Deville/Kahlthegener, NJW-CoR 1997, 168.

brought into commerce^[1]. Nevertheless, a lot of problems arise from this procedure.

A problem could be that the expressing persons did not have the intention to send out the declaration. For example, is the order to send accidentally activated then this declaration would be categorized as a "lost" declaration of intent^[2]. In this case, the e-mail reaches the addressee without a willing disposal of the expressing person. The prevailing opinion^[3] treats these cases the same way as cases lacking consciousness of manifestation. The unwilling disposal of declaration is to be put on a par with willingly emitted declarations if the unwilling disposal into commerce can be traced back to the expressing person's fault^[4]. Another opinion^[5] evaluates the legal consequence of these unwillingly disposed declarations by using the objective interpretation criteria of declarations of intent. If the addressee is fairly allowed to assume that the declaration was sent to him willingly then his reliance on the existence of such a will deserves protection. The preference of this opinion consists of the possibility for the expressing person to distance himself from the legal consequences of his unwillingly emitted declaration by rescission. In doing so, the damage of the addressee resulted from his reliance on a willingly disposed declaration of intent would be compensated pursuant to sec. 122 GCC.

[1] Fritzsche/Malzer, DNotZ 1995, 3 (11).

[2] Ultsch, DZWIR 1997, 466 (469).

[3] Palandt/Heinrichs, § 130 Rn. 4.

[4] BGHZ 65, 13 (14).

[5] Koch, Internet-Recht, S. 137.

Yet another problem is the point in time of the disposal. The determination of this moment is material for the question if a right of withdrawal was exercised in due time. The so-called queuing has to be mentioned in this context. This is a procedure where e-mails are programmed in a way that they would be transferred in a waiting queue before being dispatched. It can be imagined that the relevant point in time would be the moment the e-mail is put into the "outbox", due to the fact that by this time, the expressing person has already done everything which is necessary for the disposal into commerce and the sending procedure occurs automatically. However, up to the time of the actual sending process, the expressing person still have the possibility to influence on the declaration of intent by, for example, removing the e-mail from the "outbox", revising it or even deleting it. Therefore, the point in time of the disposal is determined by the actual dispatch of the e-mail, i. e. the moment the e-mail leaves the "outbox" to be transferred to the "inbox" of the addressee^[1].

1.1.3 Offer

Goods and services are offered on several internet pages. The customers can order the specific good or service from those websites. First of all, the question is how the legal aspect of these offers on these websites are to be assessed. Whether the presentation of goods and services is to be seen as an offer in terms of sec. 145 et seq. GCC or as mere invitation to treat (invitatio ad offerendum), is specified by the

[1] Härtig, Internetrecht, S. 43 Rn. 73.

normative interpretation, i. e. the objective meaning of the declaration^[1]. Websites can be visited by tremendous number of persons worldwide and theoretically, if the presentation of goods and services is to be seen as an offer, everyone can accept this offer by clicking the "order" button. However, this would probably bust the limited capacity of the online shops. Hence, the offer of those websites can only be judged as an invitation to the visitors to give an offer^[2]. Following this, the administrator of the website has the discretion to decide whether to accept this offer or not based on his capacity.

1.1.4 Acceptance

After receiving the offer by the customer, the content provider decides on accepting the offer or not. The acceptance can be manifested by several means. The traditional one is to send a confirmation mail to the customer. Furthermore, automatically generated declarations by self-governed electronic agents are also considered as acceptance, due to the fact that by installing the agent a preparation action has been undertaken deliberately, therefore the action of the agent can be ascribed to the user^[3]. Similar to this, e-mails stating that the order will be performed are regarded as a declaration of intent and therefore an acceptance, whereas e-mails referring to the order being worked on do not constitute such an acceptance.

[1] OLG Oldenburg, CR 1993, 558.

[2] OLG Oldenburg, CR 1993, 558; Ernst, NJW-CoR 1997, 165.

[3] Hoeren, Skript Internetrecht, S. 249; Heun, CR 1994, 595 (596); Köhler, AcP 182 (1982), 126.

1.1.5 Effectiveness of electronic contracts

1.1.5.1 Point in time of effectiveness

The question is when an electronic contract concluded via internet becomes effective. In German law one distinguishes between a declaration of intent between attendees or absentees. On the one hand, a declaration between attendees is received and becomes effective by the moment the addressee is able to perceive the manifestation^[1]. On the other hand, a declaration of intent between absentees becomes effective upon receipt by the addressee pursuant to sec. 130 GCC^[2]. Material for the time of receipt is the moment the manifestation has arrived into the addressee's sphere of control. In doing so, the addressee is able to take note of the declaration. If the actual notice has not taken place, the relevant point in time of receipt is the moment a receipt can be assumed under normal conditions^[3]. In the case of online communications-online chats-the rule of the attendees is applicable^[4]. On the contrary, situations, such contract conclusions at an online-shop, are determined as declarations between absentees.^[5] Consequently, the relevant point in time for the receipt of declarations of intent via e-mail is the time when a retrieve of e-mails can be ordinarily expected. Here one has to differentiate between business and private addressees.^[6] A regular retrieve of business e-mails

[1] Brox, Allgemeiner Teil des BGB, Rn. 156.

[2] Brox, Allgemeiner Teil des BGB, Rn. 149.

[3] Hoeren, Skript Internetrecht, S. 256; Brox, Allgemeiner Teil des BGB, Rn. 150.

[4] Hoeren, Skript Internetrecht, S. 256; Fritzsche/Malzer, DNotZ 1995, 3 (9).

[5] Hoeren, Skript Internetrecht, S. 256; Fritzsche/Malzer, DNotZ 1995, 3 (11).

[6] Hoeren, Skript Internetrecht, S. 256; Ernst, NJW-CoR 1997, 165 (166).

can be expected from business people. Therefore, if e-mails arrive at the "inbox" during office hours, the declaration of intent contained becomes effective simultaneously. Declarations arriving at the "inbox" out of office hours become effective by the time the business usually starts. It can be assumed that private addressees check their e-mails at least once per day. Due to the lack of a standard stating a usual point in time for checking e-mails, the declaration of intent is regarded as received the day after the actual arriving at the "inbox".

1.1.5.2 Rescission of electronic contracts

Basically, there is no concern about allowing contracts concluded via internet to be avoided if the necessary prerequisites of such a rescission are fulfilled. Pursuant to sec. 119 para. 1 of the GCC, only errors occurring during the disposal of a declaration of intent would justify a rescission. Therefore, errors which occur in forefront cannot be taken into consideration^[1]. In the Internet there could be errors concerning data input or data transmission in particular.

a) Declaration error

Pursuant to sec. 119 para. 1 alt. 2 of the GCC a contract is voidable by reason of a declaration error, if the expressing person did not intend to manifest such a declaration with the specific content. Common cases for such a declaration error could occur during data input, for example, the customer makes an error while writing the declaration or of transposed digits. Clicking the wrong button could also constitute such an error. Upon these constellations, the erring person is entitled to avoid his

[1] Mehrings, MMR 1998, 30 (32).

declaration of intent. He remains liable for damages arising from his rescission towards the addressee pursuant to sec. 122 para. 1 of the GCC.

b) Transmission error

Pursuant to sec. 120 GCC there is a right of rescission at existence of a transmission error of the declaration messenger. In case of the mailbox system, the provider by which the expressing person operates his mailbox is the declaration messenger of the expressing person. If an error occurs while transferring the declaration by the provider as a declaration messenger, the expressing person has the right to avoid his falsely transmitted declaration. On the contrary, if the error arises after the declaration has already arrived at the addressee's messenger (which would also be a provider), a rescission is ruled out. The liability for damages resulting from a rescission remains the same as the ordinary concept for non-electronic contracts.

1.1.6 Nullity due to lack of legal capacity

Due to the anonymity of the contracting parties in the internet a question concerning the balance of protection of confidence and protection of minors arises, since the content provider of an online shop, for example, is not able to identify the party with whom he is concluding a contract. However, if a six-year-old emits a declaration of intent by clicking the "Buy"-button on the website, this declaration of intent is nevertheless void (sec. 105 and sec. 104 GCC). The content provider cannot rely on his protection of confidence since there is no bona fide

regarding the legal capacity of the contract partner^[1]. Cases of a limited legal capacity are treated the same way. As long as there is no approval by the parents or the legal representative, the concluded contract is void. There is no protection of the contract partner's confidence either^[2]. Consequently, there is a permanent risk of concluding a contract with minors or persons with limited legal capacity in the internet.

1.2 The Current EU Regulatory Framework

1.2.1 The legal system of the European Union

To understand the current EU regulatory framework one should have a glance at the current legal situation in the EU. The EU consists of 27 sovereign nations which have different legal traditions. As a result, the process of law making depends on the conveyance of responsibilities by the Member States to the EU. The EU does not intend to create a uniform legal order. In fact the Community goals are to facilitate trade, investments and mobility of the citizens. To achieve these goals the EU principally uses regulations and directives. As the regulations are binding on states when adopted and therefore limit the sovereignty of the Member States, directives are used more frequently. They only set out a binding result that must be achieved within a certain time but leaves a wide margin of discretion to the Member States with regard to the actual transposition.

[1] Palandt/Heinrichs, Einf v. § 104 Rn. 4.

[2] BGHZ 120, 170 (174).

1.2.2 Regulatory framework for e-Contracts

At the moment, the EU regulatory framework for e-contracts mainly consists of three directives. The two basic ones are the Electronic Commerce Directive 2000 (ECD, 2000/31/EC) and the Electronic Signature Directive 1999 (ESD, 1999/93/EC). Another very important directive is the Distance Selling Directive (DSD, 1997/7/EC) but this one does not apply to e-contracts only.

1.2.2.1 The ECD

The ECD is aimed at facilitating electronic commerce. As specified by the EU official, it takes quite long time to draft the ECD, which is interactive in the market between the member states only. For Article by Article Comments to Directive 2000/31/EC, please follow this link: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009945.

One main aspect of this directive is the principle of the country of origin. Explain the principle in a few words! This aspect also concerns a prohibition of any restrictions imposed on information society services offered by other Member States and a commitment to supervise the compliance with legal guidelines. In addition, the directive emphasizes aspects of information requirements, the liability of intermediary service providers and the electronic conclusion of contracts.

The last aspect, the electronic conclusion of contracts, is regulated in the 3rd part, Articles 9 to 11.

Article 9 discusses the question how to render e-contracts and how to put them into operation. Here the Member States are bound to create the background for the conclusion of electronic contracts. Since the civil law in the distinct states knows different obstacles, in particular the written

form, which cannot be directed in total, the requirements are kept very abstract.^[1] This Article also names the exceptions to the ECD, namely contracts concerning the creation or the transfer of rights in real estate (a), contracts requiring by law the involvement of courts, public authorities or professions exercising public authority (b), contracts of surety granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession (c), contracts governed by family law or by the law of succession (d).^[2]

Article 10 deals with aspects of consumer protection. It clarifies how information has to be presented and according to paragraph 3 the user must have the possibility to save and reproduce the general terms just as the terms of contract.

The third article having to do with electronic contracts is article 11. It regards the issue of placing the offer.^[3]

As stated above the directives issued by the European Union have to be transposed into national law by the legislation of the Member States. Since there are several different legal systems in the EU, the transpositions differ a lot. These legal systems basically could be divided into four groups. These are the German section (Germany, Austria, Greece), the droit civil (France, Spain, Portugal, Italy, Belgium, Netherlands, Luxembourg), the Common Law (United Kingdom,

[1] Wellbrock, Ein kohärenter Rechtsrahmen für den elektronischen Geschäftsverkehr in Europa § 6 A I.

[2] Art. 9 para 2 ECD 2000/31/EC.

[3] Art. 11 ECD 2000/31/EC.

Ireland) and the Scandinavian section (Denmark, Sweden, Finland).^[1] In the following I will turn my attention to Germany, France and the United Kingdom.

a) Germany

In Germany the legislation decided to transpose the directives by altering the Teledienstgesetz (TDG) and the Teledienstdatenschutzgesetz (TDDSG). In TDG one can find regulation concerning the area of application, definitions, the country of origin principle, duties to inform and the responsibility of providers.^[2] Section 4 TDG rules that service provider settled in Germany will be judged under German law and transposes in so far the country of origin principle into German law. In Germany there are some exceptions to the country of origin principle. This principle is not applicable to anti-trust law, conflicts of law in insurance policies, surveillance law of insurance companies, data privacy laws and intellectual property law.^[3]

Another change affects the civil process order and guarantees a more efficient legal protection. According to section 1031 para. 5 civil process order an arbitration agreement including a consumer can be provided in electronic form.^[4]

Most changes concern consumer protection. The German Civil Code

[1] Müller/Roessler, DuD 1999, p. 497; Note that after the accession of ten new Member States in May 2004 these groups might have to reassessed and altered in the future.

[2] Wellbrock, Ein kohärenter Rechtsrahmen für den elektronischen Geschäftsverkehr in Europa § 3 A p. 38.

[3] RIW 2002, p. 184; Schack MMR 2000, p. 53.

[4] EGG Art. 2.

(GCC) has been amended by section 312 e, whereby an entrepreneur has to fulfill several duties while concluding a contract by electronic means. This is the transformation of the articles 10 and 11 ECD.^[1] This transformation may be, in addition to the regulations concerning the country of origin principle and those transposing article 9 ECD, the most important one regarding the issues of electronic contracts. The section 312 e GCC is applicable if an entrepreneur uses tele or media services for the delivery of goods or the rendering of services.^[2] Relevant services are according to the Teledienstgesetz for example online banking, online shops or online auctions. The entrepreneur's duties are in detail to provide adequate technical means in order to correct mistakes, to inform the consumer and to approve the consumer's orders.^[3] However this approval is no acceptance of a contract.^[4] If the entrepreneur fails to fulfill these duties the contractual partner is entitled to damages.

b) France

In France it took a bit longer to transpose the ECD into national law, but in the end the Loi n° 2004 - 575 du 21 juin 2004 pour la confiance dans l'économie numérique was passed.^[5] Articles 1 - 4 concern general regulations, articles 5 - 9 regulate the provider responsibility, by amending the Loi relative à la liberté de la communication and the Code de postes et télécommunication, and the articles 10 - 28 affect the

[1] Palandt section 312 e para 1.

[2] Palandt section 312 e para 2.

[3] Palandt section 312 e para 3.

[4] AG Hamburg NJW-RR 04, 1284.

[5] J. O. n° 143 du 22 juin 2004, p. 11168.

remaining transformation of the ECD.

c) United Kingdom

After some difficulties the British parliament passed the Electronic Commerce Regulations 2002.^[1] So they transposed the majority of the aspects of the ECD. Two months later the extension of the Stop Now Orders (EC Directive) Regulations 2001^[2] included consumer protecting elements of the ECD. The main aspects of the Electronic Commerce Regulations 2002 consider the Country of Origin Principle. So the online sellers and advertisers are subject to the laws of the UK if the trader is established in the UK. Contracts with consumers and contracts where another law has been chosen are excepted. Online traders have a duty to render clearly defined information about the trader, the nature of commercial communications and how to complete an online transaction.^[3]

1.2.2.2 The ESD

The ESD has the ambition to secure the acceptance of electronic signatures across national boundaries.^[4] It regulates difficulties associated to security levels of electronic signatures as well as questions about liabilities.^[5] In Article 2 of the directive three levels of security are defined, in particular the "electronic signature", the "advanced

[1] <http://www.opsi.gov.uk/si/si2002/20022013.htm>.

[2] <http://www.opsi.gov.uk/si/si2001/20011422.htm>.

[3] <http://www.dti.gov.uk/sectors/ictpolicy/ecommsdirective/page10133.html>.

[4] Hoeren-Skript Internetrecht, p. 259, <http://www.uni-muenster.de/Jura.im/hoeren/>.

[5] <http://europa.eu/scadplus/leg/de/lvb/l24118.htm>.

electronic signature" and the "qualified electronic signature".^[1]

The first one comprises data in electronic form that may serve as method of authentication, the second one is reached when the signature can be related to only one single person and to comply with the third level, the electronic signature has to meet further requirements. In Article 5 the directive rules that qualified electronic signatures are equal to a handwritten one and may even be presented in front of court as evidence.^[2] Another main aspect of the ESD is the question of liabilities in each Member State. This aspect is dealt with in Article 6 ESD. According to paragraph 1 it has to be ensured that a certification-service-provider is liable for damage by issuing a certificate as a qualified certificate to the public or by guaranteeing such a certificate to the public.^[3] This liability applies to issues of content, ownership and the use of data.^[4]

a) Germany

The German legislator already passed a signature law in 1997^[5], but unfortunately this law contradicted the ESD in some points. So Germany transposed the directive by adapting several rules of the GCC, the civil Process Order and this signature law. The new section 4 of para 1 SigG^[6] rules that operators of certificate services do not need an

[1] Art. 2 ESD 1999/93/EC.

[2] Art. 5 ESD 1999/93/EC.

[3] Art. 6 para 1 ESD 1999/93/EC.

[4] Art. 6 para 1 a-c ESD 1999/93/EC.

[5] <http://www.online-recht.de/vorges.html>? SigG.

[6] http://bundesrecht.juris.de/sigg_2001/index.html.

authorisation. However these providers have to satisfy certain criteria and are obliged to notify the appropriate authorities. Furthermore the SigG transposes the definitions of Article 2 ESD into German law and regulates the provider's liability.^[1] Outside the SigG, section 126 a GCC introduces the electronic form of signatures and section 126 a para 3 GCC equates the electronic form with the handwritten one. The Civil Process Order was amended and now contains adopted rules concerning prima facie evidence (section 292a) and demonstrative evidence (section 371 phrase 2).

b) France

The two important laws in France regarding the ESD are the Loi 2000 - 230 du 13 mars 2000^[2] and the Décret n°2001 - 272 du 30 mars 2001.^[3] The former law alters the French regulations concerning documents of evidence. It acknowledges the jurisprudence of the French Supreme Court (Cour de cassation) which accepted in 1997 a fax as document of evidence and stated that a "written" declaration of intent does not have to match any formalities.^[4] Therefore e-mails are admissible in front of court as documents of evidence. The latter law defines requirements of electronic signatures so that these are treated equally to normal signatures. In contrast to many other countries France abstained from an accreditation of certificate providers. The COFRAC

[1] [www. uni-leipzig. de/ - urheber/ressrc/ material/seminare/infoges/seidel-digitalsignatur. pdf](http://www.uni-leipzig.de/~urheber/ressrc/material/seminare/infoges/seidel-digitalsignatur.pdf)

[2] J. O. n° 62 du 14 mars 2000, p. 3968.

[3] J. O. n° 77 du 31 mars 2001, p. 5070.

[4] Cour de cassation, Chambre commerciale, JCP 1998, Jurisprudence, p. 178.

(Comité français d'accréditation) which is a system of accreditation founded in 1994 inherited this task.

c) United Kingdom

In the UK the process of transposition of the ESD was carried out in two steps. The first one was the Electronic Communications Act 2000 (ECA),^[1] the second one the Electronic Signatures Regulations 2002.^[2] The first one rules in section 7 para 1 that documents with an electronic signature are admissible as evidence in respect of authenticity and integrity of the document.

In sections 8 and 9 the responsible secretary is authorized to pass regulations in order to regulate details. These regulations are the Electronic Signatures Regulations 2002. This regulation comprises definitions (section 2), the surveillance of the certificate providers (section 3), the liability (section 4) and the provider's duty to data protection (section 5). Since formalities are very uncommon in the UK the British transposition mainly deals with the clarification of procedural aspects of the law.

1.2.2.3 The DSD

The third important directive, the DSD, regulates problems related to distance selling as for example protection against demands for payments of unsolicited goods and high pressure selling methods. In addition the buyer gets a special right of withdrawal since he has no chance to inspect the goods before the purchase.

[1] <http://www.legislation.hmso.gov.uk/acts/acts2000/20000007.htm>

[2] <http://www.legislation.hmso.gov.uk/si/si2002/20020318.htm>

The exclusive use of means of distance communication in the whole period of concluding of a contract is essential to apply the DSD.

Since a special directive exists for financial services, it is important to distinguish whether goods and services are related to financial services or not.

a) Germany

The DSD first has been transposed into German law outside the GCC. The legislator created a separate law concerning contracts of distance selling.^[1] Later, this law has been introduced into the GCC. Sections 13 and 14 GCC are now defining the consumer and the entrepreneur. Sections 361 a, b GCC is about the consumer's right to withdrawals. During the modernization of the law of obligations in 2001,^[2] the legislator had introduced the regulations of the Fernabsatzgesetz into the GCC. Now sections 312 b to d GCC constitute the German rules in respect of contracts of distance selling. Whereas section 312 b GCC represents a definition of contracts to which these rules are applicable sections 312 c and d GCC regulates the duties of entrepreneurs using distance selling contracts and the consumer's rights.

b) France

A general problem in French consumer protection law is that it is not exactly clarified who is consumer and who is entrepreneur. This has always been an issue in front of the courts. Unfortunately even the French Cour de Cassation has decided in ambiguous ways. For example an estate

[1] Fernabsatzgesetz: <http://dejure.org/gesetze/FernAbsG>.

[2] BGBl. 2001, p. 3138.

agent who buys an alarm device is considered as a consumer^[1] but a jeweler who bought a fire extinguisher was considered as an entrepreneur.^[2] These problems of definition have not been solved until now.^[3] Since the former French regulation was almost identical with the provisions of the DSD, there has not been a successful attempt to transpose the DSD into French law. Now, the LSI^[4] adopts some regulations of the DSD to clarify individual aspects.^[5]

c) England

The issue of the Consumer Protection (Distance Selling) Reg. 2000 was the British transposition of the DSD.^[6] It covers among other things aspects of e-commerce, mail, telephone and fax. The withdrawal from a contractual obligation has to be presented in written or another durable form.^[7]

[1] Cass. civ. lère 28.04.1987, J. C. P. 1987 II, 20893, note paisant, but contra, Cass. civ. lère 18.04.1986, R. T. D. 1987 Vol. 2, p. 86.

[2] Cass. crim. 27.06.1989. D. 1990. Som. p. 360.

[3] Lilian Edwards, The New legal Framework for E-Commerce in Europe, 2005, p. 102.

[4] Projet de loi sur la Société de l'information, Doc. Assemblée Nationale Nr. 3143.

[5] Lilian Edwards, The New legal Framework for E-Commerce in Europe, 2005, p. 104.

[6] Statutory Instrument 2000/2334.

[7] Lilian Edwards, The New legal Framework for E-Commerce in Europe, 2005, p. 285.

2. The Relevant European Experience on E-contract Regulation

As pointed out above, the current EU regulatory framework for electronic contracts mainly consists of three directives:

- * Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("E-Commerce Directive");

- * Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures ("the Electronic Signature Directive");

and

- * Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance

contracts.

This chapter will focus on the general information about the E-Commerce Directive and the Electronic Signature Directive as follows:

2.1 The ECD^[1]

The ECD^[2] aimed at facilitating electronic commerce to the greatest extent possible.

One main aspect of the directive is the principle of country of origin. It contains a prohibition of any restrictions imposed on information society services offered by other Member States and a commitment to supervise the compliance with legal guidelines. Additionally the directive emphasizes on aspects of information requirements, the liability of intermediary service providers and the electronic conclusion of contracts.

2.1.1 Definitions

The most important terms used are the ones in respect of the conclusion of electronic contracts like information society services, (established) service provider, recipient of the service, consumer and the coordinated field. These definitions are provided in Art. 2 of the ECD.

1. Information society services

The information society services shall be understood as services within the meaning of Article 1 para. 2 of Directive 98/34/EC as

[1] ECD, as referred to in the following.

[2] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

amended by Directive 98/48/EC.^[1] In this Directive information society services are defined as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.^[2]

“At a distance” means that the parties are not simultaneously present. This does not comprise services like treatment at a doctor’s surgery or plane ticket reservation at a travel agency when electronic equipment is used but when the client is physically present. Another case is the consultation of an electronic catalogue in a shop with the customer on site.^[3] So the absence of physical presence is a key element of the definition of at a distance.

The term “by electronic means” describes that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means. Exemptions are for example automatic cash or ticket dispensing machines, telefax/telex service or services provided via voice telephony or fax.^[4]

Finally the expression “at the individual request of a recipient of services” means that after an individual process the services are provided through the transmission of data.^[5] The so called point to multipoint

[1] Art. 2 Directive 2000/31/EC.

[2] Art. 2 Nr. 2 lit. a Directive 1998/48/EC.

[3] Annex V 1 Directive 1998/48/EC.

[4] Annex V 2 Directive 1998/48/EC.

[5] Art. 2 Nr. 2 lit. a Directive 1998/48/EC.

transmissions do not form part of the information society services. These are services provided without individual demand for simultaneous reception by an unlimited number of individual receivers, such as television or radio broadcasting services as well as teletext.^[1] Looking directly at the wording, all so called Hybrid Transactions (Transactions which take part in the offline world, too) would be excluded from this directive. However, this would not make any sense since the biggest number of contracts concluded online implies an offline part. So it is very unlikely that the draftsmen intended such an exemption. Why should there be different rules applicable for the purchase of an e-book or a real book. The content would be the same. Or imagine a Hybrid Transaction where the Country of Origin Principle would apply to the online part but not the offline one. This was clearly not intended by the European Commission, so the Hybrid Transactions have to be included in the scope of application.^[2] Many Member States have directly adopted the definition as it is stated in the directive,^[3] but as it is very complicated, there are some States which decided to take a different approach. The Polish legislator for example replaced “information society services” by “a service provided by electronic means”.^[4] That means transmitting and

[1] Annex v. 3 Directive 1998/48/EC.

[2] Hörnle, *International Journal of Law and Information Technology*, p. 333 et sqq.

[3] E. g. England: *Electronic Commerce (EC Directive) Regulations 2002* Sec. 2 lit. b; Finland: *Act on Provision of Information Society Services 2002* Sec. 2; Spain: *Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico* Annex a); Portugal: *Decree-Law no. 7/2004, of 7 January* Art. 3 1.

[4] Kryczka, *International Journal of Law and Information Technology*, p. 55 et sqq.

collecting data by means of tele-information systems, through a public network, at the individual request of a service recipient, without the parties being simultaneously present. While maintaining most of the elements included in the European definition the Polish Law introduces the term "tele-information system". This is understood as any set of co-operating hardware and software that ensures processing and saving, transmitting and collecting data through networks, by means of wire, radio waves, optical means or other means using electromagnetic energy.^[1] Additionally the Polish definition puts more emphasis on the term public network. It thereby excludes services provided through an intranet. However, the Polish definition concerns the same broad catalogue of services that the European Commission wanted to comprise.^[2]

2. Service provider

A service provider is any natural or legal person providing an information society service.^[3] For example a retailer who sells his wares online, an organisation that supplies a data bank or the operator of search engines. This service provider shall be considered as established if he effectively pursues an economic activity using a fixed establishment for an indefinite period. Where upon the simple presence and use of electronic means do not constitute an establishment of the provider, in themselves.^[4]

3. Recipient of the service

Any natural or legal person who, for professional ends or otherwise,

[1] Kryczka, *International Journal of Law and Information Technology*, p. 55.

[2] Kryczka, *International Journal of Law and Information Technology*, p. 55.

[3] Art. 2 lit b Directive 2000/31/EC.

[4] Art. 2 lit c Directive 2000/31/EC.

uses an information society service is a recipient of these services if he wants to make them accessible or seek information.^[1]

4. Coordinated field

With coordinated field the EC legislator describes the requirements laid down in Member States' legal systems applicable to ecommerce, particularly to information society service providers or information society services, regardless of their general nature or their special design.^[2] It only covers aspects in relation to online activities and not those in relation to goods as in particular safety standards, labelling obligations, or the liability for goods.^[3] In detail the coordinated field concerns the taking up of the activity of an information society service by a service provider such as qualification, authorisation or notification. Furthermore the pursuit of the activity of an information society service, like the behaviour, quality or content of services or their liability fall into the scope of the coordinated field.

5. The internal market and the freedom of admission

Even if the ECD does not intend to render new provisions concerning International Private Law, the internal market needs some regulations concerning the Member States' behaviour among each others and the admission of foreign service providers.

Therefore a prohibition of restrictions is contained in Art. 4, which concerns the admission of foreign providers in the Member State.

[1] Art. 2 lit. d Directive 2000/31/EC.

[2] Art. 2 lit. H Directive 2000/31/EC.

[3] Recital 21 Directive 2000/31/EC.

Exceptions are admission procedures which are not aimed at the information society specifically.^[1]

A little more complicated is the "Country of Origin principle" contained in Art. 3. It is the most important regulation in the whole directive. While it applies to information society services including Hybrid Transactions, as mentioned above, the Member States may derogate from this principle if it serves the protection of public health, public security or consumers, including investors.^[2]

The principle covers two different aspects. On the one hand it deals with the Member State's duty not to restrict any services of the information society rendered by providers established in other Member States.^[3] That means that the Member States have a duty to acknowledge the other Member States' legislation.^[4] Unfortunately this is not always possible because of the common interest or because of the fact that in some areas a sufficient harmonisation is still missing.^[5] To avoid such difficulties the ECD names certain exemptions to the country of origin principle in the Annex. These are the copyright law, the emission of electronic money, the question of the applicable law in direct and life insurances,^[6] the choice of law in contracts, contractual obligations in consumer contracts, certain aspects of the transfer of rights in real estate and the permissibility

[1] Wellbrock, p. 33.

[2] Art. 3 para 4 Directive 2000/31/EC.

[3] Haubold in Gebauer/Wiedman, Chapter 8 Mn. 22.

[4] Tettenborn, Europaeischer Rechtsrahmen fuer den elektronischen Rechtsverkehr, K&R1999 p. 252 et sqq..

[5] Wellbrock, p. 46.

[6] Wellbrock, p. 45.

of spam. On the other hand the Country of Origin Principle binds the Member States to supervise the providers' settled on their territory-adherence the "local" laws which fall into the coordinated field. In contrast to this the British legislator seems to understand the country of origin rule as an enforcement of the freedom to provide services in the Community, as it is stated in the Consultation Document of the implementation that Art. 3 have as its objective the implementation of the principle of the freedom to provide services under Art. 49 of the Treaty.^[1] So the scope of the Country of Origin Principle is distinctive in the different Member States. It is therefore likely that the weakest interpretation will prevail.^[2]

Although Recital 7 states that, these rules shall not create a new rule for the International Private Law (IPL), the relationship between the IPL and Country of Origin Principle remains controversial.^[3]

6. Duties to inform and commercial communication

According to the Directive, providers have to render easy and direct access to certain information.^[4] These are in particular their names, address of their settlement, e-mail and if available the number of the commercial register, the VAT number and the responsible authorities. Prices and shipping costs also have to be easily notable.^[5] Unfortunately

[1] Hörnle, International Journal of Law and Information Technology, p. 333; Waelde in Edwards/Waelde, p. 6.

[2] Haubold in Gebauer/Wiedman, Chapter 8 Mn. 22.

[3] See next part I 3 a.

[4] Art. 5 Directive 2000/31/EC.

[5] Wellbrock, p. 91.

the ECD only states that information has to be “easily, directly and permanently accessible”, therefore it is not clear whether it is sufficient to only link the information. The French legislator primarily decided to force the providers to render adequate information both on the homepage as on each site on which it is possible to conclude a contract.^[1] This would have clarified some uncertainties but in the final version the French legislator decided to assume the wording of the ECD. The British and the German legislator also adopted the text of the ECD. But while the only recommendation on the part of British experts is to use hyperlinks,^[2] in Germany this problem is discussed very controversially. One view is that it is sufficient to use a hyperlink which would satisfy the legal requirements explained as “to be easily notable and detectable without unnecessary delay”^[3]. The other one is that according to the “Two-Clicks-Away-Principle” a hyperlink is no direct accessibility.^[4] The German courts decided that the use of hyperlinks is a frequent technique in the internet^[5] and that it would be even sufficient to provide the information on the second layer.^[6]

Another area in which the recipient of the services shall be protected

[1] See Art. 9 in the original version of the “Projet de loi pour la confiance dans l'économie numérique, n° 528”, déposé le 15 janvier 2003, on <http://www.assemblee-nationale.fr/12/projets/pl0528.asp>.

[2] Rigby/Marsden, p. 8 et sqq.

[3] BT-Drucksache 14/6098, p. 21; Hoenicke/Hulsdunk, MMR 2002 p. 415 et sqq.

[4] Steins, WM 2002 p. 53 et sqq.

[5] OLG Hamburg NJW-RR 2003, p. 985 et sqq.

[6] OLG München, MMR 2004, p. 36 et sqq.; see also OLG Hamburg, MMR 2006, p. 675.

is the scope of commercial communication. Special duties to provide information are established by Art. 6. A commercial communication has to be clearly identifiable and the providers have to be detectable. The same principle applies to advertisements and lotteries.^[1]

2.1.2 Conclusion

The ECD was issued to facilitate the electronic commerce to the greatest extent possible. This attempt has been successful in large areas. The directive regulates important aspects of the liability, electronic contracts and electronic advertising. Unfortunately the regulations concerning the Country of Origin Principle and the distinctive definition of the consumer respectively the service provider create an amount of uncertainty. However, besides all its problems this directive has reached its aim in creating a legal framework for electronic commerce in Europe.

2.2 The Electronic Signature Directive

The key aspects of the Electronic Signature Directive will be summarized below.

2.2.1 Scope of application

The scope of application is defined as to facilitate the use of electronic signatures and to establish a legal framework in respect of a smooth functioning internal market.^[2] Whereas it is not intended to harmonise the provision of services relating to confidential information, if

[1] Wellbrock, p. 95.

[2] Art. 1 Directive, 1999/93/EC, OJ L 13, p. 12.

there are existing rules in the Member States concerning public policy or security.^[1] An important exemption to the scope of application is that the directive does not render any assistance whether a contract is concluded, valid or in compliance with form prescriptions.^[2]

2.2.2 Definitions

Art. 2 of the Directive distinguishes three levels of security, in particular the "electronic signature", "the advanced electronic signature" and the "qualified electronic signature".^[3]

The first and lowest one comprises data in an electronic form that may serve as a method of authentication, for example a written signature that has been scanned. These signatures do not have to be fraud resistant and on account of this they do not contain any guarantee of security.

The second level is reached when the signature can be related to only one single person who has to be clearly identifiable. It has to be possible to recognize changes to the signature with means which can be controlled by the signatory. This level does not comply with form requirements if something has to be presented in writing.^[4]

To comply with the third level the electronic signature has to be based on a qualified certificate. A qualified certificate is used in the so called asymmetric cryptography. This technique uses a pair of keys. The data is encrypted with the "secret key" of the sender. After that, the

[1] Recital 6 Directive, 1999/93/EC.

[2] Art. 1 Directive, 1999/93/EC.

[3] Art. 5 para 1 Directive 1999/93/EC.

[4] Lammich in Moritz/Dreier, *Rechtshandbuch zum E-Commerce*, p. 120 Mn. 323.

recipient can decode the data with the "public key", which is corresponding to the private one.^[1] Therefore only certificates that have been created with this technique of cryptography are permissible for qualified electronic signatures.^[2] Additionally the certificate has to be created by a secure-signature-creation device. This is configured software or hardware used to implement the signature-creation data which must ensure that the data can only occur once, that it cannot be derived or forged and that it can be protected by the signatory against the use of others.^[3]

Whereas the first two levels of signatures are not connected to special technical methods, the third level demands, as stated above, a special technique to be used.

2.2.3 Status of electronic signatures

Qualified electronic signatures are considered to be equal to handwritten ones and may even be presented in front of court as evidence.^[4] In order to meet the security level of a handwritten signature qualified electronic signatures have to fulfil special requirements. These requirements have to be determined as exact as possible.^[5] Therefore the directive renders for qualified certificates further specifications concerning the essential technical components. As these are only described to be confidential, protected against manipulations and able to guarantee the

[1] Strömer, p. 304.

[2] Gravesen/Dumortier/Van Eecke, MMR 1999 p. 577 et sqq.

[3] Art. 2 No. 4-5, Annex 3 Directive 1999/93/EC.

[4] Art. 5 Directive 1999/93/EC.

[5] Schwemmer, DuD 2000 p. 70.

technical and cryptographic security the specifications are kept very abstract.^[1] An unexpected issue is that although the directive tries to establish a standard independent from the technique^[2] at the moment, due to the technical possibilities the qualified certificates are limited to the technique of asymmetric cryptography. As a result of this the directive may have to be adjusted in the future if new methods are developed which match the current security level of the asymmetric cryptography.^[3]

2.2.4 Liability

Another main aspect of the ESD is the question of liabilities in each of the different Member States. According to Art. 6 para. 1 it has to be ensured that a certification service provider is liable for damage by issuing a certificate as a qualified certificate to the public or by guaranteeing such a certificate to the public.^[4] This liability applies to issues of content, ownership and the use of data if the harmed person relied reasonably on the certificate.^[5] To be on the safe side that occurring damages can be compensated the certification providers have to be effectually funded.^[6] On the other hand the providers can restrict the use of the certificate in order to minimize their liability so they will not be liable for damages caused of the defiance of these restrictions.

2.2.5 Accreditation of foreign certificates

A very interesting aspect is the accreditation of qualified certificates

[1] Annex II f) Directive 1999/93/EC.

[2] Recital 8 Directive 1999/93/EC.

[3] Rosnagel, K&R 2000 p. 313 et sqq.

[4] Art. 6 para 1 Directive 1999/93/EC.

[5] Art. 6 para 1 a-c Directive 1999/93/EC.

[6] Annex II h) Directive 1999/93/EC.

issued in the third countries which is contained in Art. 7 ESD. Foreign certificates will be acknowledged if they accomplish the requirements stated in Annex I and II of this directive. Unfortunately this cannot be assured with the existing control system. The provider of the certificate has to be either accredited voluntarily in one Member State or the provider has to be acknowledged in a bilateral or multilateral agreement. Another possibility is that an accredited provider vouches for the certificate.^[1] While the German legislator decided that this list has to comprehend a complete list of requirements of certificates issued in third countries, so that the recognition does not depend on treaties between the third country and the EU, the British legislator even decided not to implement this regulation because he thought that it was not necessary. He stated that the requirements in Art. 5 ESD do not depend on the place where the provider of this certificate is established.^[2] As a result of this distinctive appraisal, it would be much easier to directly regulate the acknowledgement of advanced electronic signatures or secure signature-compilations-devices. Unfortunately such rules have not been issued by the EU yet.

2.2.6 Conclusion

The idea of the directive is to provide a legal framework for electronic signatures. Until today electronic signatures have not been established as a common instrument in commerce, it is therefore not clear whether this aim has been achieved. But it can not be dismissed that a uniform status of

[1] Art. 7 para 1 lit a-c Directive 1999/93/EC.

[2] <http://www.dti.gov.uk/sectors/infosec/electronic/signature/Note/page10058.html>.

electronic signatures or the acceptance of electronic signatures originating from foreign countries is fundamental to establish electronic signatures. Therefore the directive constructs a very good basis for a framework that contingently will be altered in the future.

3. The National Implementations of EU Regulation on E-contract

3.1 The National Implementations of the E-Commerce Directive

After having discussed the key features of the E-Commerce Directive, this chapter will offer a detailed analysis dealing with the conclusion of electronic contracts and the specific legal framework of particular Member States (with the focus on Germany, United Kingdom and France), which existed before the ECD was implemented. The conclusion of electronic contracts is an issue of a vital economic importance and it therefore deserves a chapter of its own. The second part concentrates on the E-Commerce Directive and highlights the regulations which are relevant for e-contracts.

Subsequently, attention will be drawn to the realization of the ECD by the individual Member States.

3.1.1 The legal framework before implementation of the E-Commerce Directive

3.1.1.1 Situation in Germany

As previously discussed, electronic contracts hold the same characteristics as ordinary contracts concluded in common business life. The main difference, as it is embedded in the word "electronic", is that these contracts are specifically concluded via internet and recorded digitally.

Since the ordinary contract constitutes the starting point of electronic contracts, it is inevitable to illustrate briefly the main features of the conclusion of ordinary contracts, in order to specify the key defining elements of electronic contracts simultaneously.

Pursuant to Sec. 145 et seq. of the German Civil Code (GCC) contract formation requires declarations of intent, which are concordant in their content, manifested by at least two persons. The declaration of intent which is expressed first is termed "offer" whereas the subsequent is an "acceptance".^[1]

The offer is a manifestation of intent which requires receipt and by which the conclusion of a contract is offered in a way that the accomplishment of the contract only depends on the consent of the

[1] Brox, Mn. 165.

offeree.^[1] The consent is the corresponding acceptance thereof.^[2]

In addition to the details specified in Sections 1.1.2 to 1.1.5 above, the German law has the following regulation regarding formality requirements before implementation of the E-Commerce Directive.

Particular contracts in the German law are subject to formality requirements. For example, a contract of personal security pursuant Sec. 766 GCC must be in written form. Other contracts as a purchase of real estate pursuant Sec. 311 b (1) GCC or a promise to make a gift pursuant Sec. 518(1) GCC needs to be notarized. The requirement of the written form means pursuant Sec. 126(1) GCC that the certificate is to be signed personally or by notarially certified emblem. According to adjudication a declaration transmitted by fax machine does not suffice the written form requirement.^[3] This means that a declaration via internet does not meet the demand of Sec. 126(1) GCC either. However, independently from the realization of the ECD, the German legislator has already counteracted this problem in the context of the Signature Directive (99/93/EC) with the Formality Requirements Adjustment Code^[4] which added Sec. 126 (3), Sec. 126 a and Sec. 126 b to the GCC. Pursuant Sec. 126(3) GCC the written form can be replaced by the electronic form if this is not explicitly excluded by law. For the effectiveness of the electronic form, the name of the person making a declaration has to be stated and this

[1] Brox, Mn. 165.

[2] Brox, Mn. 176.

[3] BGHZ 121, 224.

[4] Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr from July 13 2001, BGBl. I, p. 1542.

declaration has to be furnished with a qualified electronic signature pursuant to the Signature Code.^[1] Pursuant Sec. 2 no. 3 Signature Code a qualified signature is a electronic signature which enables the definite relation to the signature key owner, his identification and the exclusive control of the key owner over the particular signature. This signature has to be connected to the document in a way that subsequent modification can be easily detected. In addition to that, the signature has to be based upon a qualified certificate and it has to be issued by a secure signature creation institution.

Thereby, contracts subjected to form requirements could already be concluded in Germany before the implementation of the ECD. In particular contracts as the contract of personal security, Sec. 766 GCC, and the consumer credit contract, Sec. 492(1) GCC, are still excluded explicitly.

If notarization is demanded the form requirements depend on the Authentication Code (Ger.: "Beurkundungsgesetz"). There are specific obligations to which the notary is subjected, for example, the examination and indoctrination duty pursuant to Sec. 17 seq. of the Authentication Code. Furthermore, a transcription has to be made pursuant to Sec. 8 Authentication Code which has to be read out, approved and signed. Since such a procedure cannot be conducted via electronic means or internet properly, contracts which are bound to notarial form cannot be concluded electronically.

[1] Gesetz über die Rahmenbedingungen für elektronische Signaturen (SigG) from May 16 2001, BGBl. I, p. 876.

Hence, before the implementation of the ECD contracts which were exempted explicitly and which required notarization could not be concluded via electronic means.

In addition, due to the importance of the treatment of "electronic errors", this section deals with the main rules of German Legislation and its case law on the treatment of electronic errors.

The parties' declarations of intent do not always perfectly express what they originally intended to declare. Quite often they express themselves erroneously. Parties might have mistyped or misspelled their declaration or they might have expressed themselves correctly but then erred about the meaning of their declaration.^[1] While case law found ways to deal with the errors occurring during the exchange of papers or the oral conclusion of contracts, the electronic environment presented new challenges. New types of errors and problems occurred that the traditional legal framework had to accommodate.

a) Errors of declarations of intent

Traditionally errors of declarations of intent were divided into 4 categories: errors in scripture, errors in will errors in motivation and errors in transmission.

* Errors in scripture: The parties are well informed about all the terms of the contract and have formed their will, but then they make a mistake in typing or spelling which expresses their will incorrectly.

* Errors in will: The contracting party knew what it was declaring

[1] For example A declares he wants to purchase the property Y and declares this, but only because he confuses property Y with property X which he originally wanted to purchase.

but assumed that what it declared had another meaning.

* Errors in motivation: Errors in motivation concern the formation of will, e. g. the buyer intends to purchase a gift for a wedding which then does not take place. As these errors lie before the actual declaration of intent, they usually do not have any impact on the formation of the contract. To extend the rights of the buyer to render a contract void to such errors would expose the vendor to incalculable risks.

* Errors in transmission: This category of errors traditionally refers to situations where a party uses a messenger to transmit his or her declaration of intent. Although the party perfectly expressed its declaration, the messenger himself might mistype or misspell it. Sometimes, errors in transmission are not seen as a separate category of errors but as a subcategory to the category of "errors in scripture".^[1]

The treatment of errors occurring during the formation of the contract touches upon three questions of law: the right to rescission, the allocation of risks and the burden of proof.

* The right to rescission: As mentioned above, certain categories of errors give the parties a right to rescission. As a legal consequence, the contract will be rendered void from the beginning. § 119 par. 1 of the German Civil Code gives a right to rescission for errors in scripture and errors in will. § 120 stipulates the same right for errors in transmission.

* The allocation of risks: An error might occur due to the negligence of a party to inform the other side or the erring party might not have considered the received information carefully enough. Such

[1] Palandt-Heinrichs, § 119, Rn 4.

negligence might give rise to damages, especially for damages for the violation of pre-contractual duties (the so-called "culpa in contrahendo"). To answer the question whether a party could be held liable for an error that occurred, the risk needs to be allocated between the parties.

* The burden of proof: Closely connected to the question of the allocation of risks is a procedural question. Who needs to demonstrate in front of court that he submitted all information correctly or informed the other party properly?

b) Electronic errors

The treatment of errors is a frequent issue in German contract law and the case law has over the years developed principles to deal with all types of cases. But the introduction of electronic contracts created a variety of new constellations of errors the law had never dealt with before. The use of digital technologies increases sometimes the risk for errors in contract formation. This partly due to inexperienced consumers who are not apt to use these online-technologies properly and sometimes the technology itself is not developed to an extent that it functions in the expected way. Frequent examples in German case law were online-shops that used software that displayed product prices in an incorrect manner which was often very favourable to the consumer.^[1] Another example are password or log-in systems that were insecure and did therefore not refer to the contract partner that the other party was expecting.^[2] The law of contract had to

[1] Palandt-Heinrichs, § 120, Rn 1.

[2] See for example LG Bonn, MMR 2004, pp. 179, 180.

find a way to integrate these new phenomenons. As a general principle, the European legislators did not draft a new "e-contract law" but sought to adapt its traditional law to e-contracts. To deal with electronic errors, the German legislator again applied its traditional contract law.

ba) Allocation of risks

The allocation of risks is especially an issue in claims for damages for the violation of pre-contractual duties. The legislator did not set up general principles to govern e-contracts or gave examples of new types of errors. Rather the allocation is guided by general principles on a case-to-case basis. The courts determine "spheres" of responsibility according to which they allocate the risks. Risks that relate to the software used to display the offer or to generally present the online-shop are usually allocated to the vendor, irrelevant of whether he could have avoided the damage by diligent behaviour or not. First, the use of software and digital technologies is under his control and second, if he wishes to benefit from the commodities of e-commerce, he also has to bear its risks.^[1] It should be kept in mind that EU regulation very often follows a very consumer-friendly policy.

In a case decided by the District Court of Hamm (Oberlandesgericht) in 2007, a minor got hold of his fathers Ebay log-in without any negligence of the latter and bought a car in an online auction. The father then rescinded the contract but the vendor claimed damages because he had now failed to sell the car to a profitable price. The question before the court then was who bears the risk that the person

[1] LG Bonn, MMR 2004, pp. 179, 180.

behind the log-in really is the registered party. Does the father have an obligation to control his password and can be held liable if someone abuses it or does the provider bear the risk that his password-system is not foolproof? The court decided that there is no general duty of the user to protect his password. If the provider uses a system of passwords that can be easily abused by third parties¹ he has to bear the risk.^[1] This line of argumentation has been followed in many other court decisions.^[2] But this approach has been fiercely criticised by scholars as undermining the integrity of electronic means of communication.^[3] Following this line of thought no e-mail could be attributed to its author since the system used does not guarantee the authenticity of the document. The user would receive a general right to revoke an electronic contract, as long as he does not use an electronic signature. The problem should therefore be solved on a procedural level. The user should bear the burden of proof that he was not using his password himself.

To define the liabilities for electronic errors, European consumer regulation often pursues a preventive strategy. Art. 10 and 11 of the E-Commerce Directive oblige the provider to install sufficient mechanisms on his website that permit the consumer to check and correct his input. If these mechanisms are provided in a satisfactory manner, the liability for errors in scripture will be attributed to the consumer. Furthermore, sufficient information about the terms of the contract need to be provided

[1] OLG Hamm, NJW 2007, S. 611.

[2] LG Bonn, MMR 2004, pp. 179, 180.

[3] Mankowski, NJW 2002, S. 2822, 2827. Compare also the comment of Mankowski on LG Bonn, MMR 2004, pp. 179, 182.

according to the Distance Selling Directive. Providing this information also limits the provider's liability.

bb) Burden of proof

As a general principle, the party that wants to rescind a contract or claims damages has to prove its allegations. Only in cases where the circumstances are impossible to prove for a party because he or she does not have access to the relevant information, the burden of proof is shifted to the accused party. For example, the burden of proof is reversed for cases of product liability because the consumer can impossibly prove that the production process follows best practice standards.

The above mentioned principles on the allocation of risks also have an impact on the rules of civil procedure. For example the fact that a party is registered with a certain password does not create a *prima facie* evidence that the act or document can be attributed to this person. The Jurisprudence still does not have enough confidence in online authorisation systems such as the password-system of ebay. The allocation of the burden of proof is strongly linked to the confidence people have in new mechanisms of electronic communication.

bc) Right to rescission

To rescind a contract because of an electronic error the same rules apply that were drafted for non-electronic documents. For mistyping a declaration or "clicking" the wrong option, § 119 dealing with errors in scripture would apply.^[1] For technical or software problems that hinder the transmission of the declaration of intent, § 120 applies. The means

[1] See for example BGH, MMR 2005, S. 233, 235.

of electronic communication are thereby equalized with the use of a messenger that delivers the information from A to B.

c) Conclusion

To conclude, the traditional legal framework is surprisingly well prepared to accommodate the phenomenon of electronic errors. More critical is the question of the allocation of risks in case an error occurs. This field of law is submitted to permanent changes and will evolve at the same pace as people accept electronic means of communication as a reliable and secure information system.

3.1.1.2 Situation in the United Kingdom

a) Elements of a contract

A legal definition of contract can be found in Part II Sec. 2(1) Sale of Goods Act 1979 (SGA): "A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price". Although this regulation explicitly applies to purchase of goods only, it describes nonetheless the essential prerequisites for a contract conclusion. This consists of an agreement between at least two parties by meeting of the minds and a consideration. There is no general doctrine of declaration of intent and legal transaction. Therefore, the central term is the "actionable promise". Consequently, a contract is composed of one or more promises, on which a consensus has been reached.

So, just as in German law, a lack of human intervention does not impede a contract concluded by for example, an electronic agent to

become effective [1].

The most important difference to the continental European law is the requirement of a so called "consideration". A binding contractual obligation can basically only become effective if any kind of consideration-return service-exists. A consideration can be any kind of right, benefit or advantage of the one party which at the same time causes forbearance, a disadvantage or an encumbrance of the other party.[2] It has to be borne in mind, that only the person receiving the particular promise can render the consideration, not a third party. Whether the promise and the consideration are balanced in value is irrelevant to the effectiveness of the contract.[3] Consideration is only disposable if contracts under seal are required. Here, the sincerity to enter into a contract is already displayed by the formal document; therefore the function of consideration is fulfilled.[4]

The element of consideration can be easily affirmed in electronic transactions where services of goods are purchased-money consideration. However, this could be difficult in cases where services or goods are offered at no charge, for example, free websites, shareware or freeware. Nevertheless, in order to enjoy such a service or goods the user has to agree to non-warranty clauses or commercial utilization restrictions.[5]

[1] Smith, p. 455; Thornton v. Shoe Lane Parking (1971) 2 Q.B. 163.

[2] Currie v. Misa (1875) L.R. 10 Ex. 153.

[3] Consideration need not be adequate, but must have some value, however slight [...], Thomas v. Thomas (1842) 2 Q.B. 851; William v. Roffey Bros & Nicholls (1991) 1 Q.B. 1.

[4] Von Bernstorff, p. 54 et sqq..

[5] Chissick/Kelman, p. 93.

aa) The offer

The English law also distinguishes between an offer and an invitation to treat. In order to be qualified as an offer it has to be emitted with an intention to contract. It depends on the specific situation whether an offer is given or rather an invitation to treat. The doctrine which draws the line between them is the same as in German law.

Just as presenting goods in shop windows [1] and magazines [2] and sending catalogues, the presentation of goods and services on the website is to be classified as an invitation to treat. So, the order by the user is the actual offer [3]. Even if the service provider promises to fulfil every single order, an intention to contract can still not be subsequently concluded since the service provider usually would want to verify the capacity of the customer to perform (to pay) before entering into a binding contract. Only if an explicit will of being legally bound can be found on the website, then this declaration can be regarded as an offer. This could be the case at downloading-contracts which can be fulfilled immediately and without restrictions.

ab) The acceptance

According to Anson [4], "Acceptance means, in general, communicated acceptance, which must be something more than a mere mental assent. A tacit formation of intention is insufficient". The offeree has to objectively carry out an action to declare. The declaration of

[1] Fisher v. Bell (1961) 1 Q.B. 394, 399.

[2] Partridge v. Crittenden (1968) 1 W.L.R. 1204.

[3] Chissick/Kelman, p. 82.

[4] Beatson, p. 41.

acceptance need to be communicated and it has to be possible to perceive it^[1]. This could happen by a written document, an oral statement or even by conclusive conduct. Silence is generally not sufficient^[2].

b) Point in time of effectiveness

The general rules are: on the one hand, the receipt rule which is also the normal rule and on the other hand, the postal rule. As it is already embedded in the word "receipt" rule, the declaration of intent becomes effective upon receipt by the addressee^[3] whereas if the postal rule is applicable, the declaration becomes effective upon dispatch.^[4]

The main aspect to distinguish between the both rules is whether the parties have communicated directly and instantaneously.^[5] However, this criterion alone is not sufficient for a definite classification. Particularly in situations where the declaration does not arrive, it has to be determined who was responsible or who should be held responsible for the failure of arrival.^[6]

The jurisdiction has decided to generally apply the receipt rule when the acceptance is emitted via telex or fax, due to the fact, that the person issuing the acceptance can recognize a failure of arrival more easily than the addressee. Thus, he bears the risk of potential error of the transmission.^[7]

Based on the criterion of direct communication, contracts concluded

[1] *Holwell Securities Ltd. v. Hughes* (1974) 1 W. L. R. 155, 157.

[2] Chitty, Chapter II, Mn. 84.

[3] Treitel, p. 12 et seq.

[4] *Adams v. Lindsell* (1818) 1 B & Ald 681.

[5] *Entores Ltd. v. Miles Far Eastern Corp* (1955) 2 Q. B. 326.

[6] Rowland/Macdonald, p. 304.

[7] *Brinkibon v. Stahag Stahl- und Stahlwarenhandel GmbH* (1982) 1 All ER 293.

on a website fall under the rule of receipt,^[1] whereas contract conclusions via e-mail were for the time being classified as cases of the postal rule.^[2] However, after the jurisdiction set up the receipt rule for fax as the rule to be applied, contracts via e-mail are also assessed by the receipt rule. Subsequently, it was discussed, when exactly the e-mail arrives; upon arrival at the server of the addressee or upon retrieve of the e-mail.^[3]

In addition, it is possible in English law that the service provider sets up the exact way of the acceptance in the terms and conditions. According to this, the service provider can state that the website is an invitation to treat but the acceptance of the offer already becomes effective upon dispatch. In doing so, the long revocation term can be held as short as possible.^[4]

In conclusion, there was still lack of clarity about the exact point in time of effectiveness in the UK before the implementation of the ECD. However, according to the general rule, a contract becomes effective upon arrival of the acceptance.

c) Formality requirements

In general, there is no restriction to formalities. Therefore, a conclusion of a contract via electronic means is basically possible. Nevertheless, as in German law, there are specific contracts which require the written form. These contracts are for example: land tenancy contracts

[1] Rowland/Macdonald, p. 307.

[2] Chissick/Kelman, p. 80.

[3] Rowland/Macdonald, p. 306.

[4] Chissick/Kelman, p. 83.

of more than three years which demand notarization^[1], other contracts as purchase of real estate^[2], certain agreements about the copyright^[3] or consumer credit contracts^[4] have to be signed personally. Even though Schedule 1 of the Interpretation Act 1978 states explicitly that writing is also, among other examples, the reproduction of words in a visible form, which could include the display of words on the computer screen^[5]; still, the main opinion does not classify the display of words on the screen as written form. It is merely a stringing together of electronic impulses^[6].

3.1.1.3 Situation in France

a) Contract formation

The French law requires pursuant Art. 1108 Code Civil a "consentement" (agreement) for the contract formation. The Code Civil does not explicitly regulate offer and acceptance, still, the "consentement" demands an accord of the wills^[7]. The French law does not have a term of acceptance which means that the offer remains effective and binding until it is accepted or rejected^[8]. However, concerning so called "offers au public", which are offers made at an unclear number of persons (to the public), the offer remains as long

[1] Law of Property Act, 1925, Sec. 52 and 54(2).

[2] Law of Property Act (Miscellaneous Provisions) Act 1989, Sec. 2 (1) and (3).

[3] Copyright, Designs and Patents Act 1988, Sec. 90 (3).

[4] Consumer Credit Act, Sec. 61.

[5] Bainbridge, p. 305.

[6] Lloyd in Edwards/Waelde, p. 139.

[7] Ferid/Sonnenberger, Vol. 1/1, Mn. 1 F 214.

[8] Ferid/Sonnenberger, Vol. 1/1, Mn. 1 F 222, p. 437.

binding as the service provider is still capable to perform^[1]. In addition, there is the legal construction of the "offers assorties d'une réserve". This is equivalent to reservation to revoke or disintegrating condition which terminates the binding effect of the offer. Yet, the French law pursues the principle of free revocability of an offer, thus, before categorizing an offer as one attached to a "réserve", it has to be determined, whether an offer is already given or whether it is only an invitation to make an offer (invitation to treat).^[2]

The question of how to classify a contract conclusion via internet, whether it is a contract between attendees or absentees, was discussed as an aspect of consumer protection. The internet issue as one of the distance selling has already been dealt with by the French legislator since there already existed a kind of online-shopping via the system of Minitel.^[3] In context to this, the categories of "vente à domicile" and "vente à distance" were introduced to the Code de la Consommation (consumer code). The internet contract was discussed on the basis of these two types.^[4] In order to distinguish between the two types, it has to be determined whether the consumer is active or passive. A consumer is rated as active if he actively types in the website address of the service provider to look for the offers (so-called pull media). In these cases, the regulations of "vente à distance" should apply. These include among others the Art. L 121 - 16 seq. Code de la Consommations (duties to

[1] Ferid/Sonnenberger, Vol. 1/1, Mn. 1 F 221, p. 437.

[2] Ferid/Sonnenberger, Vol. 1/1, Mn. 1 F 219 and 1 F 223, p. 436 et sqq..

[3] Renard/Barberis in Spindler, E-Commerce Law in Europe and the USA, p. 77.

[4] Bellefonds, <http://www.creda.ccip.fr/colloque/10e-comm/10acolmel.pdf>.

inform) and the requirement to supply the contract documents pursuant Art. L 121 - 19 Code de la Consommations. Both articles were passed during the implementation of the Distance Selling Directive.

On the contrary, a passive consumer is someone who takes notice of the offers via radio or television (so-called push media). Here, the rule of "vente à domicile", which refers to specific consumer protection regulations (Art. 121 - 21 seq. Code de la Consommations) would be applicable^[1].

Contracts via internet were generally classified as pull media; thus, the regulations of "vente à distance" were favoured. For non-consumers the general rules of the Code Civil should be applied. Since there is no construction of invitation to treat, the presentation of the goods of services on the website would constitute a valid offer, except for a réserve. However, according to the theory of the offer au public, the service provider is only bound to his offer to the extent of his performance capability.

b) Point in time of effectiveness

The rule among attendees is that the acceptance becomes binding or the contract becomes effective when the parties are objectively and subjectively in accordance about the essential issues of the contract.^[2] For contracts among absentees, there are four theories, decisive is respectively: the declaration (declaration), the dispatch (emission), the reception (reception) or the notice by the offeree (information). The

[1] Bensoussan, <http://www.creda.ccip.fr/colloque/10e-comm/10acolmel.pdf>.

[2] Ferid/Sonnenberger, Vol. 1/1, Mn. 1 F 232, p. 441.

jurisdiction favours the theory of dispatch^[1] in case of the internet conclusion; nevertheless, it has also applied the theory of receipt in recent cases.^[2] Assuming the theory of dispatch as the general rule, it would mean that the acceptance by the purchaser would become effective upon dispatch. This would also mark the point in time of when the contract becomes valid.

c) Formality requirements

In France, there is also a general principle of no formality.^[3] However, the French law contains some exemptions from this principle as well. Important is the provision of "forme authentique", which is the notarization. This prerequisite applies to for example, gift contracts^[4], the contractual appointment to the rights of the creditor^[5], the creation of a mortgage^[6] and the matrimonial goods contract^[7]. Furthermore, the French law has the simple written form which only leads to nullity if this is stated explicitly by law. One example is the personal securities contract of consumer credit^[8].

3.1.2 Transposition of the E-Commerce Directive by the Member States

3.1.2.1 Germany

- [1] Ferid/Sonnenberger, Vol. 1/1, Mn. 1 F 233, p. 441 et sqq..
- [2] Renard/Barberis in Spindler, E-Commerce Law in Europe and the USA, p. 78.
- [3] Ferid/Sonnenberger, Vol. 1, Mn. 1 F 501.
- [4] Article 931 et sqq. Code Civil.
- [5] Article 1250 No. 2 Code Civil.
- [6] Article 2127, Code Civil.
- [7] Article 1394, Code Civil.
- [8] Article L 313 - 7 Code de la Consommation.

a) Transposition of Art. 9 ECD-Validity of electronic contracts

With the introduction of the electronic form and the regulations about the digital signature^[1], the German legislator did not recognize further necessity to act in order to meet the requirements of Art. 9 ECD. However, even after the introduction of the electronic form, there are still obstacles to the contract conclusion via the internet regarding particular types of contracts. Similar to the German law, the ECD postulates certain exemptions to the validity of electronic contracts. Art. 9 para. 2 lit. b excludes contracts which require the involvement of courts, public authorities or professions exercising public authority. This exemption overlaps with the requirement of notarization by German law, because the notary is an independent agency of a public charge, so he carries out public authority. In addition to this, real estate contracts are also covered, since the purchase of real estate requires notarization. The exemptions of the personal surety ship contracts pursuant Sec. 766 (1) 1 GCC and the consumer credit contracts pursuant Sec. 492 (1) 2 GCC also matches the ones stipulated in Art. 9 of the ECD.

In conclusion, the German law has enabled the contract formation via electronic means to the extent demanded in the ECD; therefore further realization procedures regarding the validity of electronic contracts were not necessary.

b) Transposition of Art. 10 ECD-Duties to inform

The issues the ECD postulates are mainly converted into Sec. 312e GCC which refers to Sec. 3 of the Duties to Inform Regulation (Ger. :

[1] Wellbrock, p. 128.

“Informationspflichten VO”). By integrating the ECD regulations into the GCC, the practical process of legal working has been simplified since the important regulations are then summarized in one code. Furthermore, the impending split of law into several complex codes with different understanding and interpretation of legal terms can be avoided. The new provision has clarified that the information has to be provided before the placing of the order. Sec. 312 e (1) no. 4 GCC contains the prerequisite of enabling the retrieval and storage of the contract terms and general conditions. According to considerations of the Bundesrat (federal council of Germany), in order to meet the regulation purpose of the ECD, this requirement has to be met at the time of the contract conclusion.^[1] The second paragraph states that these prerequisites do not apply to contracts via e-mail (individual communication) and it regulates the exemptions for non-consumers if they have agreed otherwise. Thus, the German legislator has comprehensively transferred the required duties to inform.

Concerning the sanction of breach of duties to inform Sec. 312 e GCC merely regulates that the term of the revocation right pursuant Sec. 355 GCC does not start until the service provider has properly met his duty to inform.^[2] Remaining questions about the liability are judged by the general regulations of the GCC. Thus, there could be a rescission of the contract due to misapprehension pursuant Sec. 119 GCC if the customer was not informed properly and so unwillingly emitted a declaration of

[1] BT - Drs. 14/6857, p. 20.

[2] Wellbrock, p. 131.

intent based on false perceptions.^[1] Another possibility could be a liability out of "culpa in contrahendo" pursuant Sec. 311 (2), 241 (2) in connection with Sec. 280 GCC if besides the breach of the duties to inform other duties of protection and considerateness are also infringed. Consequences could be damages, termination of contract or in specific cases adjustment of contract.^[2]

c) Art. 11 ECD - Placing the order

The question of the point in time of effectiveness was answered by the German law in the following way: a website is, according to the main opinion, an invitation to treat. In cases of a contract conclusion among absentees, offer and acceptance become effective and legally binding upon receipt; Actual notice is not necessary merely the possibility to retrieve the declaration of intent^[3].

The implementation of Art. 11 ECD has already been carried out in the context of the Purchase of Consumer Goods Directive by the modernisation of the law of obligations. According to the current Sec. 312 e (1) 1 No. 3 GCC, the entrepreneur has to confirm the receipt of the order immediately. The point in time when the declaration becomes effective is the moment when the retrieval thereof is possible under usual circumstances. The requirement of providing a device for detecting and revising input errors has been verbally transferred to Sec. 312 e (1) 1 No. 1 GCC. Paragraph 2 postulates the exemption for individual

[1] Grigoleit, WM 2001 p. 597.

[2] BT - Drs. 14/6040, p. 173.

[3] Compare: I 1 d.

communication among non-consumers.

To conclude, the German legislator has basically transferred Art. 11 ECD literally. Following the main opinion, the point in time of effectiveness has been specified. The contract is concluded, when the customer is able to retrieve the acceptance of the service provider. However, uncertainty still remains at the classification of an automatic reply message as a legally binding acceptance or merely as a confirmation of order. Therefore, there could be different possibilities for the point in time of effectiveness according to the respective interpretation of the automated declaration.^[1]

The GCC substituted the term "user" which is used by the ECD for the term "customer". The term "recipient" was used in a previous draft of the Bundestag. However, this term was discarded in the final version which only contains the term "customer". The reason for this decision was a concern about ambiguity since "recipient" could be both the service provider and the purchaser. The only term which seemed to be suitable to avoid this confusion was "customer". "User" was discarded due to the fact that "customer" has already been used in Sec. § 675a GCC in connection with Sec. 12 Duties to Inform Regulation and thus an addition term should not be introduced in order to maintain uniformity.^[2]

3.1.2.2 United Kingdom

a) Art. 9 ECD - Validity of electronic contracts

As in German law, UK law also had specific form requirements which

[1] Compare: I 1 c.

[2] Rudolph, p. 49.

complicate or even impede the validity of electronic contracts. However, the British legislator had already reacted to this problem before the implementation of the ECD. Within the scope of the Digital Signature Directive, respective regulations were set in Sec. 7 and 8 of the Electronic Communications Act 2000. Sec. 7 dealt particularly with the probative force of electronic signatures whereas Sec. 8 empowered the responsible ministers to alter existing law, so that contracts can be concluded effectively via electronic means.^[1] These modifications should not be definite but they should refer to individual cases. In doing so, the English government had not chosen the way of a horizontal regulation which would put an electronically concluded contract on par with a traditional contract as other member states did. The reason for this case by case inspection, whether particular form requirements met Art. 9 ECD was that the regulations on written form and signature have been developed through hundreds of years and a sudden equalisation of electronic contract and traditional contract would lead to consequences that were not foreseeable.^[2]

However, further transpositions to meet the requirements of Art. 9 ECD have not been carried out. Thus, it depends on the actions of the minister of how the ECD will be realized in the British law.

b) Art. 10 – Duties to inform

The duties to inform the customer before electronic contract

[1] Transposition Note for Directive 2000/31/EC, http://www.dti.gov.uk/industry_files/pdf/transposition.pdf (Oct 18, 2006); Wellbrock, p. 138.

[2] Pothmann, p. 259.

conclusions were completely transposed in Reg. 9 EC-Regulations 2002. In case of breach the user has a claim to damages arising out of a breach of statutory duty pursuant Reg. 13 EC-Regulations. In addition to that a Stop Now Order is issued (reg. 16 EC-Regulations). No damages can be claimed in case of a breach of the duty to inform about the code of conduct of Art. 10 para. 2 ECD. There is only the possibility of a Stop Now Order. The same applies to the breach of the duty to inform about the contract terms and general conditions.

c) Art. 11 – Placing the order

The specifications regarding the placing of an order can be found in Reg. 11 of the British EC-Regulations 2002. Pursuant paragraph 1 lit. a, the receipt of the order has to be confirmed immediately by the service provider. Paragraph 1 lit. b postulates the providing of a technical device for identifying and correcting input errors. Correspondingly, paragraph 2 sets up a regulation that the order and the receipt confirmation are regarded as received as soon as the addressee is able to retrieve the declaration. Above mentioned regulations are not applicable if the parties who are non-consumers have made other agreements or if individual communication was used.

In Reg. 12, the British legislator has defined the term “order” in Reg. 9 (1) and 11 (1) b, which are the regulations about the technical device, as a contractual offer. Whereas, in other regulations “order”

does not necessarily has to stand for a contractual offer.^[1]

By interpreting this regulation referring to its wording and systematic position, it can be concluded that not every click on the "order"-button constitutes an offer; it could already be the acceptance if the presentation on the website can be regarded as an offer. Thus, a clear classification whether a website, according to the main opinion, is an invitation to treat and when exactly the contract is concluded cannot be made. It can merely be assumed that a website is generally intended to be an invitation to treat; yet, if the website is constructed and designed as an obvious offer, it should be categorized as a contractual offer.

In cases of contract conclusions via e-mail, pursuant Reg. 11 (2) lit. b, the declaration of acceptance is regarded as effective when the retrieval thereof is possible. However, the content of such an e-mail should be considered, in order to classify the declaration properly, since not every automated answer intends to be an acceptance but merely a confirmation of receipt.^[2] Thus, the words of such an automated e-mail should be chosen wisely.

In conclusion, even after the implementation of the ECD, there are still ambitious issues regarding the point in time of effectiveness in the British law, yet, the other requirements were transposed correctly.

3.1.2.3 France

In France the transposition has taken place in the articles 25 - 27 of

[1] Reg. 12: "Except in relation to regulation 9(1)(c) and regulation 11(1)(b) where "order" shall be the contractual offer", order" may be but need to be the contractual offer for the purpose of regulation 9 and 11".

[2] Compare German law: I 1 c.

the law for the confidence in the digital economy ("Loi pour la confiance dans l'économie numérique").

a) Art. 9 ECD - Validity of electronic contracts

The validity of electronic contracts has been incorporated into Art. 25 of the Law for the Confidence in the Digital Economy by introducing the Art. 1108 - 1 and 1108 - 2 into the Code Civil.^[1] Pursuant Art. 1108 - 1 Code Civil, the electronic form suffices the legal written form if the Art. 1316 - 1 to 1316 - 4 Code Civil (transposition of the Signature Directive) were observed. The Art. 1316 - 1 to 1316 - 4 Code Civil regulate the requirements which have to be fulfilled, if an electronic contract is supposed have the same probative force as written documents. The possibility of identifying the composer and the verification of integrity at composing and storing the electronic document are the main prerequisites which to be met. A handwritten signature can be substituted by an electronic one, if the identity of the person signing can be guaranteed (1108 - 1 (2) Code Civil). Furthermore, Art. 1108 - 2 Code Civil enumerates the exemptions where the electronic form is not applicable. These exemptions cover the ones stated by Art. 9 (2) ECD. Thus, the French legislator has enabled the electronic contract in the required scope of the ECD.

b) Art. 10 ECD - Duties to inform

In order to meet the requirements of Art. 10 ECD, France has introduced a new chapter VII (Art. 1369 - 1 to - 3) to the Code Civil with the heading "Contracts of electronic form" ("Des contrats sous

[1] Wellbrock, pp. 144, 145.

forme électronique"). Art. 1369 - 1 Code Civil transposes all duties to inform of Art. 10 ECD. The exemption regarding individual communications is postulated in article 1369 - 3 Code Civil. Thus, the duty of transposition is fulfilled. Furthermore the French government has implemented an additional duty of archiving for professional service providers when concluding contracts with consumers. This is regulated by the introduction of Art. L 134 - 2 Code de la Consommations.

c) Art. 11 ECD - Placing the order

In respect of the demands of Art. 11 ECD, the French legislator has exceeded the ECD. Art. 1369 - 2 Code Civil regulated the exact point in time of effectiveness. The construction of the double confirmation,^[1] which was discarded from the ECD because it was too complicated, is to be applied. According to this, the contract is concluded when the customer had the possibility to substantiate or revise his order and after that when he confirms his order.^[2] Thus, the following steps have to be passed through: the order of the customer, the acceptance by the service provider, the confirmation of the order and maybe particular adjustments by the customer and at last the immediate confirmation of receipt by the service provider. Paragraph 3 of Art. 1369 Code Civil regulates that the declaration is received when the retrieval thereof is possible; consequently, the theory of receipt^[3] is applicable. In addition, the requirement of a technical device enabling the identification and correction

[1] Compare: II 3 a.

[2] Renard/Barberis, in Spindler, E-Commerce Law in Europe and the USA, p. 77.

[3] Compare: I 3 b.

of input errors does not have to be regulated separately since the possibility to correct is already part of the process of contract conclusions.

To sum up, the French legislator has found a clear and persuasive way to realize the requirements of the ECD.

3.1.2.4 Conclusion

The transposition of the ECD did not cause tremendous difficulties to the Member States. Concerns arose about the wide scope of Art. 9 which requires a general enabling of electronic contracts. However, the Member States have mastered this issue by modernising the formality requirements. Particularly Germany and France have introduced the electronic form which is comparable to the written form; whereas the UK has reserved the rights for the responsible ministers to alter specific laws. Thus, the transposition has not been completely put into effect, yet, the basis for further steps is established.

In terms of Art. 10 ECD, the Member States have adopted the duties to inform comprehensively and accurately regarding the wording, so that there is no further action necessary.

Also, Art. 11 (placing the order) has been transformed successfully. France even exceeded the demanded scope and codified the double confirmation construction. In Germany, the main rule is that the contract is concluded when the service provider has accepted the offer by the customer and when the customer is able to retrieve the acceptance. The same rule applies to the UK, whereas in British law the website could also be assessed as an offer in particular circumstances.

However, legal insecurity still remains concerning the exact time of the contractual effectiveness on the national and in particular on the cross-

boarder level. Even though the Member States which are scrutinized in this report indicate similar regulations, thus corresponding resolutions can be perceived, other Member States, for example, Spain, classifies the website as a contractual offer^[1], which would lead to another result. In addition, the Spanish legislator postulates that an electronic contract is concluded when the acceptance is dispatched^[2]. In order to provide more clarity for the consumers, a uniform regulation throughout the community level should be desirable, so that consumers would know when exactly they are legally bound to their declarations of intent.

3.2 The national implementations of the Electronic Signature Directive

To enforce the Electronic Signature Directive^[3], changes in the national laws on form requirements for written documents as well as changes in the procedural laws on the validity of (electronically) signed documents as evidence were required. As pointed out above, the Signature Directive is quite straight forward and distinct in its formulations. Only in some details it leaves a margin of discretion to the implementations of the member states. Nevertheless, the solutions found by the Member States to enforce the Signature Directive are quite dispersing and can hardly be compared with each other. The reason for

[1] Lehmann, ZUM 1999 p. 180.

[2] Julia-Barcelò, CRi 2002 p. 112, 115; compare: Echegoyen/Girbau in Spindler, E-Commerce law in Europe and the USA, p. 470.

[3] In the next paragraphs referred to as the "Directive".

this lies in the very different starting points of the national laws.

European national legal systems are based on different legal traditions. French law for example is based on the so-called "droit civil", German law follows the principles of "Germanic" legal tradition and the law of the United Kingdom finally belongs to the "Common Law", following a case-law tradition. The laws on form requirements for documents as well as the national rules on civil procedure therefore differ a lot from country to country.

The following paragraphs will briefly point out the amendments to the national laws of France, Germany and the UK that were necessary to implement the rules of the Electronic Signature Directive.

3.2.1 Germany

In Germany, Electronic Signatures were introduced and regulated even before the introduction of the Directive in 1999. The "Signaturgesetz" (SigG) was implemented in 1997, but its technical and organisational requirements for a valid electronic signature were so demanding, that they were rarely used in practice.

To implement the Directive, two major amendments were necessary. First, the SigG was revised according to the Directive and provides the legal infrastructure for the use of electronic signatures.^[1] The second amendment referred to the law of contracts and its form requirements.^[2]

[1] Gesetz über Rahmenbedingungen für elektronische Signaturen und zur Änderung weiterer Vorschriften, BGBl. 2001 - I Nr. 22 vom 21.05.2001.

[2] Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsverkehr (FormAnpG) of July 13, 2001, BGBl 2001 - I, p. 1542.

§ 126a BGB introduced the electronic form. According to § 126a BGB, an electronic document signed with a qualified electronic signature is equal to the so-called "written form" of § 126 BGB which requires a handwritten signature.

§ 371 par. 1 ZPO (code of civil procedure) then clarifies that electronic documents are equally permissible in front of court and are treated like paper documents.^[1] If a document is signed by a qualified electronic signature, there is a legal assumption that it was generated by the person referred to by the electronic signature.

Furthermore, the Directive permitted the member states to introduce a voluntary accreditation system. The German legislator made use of this option in § 15 SigG. Accredited certification providers are supervised by the state authority for telecommunication and mail.

After these amendments, the electronic signature takes the same legal effect as handwritten signatures. Nevertheless, electronic signatures are effectively rarely used in Germany. Until today, only 32,000 e-signatures were distributed, which is a disappointing number. The reasons for the present failure of this technique will be pointed out below.

A review of the court decisions of the last years shows that electronically signed documents have only rarely given rise to legal disputes. Since in addition electronic signatures are not frequently used, there are no compelling conclusions which can be drawn from the case law.

What can be deduced from recent court decisions, is that there is a

[1] BGBl 2001 - I, p. 1542.

growing acceptance and confidence in electronic communication in general. E-mails—independent of whether they contain electronically signed documents—are more and more considered to be a reliable means of communications. Arguments by parties that e-mails got lost and that as a consequence they did not receive certain information are more and more rejected by the judges.^[1]

3.2.2 France

The French law was also amended in two legislative steps. The first law adapts the rules of civil procedure to the new technologies^[2] and the second regulates the requirements for a valid electronic signature, its field of application, etc^[3].

In France, evidence via written documents (*preuve littérale* or *preuve écrite*) is of central importance in court procedures. Art. 1341 of the civil code lays down, that from a certain value of the claim onward, no testimonial but only documentary evidence is admitted.^[4] In addition, above this amount, the conclusion of a contract cannot be assumed by an analysis of circumstances but it has to be presented in a written form. But the notion of "signature" had never been defined in traditional French law

[1] Beschluss vom 20.04.2006 - 5 U 456/06 (LG Regensburg).

[2] Loi no 2000 - 230 du 13 mars 2000 portant adaptation du droit de la preuve aux technologies de l'information et relative à la signature électronique, Journal Officiel Nr. 62, March 14, 2000, p. 3968 ff.

[3] Décret no 2001 - 272 du 30 mars 2001 pris pour l'application de l'article 1316 - 4 du code civil et relatif à la signature électronique, Journal Officiel, Nr. 77, March 31, 2001, p. 5070 ff.

[4] This rule of law goes back to Art. 54 of the "Ordonnance de Moulins" of 1566. The amount of money is adapted regularly through a regulation.

of civil procedure. There is no section that stipulates the legal consequences of a missing signature. As a consequence, the French case law developed in a somewhat liberal way. The Cour de Cassation, the French Supreme Court decided in 1997, that a fax can be admitted as documentary evidence even if it does not contain any kind of qualified signature.^[1] It was considered sufficient that it is presented in a written form and can be clearly attributed to an author.

The law on form requirements then developed accordingly. The loi 2000 - 230 defines a document as anything that carries and supports information, a signature is not required. Even e-mails can therefore be admitted as documentary evidence in court proceedings.

Art. 1316 - 3 CC attributes the same legal effect to electronic and to paper documents. Art. 1316 - 4 CC then lays down, that an electronic signature is equal in its legal effect to a handwritten one.

Because of the principle of unity of law, these procedural requirements for the validity of documents as evidence apply also in material civil law. Therefore, in contract law, qualified electronic signatures will also be of equal legal effect.

In contrast to the German legislator, the French law consciously resigned from the idea to introduce a voluntary accreditation system.

The experiences with the use of electronic signatures are very similar to the ones made in Germany and will be discussed further below.

[1] Cour de Cassation, Chambre Commerciale (Cass. Com.), Decision of 02. 12. 1997, JCP 1997, p. 178 ff.

3.2.3 United Kingdom

The UK legislator has also implemented the Directive in a two-step process. The Electronic Communications Act^[1] stipulates in Art. 7 par. 1 that documents signed by a qualified electronic signature are admissible as evidence in court proceedings and take the same legal effect. Sec. 7 par. 2 defines the electronic signature and Sec. 8, 9 (1) (a) gives the competence to regulate details in a regulation. This competence was used by passing the Electronic Signatures Regulation 2002.^[2] The Regulation sticks closely to the wording of the Directive and deals with issues such as the supervision of the accreditation services, their liability etc.

Similar as in French law, the implementation of the Directive seems to affect procedural law only. Form requirements are very rare under the Common Law system.^[3] According to the Law of Property Act 1989, only donations need to be presented in a written document and signed by the donating party and a witness to be valid. For all other contracts, no specific forms are required. But if a contract is not presented in a written form and has not been signed by the parties, the contract remains valid but it cannot be enforced in front of court. Since this is a major disadvantage, it is obvious that this rule, even if it is only of a procedural nature, has an impact on material civil law. Indirectly, the Electronic Communications Act 2000 therefore had an impact on the form requirements of contract law.

[1] Available at <http://www.legislation.hmso.gov.uk/acts/acts2000/20000007.htm>.

[2] Available at <http://www.legislation.hmso.gov.uk/si/si2002/20020318.htm>.

[3] See above.

3.2.4 Experiences with the use of Electronic Signatures and Future Perspectives

The European Commission reported in March 2006 on the application and use of electronic signatures in the EU.^[1] The study mainly focused on advanced or qualified electronic signatures and found out that they are still rather the exception than the norm. Until today, qualified electronic signatures are mainly used in the context of e-government or public services or in the banking sector.^[2] But even there, systems of individual passwords or PIN numbers are more frequent than electronic signatures attributed to a user. Several technological problems still render the system of encrypted signatures inconvenient and economically unattractive.

First, there is no economic incentive for accreditation system providers to authorize electronic signatures for other services than their own. This is seen as the main reason by the Commission why users still have to register individually with every service.

Another obstacle is the lack of interoperability between the different accreditation systems. The diversity in national systems of accreditation further promoted the reference to individual passwords etc. instead of using electronic signatures.

And third, the technology to use a qualified electronic signature is still rather expensive and complex. It requires investments in an infrastructure to distribute and read the encrypted signatures. In addition,

[1] Report from the Commission to the European Parliament and the Council—Report on the operation of Directive 1999/93/EC on a Community framework for electronic signatures, Brussels, March 15, 2006, KOM (2006) 120 final.

[2] KOM (2006) 120 final, p. 6.

it creates costs because the electronic documents need to be archived. Legal requirements to archive documents up to 30 years demand complex technologies to guarantee the readability of the documents for such a long time.^[1]

To conclude, the reasons for the lack of acceptance are of an economic and technological nature. There is no economic incentive for providers to develop authorisations that can be used with a variety of services which are not their own. And in addition, the technical infrastructure for electronic signatures is complex and cost-intensive which at the same time minimises the economic incentive to use it.^[2]

[1] See id., p. 8.

[2] See id., p. 11.

4. Conclusion: Further Steps of EU Legislation and Inspiration to China's E-contract Regulation

4.1 Further steps of EU legislation

To deal with the afore-said problems, the EU induced the "E-Confidence-Initiative" in May 2000. In order to this, the organisation for Economic Co-operation and Development (OECD) released guidelines in 1999 and 2003 how to handle e-commerce, how to judge reliable platforms, etc. Companies could be labeled for quality and reliability by a certification system developed with the input of consumer organisations and industry representatives at international level leading to a wide

use and acceptance for these labels^[1].

According to the Deputy Head of Unit of Information Society and Media DG of European Commission, there will be a new study on e-signature regulation and its implementation in Member States. Due to the importance of e-signature, such regulation will greatly enhance the security of e-commerce. For instance, the security of payments shall be raised by the adoption of the electronic signature. Directive on the one hand, on the other hand the awareness of, the technological support for shall be raised, e. g. by the duty of the business-seller to give the customer a chance to check his order for mistakes, etc., and point the customer's attention to that possibility. The National Expert of European Commission's Retail Issues, Consumer Policy and Payment Systems, Internet Market and Services DG believes that it will be helpful to the market if there is a comprehensive regulation regarding e-payment. At the EU level, a comprehensive directive is expected to come to the public at the end of this year, which will be the basic requirements for the e-payment sector.

Another foreseen mean is to develop the "System for Rapid Exchange of Information" ("RAPEX") for competent nominated authorities to swiftly exchange information and communicate urgent warnings^[2] and a soundly-structured national enforcement system staffed by well-trained, competent authorities belonging to a single rather than multiple ineffective administrative organisation.

[1] Point 4.3.4 of (2001/C 123/01).

[2] Point 3.9.3 of (2003/C 95/01).

Feedback from enterprises on concrete examples of unfair practices in B2B e-markets will be encouraged, being collected through existing business networks, such as European e-Business Legal Portal [1], the European B2B e-marketplaces portal [2] and the national e-commerce contact points [3].

The On-line Dispute Resolution shall help those who became victim to malicious or negligent e-commerce in a quicker and cheaper way than courts [4]. If confidence in E-commerce is to expand, consumers need speedy access to justice [5]. As specified by the Deputy Head of Unit of Information Society and Media DG of European Commission, the project "ECODIR" regarding ODR has not attracted common attention and interests in the industry.

Currently, the European Commission has no intention to revise the ECD. Instead, EU is reviewing the ECD with the help of relevant scholars/experts and a report on the said directives is expected to be open to the public in the near future. However, the Deputy Head of Unit of Information Society and Media DG of European Commission believes it will be good to develop some simple and open regulation for e-contract issues and other e-commerce issues, so as to set up basic requirements for its Member States to implement in their national laws according to the actual

[1] p. 5 of SEC(2004) 930.

[2] [Http://www.emarketservices.com](http://www.emarketservices.com).

[3] [Http://europa.eu.int/comm/internal_market/en/ecommerce/contactpoints_en.htm](http://europa.eu.int/comm/internal_market/en/ecommerce/contactpoints_en.htm).

[4] Point 3.9.4 of Economic and Social Committee—397th plenary session, 26 and 27 February 2003 (2003/C 95/01).

[5] Point 3.6.1 (2003/C 95/01).

situation respectively.

4.2 Inspiration to china's e-contract regulation

4.2.1 To make full use of the traditional legal system in China

As discussed with relevant EU experts and EC officials, an electronic contact law is unnecessary and thus it is not advisable for China to draft and promulgate an electronic contact law, since e-contracts themselves are merely contracts. From legal perspective, the current legal system has already covers e-contracts. As a matter of fact, the online transaction and offline transaction have many things in common and thus can generally be regulated by the same legal principle.

Due to the same reason, some of the Member States of EU are reluctant to change their civil codes with the development of e-commerce. As a non-member state, Switzerland even decides that it does not need any special regulation on e-contracting after a several-year discussion.

We should also keep it in mind that the courts in Europe seldom talk e-contract/e-commerce much; instead, they will make a reasonable and acceptable decision according to their understanding of the whole case. The judges in Europe try to strike a balance between industry interests and consumer protection when they determine the legal issues relating to an e-contract. To some extent, less rules are more useful.

Therefore, China should make full use of the current legal system and relevant regulation, instead of developing a new e-contract law.

4.2.2 To revise some regulation on e-contracts with basic and comprehensive rules

In consideration that the e-commerce market is in the process of transition, it will be better to keep the current regulations in China, such as the Electronic Signature Law, though they are far from perfect. The social reaction of the amended contract law will guide us to the right direction later.

Meanwhile, due to the requirement raised by the developing e-commerce business, we may regulate the electronic transactions by updating the existing laws and regulations based on the characteristics of the e-contracts. Most of the experts in Europe also believe that we should extend the traditional laws to both offline and online contracts and made necessary new laws for some specific issues. To take Netherlands as an example, the Netherlands Civil Law Code has set up the legal framework for all types of transaction, with some new regulation on electronic transactions.

According to the EU officials, the regulation on e-contract is a success at the EU level since the general principle is accepted by the member states without material problems in transiting. However, it is difficult to let all the member states accept all the regulation issued by the EU. For instance, some of the Member State do not agree that there is no obligation for any website to monitor the content. Therefore, the EU officials believe that the regulation on e-contract should not be too strict. As a matter of fact, the European Commission is thinking to make a uniform simple regulation for both B2B transaction and B2C transaction, though it will be a difficult task.

In this connection, it is advisable to make a uniform regulation with basic requirements so as to meet the requirements of the changing practice. Further, China may revise relevant regulation in a comprehensive way so as to enhance the uniform practice all over the country.

4.2.3 To identify the outstanding issues for the revision of China's current laws

It is a must to amend the traditional law by covering the specific regulation on e-contract. Based on the previous introduction and explanation of European relevant regulation and experience, we believe the revision to China's current law shall attach great importance to the following legal issues:

4.2.3.1 Market entry

There is no license needed for the e-commerce business in Europe. Specifically, no specific licenses are required for online payment, BBS service and online retail. As a matter of fact, all the requirements for online businesses are exactly the same as those for offline businesses. For instance, both online and offline gambling is restricted in most of European countries (UK is an exception). With regard to the legal protection of services based on, or consisting of, conditional access, Directive 98/84/EC of the European Parliament and of the Council provides a minimum level of legal protection within the EU of electronic pay services against piracy and to approximate provisions in the Member States concerning measures against illicit devices which give unauthorized

access to protected services.^[1]

China may have some reason to keep the ICP license system at this state. However, it will be reasonable for such system to fade out step by step. Further, it is advisable to learn the regulation regarding competition law in Europe so as to foster a harmonious e-commerce market.

4.2.3.2 Legal validity of e-contracts and relevant liabilities

It is commonly agreed in both China and Europe that the e-contracts have the same legal validity of the traditional offline contracts. Further, the requirements for an e-contract being in writing, being signed by the party and being made available or retained in its original form are specified.

However, the allocation of liabilities regarding e-contracts is at least as important as the legal recognition of e-contracts. According to Prof. Dr. Gerald Spindler in German, there is a hot discussion in Europe about the allocation of relevant responsibility of the e-agent. Actually, experts in Germany and Spain do not believe e-agent is an agent. They consider it as purely program or automatic system. While Italy's judges hold opposite opinion. However, the legal result is similarly, that is, the person uses/controls such e-agent (principal) should be responsible for relevant legal liabilities.

Therefore, it is advisable for China to develop more specific regulations regarding e-agent further to the regulation on legal recognition of electronic communications.

[1] For a detailed explanation of Directive 98/84/EC, please see: http://www.abgs.gov.tr/tarama/tarama_files/10/SC10EXP_Conditional%20Access.pdf.

4.2.3.3 E-signature

To decide the one responsible for certain legal activities and ensure the security of online transaction, e-signature is of great importance.

Germany has promulgated German Digital Signature Law in 1997 and validity of digital signature is also regulated by relevant procedural law. Further, Switzerland's 2005 the Electronic Signature Law is a good example to regulate electronic transactions.

To clarify, the use of digital signature technologies in Germany is not as common as expected. The main reasons are: (1) due to its own interest and for the security purpose, banks deny to use electronic signatures; (2) the government declares that they have no enough money to enhance the common use of electronic signatures; (3) The insurance company does not think they shall be mainly responsible for enhancing the common use of electronic signatures in Germany and have no strong motivation for such; and (4) due to the necessary expense and unnecessary adoption of electronic signatures, most of the customers are also reluctant to use electronic signatures in practice.

Therefore, it will be a wise choice for China's government to encourage the use of e-signature step by step. As advised by the Dean of the Law School of Amsterdam University, it will be good if the government encourages the safety transaction on the Internet. For instance, China government may let the enterprise to use the e-signature first, followed by individuals over 18 years old. Further, the large amount transactions online shall be required to use e-signature. In this regard, it is advisable to learn from Switzerland's experience in regulating e-signature and relevant practice and Estonian relevant experience.

4.2.3.4 Regulation on e-contracting

As advised by Prof. Spindler, the definition for the models of electronic transaction is flexible in Europe and it is advisable for China to rethink the definition and/or category of C2C and B2C. Specifically, the "power seller" on eBay is considered as merchant and thus will be required to pay value-added tax for their online businesses. In this connection, China may get large amount of tax from the power seller on various C2C platforms. If it decides to regulate such sellers under the framework of B2C.

As for the formation of e-contract, the information on the website is normally considered by European experts as invitation of an offer, except for the information of downloading software.

With regard to the performance of e-contract, the most outstanding legal issue is how to protect consumers' rights and interests.

As an experts appointed by the EC to review the ECD and recommend relevant revision in respect of websites' liabilities; Prof. Spindler reveals that relevant liabilities will be decided according to the three basic categories, that is, access providers, cache providers and host providers.

The e-commerce experts in Germany believe the regulation on standard e-contract is also similar to the regulation on offline standard contracts. For instance, German Civil Code is restricted and prevented by the High Court from adding some regulation for liability restriction in the area of e-commerce. In fact, Article 312E regulates that consumer must be able to download relevant standard e-contract, or else, the standard terms and conditions will not be part of the agreement between the parties.

Regulation on standard contracts in Netherlands is similar to that in other EU member states. For the terms and conditions on the website, they will be considered valid after the consumer shows the consent, unless there are unfair clauses and both the consumer and the court can make them invalid according to default rules. According to the Deputy Head of Unit of Information Society and Media DG of European Commission, Norway has good example in this regard. In what ever case, the regulation on standard contracts shall strike a balance between consumer protection and business development.

In addition, for the amendment of relevant traditional contract law, the regulation on e-error should be counted in. According to the European experience, traditional rules of error, e. g., compensation to relevant damages, still apply to e-error disputes. The websites or service providers are merely required to provide a technical method to change any input mistakes. Misunderstanding is not regulated by e-error regulation, but by the traditional civil laws. For specific regulation on e-error, it is different in Germany and France. France experts believe the e-contract as a result of e-error will be invalid contract; while Germany treats such e-contract as valid agreement, which can be canceled by parties with certain compensation. In this connection, China may also regulate e-error according to the actual requirement and reasonable experience from other countries. We believe China's new regulation regarding e-error shall be in line with the provision of the United Nations Convention on the Use of Electronic Communications in International Contracts.

4.2.3.5 Dispute resolution and evidential rules

The dispute resolution methods regarding e-contract normally have

three types: litigation, arbitration and ADR.

Generally speaking, there are few cases related to e-communications or e-contracts in German and Netherlands. If there are any, the judge will decide at their discretion case by case.

Similarly, there is less arbitration practice in Germany, let alone ODR practice since the court can handle most of the cases related to e-commerce with low cost and public hearing. For time-efficiency purpose and/or privacy purpose, some case may come to the arbitrators. However, the execution of relevant arbitration awards is sometimes a problem.

Due to the time-and cost-efficiency, ADR is the most common way for dispute resolution in Netherlands. According to a professor of Amsterdam University, only 5% - 10% cases come to the courts. However, ODR is still not very popular and growing gradually in Netherlands.

However, the evidential value of electronic documents is very weak in Germany and other countries. As confirmed by a Judge from Hannover, there are few cases considered as e-contract cases and few specific trainings regarding e-commerce for Judge. Instead, each case relating to technical issues must have a technical expert give a professional statement for Judge's reference. In Netherlands, the framework for online transaction is also regulated in the Civil Law Code and there is no written evidence law for dispute resolution regarding e-contract.

4.2.4 To build a better environment for the development of e-commerce

The Deputy Head of Unit of Information Society and Media DG of European Commission believes that, generally speaking, buying online is merely 6% of all the trans-border transactions. In this connection, it is

good to make mutual communications between Europe and China in the e-contract sector so as to find an effective way to improve such rate.

It is also a good idea to make some training activities in the community of e-contract or even e-commerce with the help of both European and China's experts. The DG responsible for training issues is Directorate-General for Education and Culture (European Commission). For more information and further communication, please visit http://ec.europa.eu/dgs/education_culture/index_en.html.

Consumers' confidence to the e-commerce market is also of great importance. To raise the consumers' trust in e-commerce, a constructive dialogue between consumers and manufacturers and distributors should be supported, including the consultation of consumer organisations to create a climate of confidence^[1].

Last but not the least, it is like Churchill said after the Battle of Britain: "This is not the end. It is not even the beginning of the end. It is the end of the beginning!" There is still a long way for China to go during the process of revising the current laws based on its actual situation.

[1] Point 1.3 of (2001/C 123/01).

附录

欧盟电子商务指令

鉴于条款(略)

第一章 总 则

第一条 目标和范围

1. 本指令旨在通过确保成员国间信息业服务的自由流动以使内部市场的正常运转。
2. 为实现第1款设定的目标,本指令协调统一了某些与内部市场、服务提供者的设立、商业信函、电子合同、中间服务提供商责任、行为规范、争议的非诉解决、法庭诉讼和成员国间的合作相关的信息业服务条款。
3. 本指令补充了适用于信息业服务的欧盟法律,且不限制欧盟决议及国内立法中已确立、实施的法律保护,尤其是在公共卫生和消费者权益保护方面的法律保护,但以该保护不妨害信息业服务的自由提供为限。
4. 本指令既没有对现有的国际私法构成增补,也没有涉及法院管辖权。
5. 本指令不适用于:
 - (a) 税收领域。
 - (b) 95/46/EC 和 97/66/EC 号指令调整的有关信息业服务的问题。

(c) 受卡特法调整的协定和惯例相关的问题。

(d) 下述信息业服务活动:

- 与行使公共权力有直接或特定联系的公证机关或相当行业的活动;
- 代表客户并为其利益出庭抗辩;
- 涉及在碰运气的游戏中下有货币价值的赌注的赌博活动,包括彩票和打赌交易。

6. 本指令不影响为促进文化和语言的多样性和确保其多元化而采取的在欧盟或国内实施的与欧盟法律相关的措施。

第二条 定义

为本指令目的,以下术语作如下解释:

- (a) “信息业服务”:指根据 98/48/EC 号指令修订的 98/34/EC 号指令第1条第2款中定义的服务。
- (b) “服务提供者”:指提供信息业服务的任何自然人或法人。
- (c) “已设立的服务提供者”:指在未定明的期限内通过固定机构从事有效经济活动的服务提供者。服务提供所需的技术手段和技术的存在与使用本身并不能构成提供者的设立。
- (d) “服务接受者”:指为了行业或其他目的,特别是为了查询信息或获取信息的目的,接受信息业服务的任何自然人或法人。
- (e) “消费者”:指为了行业、业务或职业以外的目的接受信息业服务的任何自然人。
- (f) “商业信息”:指那些旨在直接或间接促进的从事商业、工业、手工业活动或信息业的公司、组织或个人商誉的任何形式的信息。下列信息本身并不构成“商业信息”:
 - 可使他人直接获取公司、组织或个人活动的信息,尤其是域名和电子邮件地址;

——以独立方式编制的与商品、服务或公司、组织或个人形象相关的信息,尤其是当并无经济上的对价时。

(g)“受规制的职业”:指1988年12月21日发布的有关承认在至少3年制职业教育和培训期满后授予高等教育学历的一般制度的89/48/EEC号委员会指令第1条d款中定义的,或1992年6月18日发布的有关补充89/48/EEC号指令承认职业教育和培训的第二个一般制度的92/51/EEC号委员会指令第1条f款中定义的任何职业。

(h)“协调领域”:指成员国法律体系规定的适用于信息业服务提供者和信息业服务的要求,而不论其为一般要求或是专门针对信息业服务提供者或信息业服务的要求。

(i)协调领域涉及服务提供者必须遵守的下列方面的要求:

——信息业服务活动准入方面的要求,如涉及资格、授权或通知的要求;

——信息业服务活动经营方面的要求,如涉及服务提供者行为的要求、与服务质量或内容相关的要求,包括使用广告和合同的要求和涉及服务提供者责任的要求。

(ii)协调领域不包括下列要求:

- 适用于商品本身的要求;
- 适用于商品交付的要求;
- 适用于以非电子方式提供的服务的要求。

第三条 内部市场

1. 每一成员国应保证在其领土范围内设立的服务提供者提供的服务符合其国内适用的属于协调领域内的国内规则。

2. 成员国不得以属于协调领域为由对来自另一成员国的信息服务的自由提供加以限制。

3. 第1、2款不适用于附件中指定的领域。

4. 如果满足下列条件,成员国可以针对某以既定的信息服务业采取措施而不受第2款的约束:

(a)采取的措施应该

(i)出于下列原因之一:

——公共政策,尤其是为了防止、调查、侦察和检察刑事犯罪的公共政策,包括未成年人保护和同任何与基于种族、性别、宗教或国籍歧视而引发的仇恨和侵犯个人人格尊严的行为作斗争;

——公共卫生的保护;

——公共安全,包括维护国家安全和国防;

——消费者,包括投资者的保护。

(ii)用以制止对第i点设定的目标造成损害或有损害危险的特定信息业服务。

(iii)适宜上述目标的实现。

(b)采取措施应不违反法庭程序,包括刑事侦察过程中采取的初步程序和行动,在采取措施之前,成员国应当:

——要求过第1款中所指的成员国采取措施,但后者并没有采取措施或者没有采取足够的措施;

——将其要采取相应措施的意图通知了委员会和第1款中所指的成员国。

5. 在紧急情况下,成员国可以不受第4(b)款中规定的条件的约束,但应在尽可能短的时间内通知委员会和第1款所指的成员国,并指出该成员国认为构成紧急情况的原因。

6. 在不会阻碍成员国可能着手进行该措施的情况下,委员会应在尽可能短的时间内审查该措施是否符合欧盟法律,如果不符,委员会应要求该成员国避免采取任何提请的措施或立即终止该措施。

第二章 原 则

第一部分 设立和信息披露要求

第四条 排除事先授权原则

1. 成员国应保证信息业服务活动的准入和经营不需得到事先授权和不会受制于产生相同结果的要求。

2. 第1款不应应对现有的授权体制构成损害,包括非特别和专门针对信息业服务的授权体制,或是欧洲议会 97/13/EC 号指令和委员会 1997 年 4 月 10 日发布的关于电信服务领域一般授权和个别许可的统一框架指令中涵盖的授权体制。

第五条 信息的一般披露

1. 除了欧盟法律规定的其他信息披露要求外,成员国应保证服务提供者应提供并使服务接受者和有权机关能够容易地、直接地和永久地获取不少于如下的信息:

(a) 服务提供者的名称。

(b) 服务提供者设立地的地理地址。

(c) 服务提供者的具体信息,包括能与之迅速取得联系和以直接有效的方式与之通信的电子邮件地址。

(d) 在服务提供者有商业登记或类似公共登记的情况下,服务提供者的商业注册机构、其注册号码、或确认其身份的相关信息。

(e) 如果活动需要授权,有关监督机关的细节。

(f) 关于规范行业

——受理服务提供者登记的行业团体或类似机构;

——职位和授予该职位的成员国;

——可适用的设立地成员国行业规范以及查取的方式。

(g) 在需要对服务提供者的经营行为征收增值税的情况下,1977 年 5 月 17 日发布的关于协调成员国有关营业税——增值税统一体制:估价的统一基础的法律的 77/388/EEC 号第六个委员会指令第 22(1)条中规定的纳税号码。

2. 除了欧盟法律规定的其他信息披露要求外,成员国至少应保证当信息服务明码标价时,所标价格应该清楚无误,特别要标出该价格是否含税和运送费用。

第二部分 商业信函

第六条 信息披露

除了欧盟法律规定的其他信息披露要求外,成员国应保证构成信息业服务或其一部分的商业信函至少应符合下列条件:

(a) 商业信函本身应能被清楚识别;

(b) 发出商业信函的自然人或法人应能被清楚识别;

(c) 服务提供者设立地所在成员国允许的促销手段本身,如折扣、奖金、礼物,应能被清楚识别,并且合法使用促销手段所需满足的条件应易于被知悉并应清楚无误地显示;

(d) 服务提供者设立地所在成员国允许的促销竞争或竞赛本身应能被清楚识别并且参加条件应易于知悉并应清楚无误地显示。

第七条 未经请求的商业信函

1. 除了欧盟法律规定的其他条件外,允许未经请求的电子邮件商业信函存在的成员国,应保证在其领土内设立的服务提供者所发出的商业信函,应该在接收方一收到该信函时,就能清楚无误地识别其为商业信函。

2. 在不违反 97/7/EC 号和 97/66/EC 号指令的情况下,成员国应采取措施,确保发出未经电子邮件商业信函的服务提供者经常查

阅和关注退阅登记表(opt-registers)。不愿意收到这样的商业信函的自然人可以在登记表上登记。

第八条 受规制的职业

1. 成员国应保证,受规制的专业技术服务提供者可以使用商业信函,以作为其信息服务的一部分,但符合行业规范,特别是有关行业独立尊严,名誉、行业秘密和公平对待客户和本行业其他成员方面等。

2. 在不违背行业团体或协会自律原则的情况下,成员国和委员会应鼓励行业团体或协会制定欧盟水平上的行业规范来规定符合第1款的商业信函中的信息的类别。

3. 为保证与第2款规定的信息相关的内部市场的正常运转,有需要起草欧盟议案时,委员会应适当考虑欧盟水平上的行业规范并与相关行业协会和团体紧密合作。

4. 本指令与受规制的专业技术职业准入和经营的欧盟指令配合使用。

第三部分 电子合同

第九条 合同效力

1. 成员国应保证其法律体系允许以电子方式达成合同,特别是应保证在适用于合同缔结过程的法律中,不设置额外的要求以阻碍使用电子合同或仅以电子方式达成为由,而剥夺其法律效力和合法性。

2. 成员国可以规定第1款不适用于所有或某种属于下列类别的合同:

- (a) 设立或转移租赁权以外的不动产权利的合同;
- (b) 法律规定需要法庭、公共机构或行使公共权力的职业技术

人员介入的合同;

(c) 为行业、业务或职业以外的目的提供保证或从担保的合同;

(d) 受亲属法或继承法管辖的合同。

3. 成员国应向委员会指明第2款规定的不适用第1款的合同类别。成员国应每5年向委员会提交一份适用第2款的报告,陈述保留第2(b)款规定的不适用第1款的合同类别的必要性的理由。

第十条 信息披露

1. 除了欧盟法律规定的其他信息披露要求外,成员国应确保服务提供者在服务接受者下订单之前至少清楚地、明白无误地披露了下列信息,除非其与非消费者当事人另有约定:

- (a) 订立合同采用的不同的技术步骤;
- (b) 已订立的合同是否由服务提供者存档和是否可供查阅;
- (c) 识别和纠正下订单前输入错误的技术手段;
- (d) 合同使用的语言。

2. 成员国应确保服务提供者指明其同意遵守的行为规范和如何电子查阅这些规范的信息,除非其与非消费者当事人另有约定。

3. 提供给接受者的合同条款和条件应能为接受者所储存和复制。

4. 第1、2款不应适用于仅通过交换电子邮件或其他相当的个人信函方式达成的合同。

第十一条 下订单

1. 成员国应确保在服务接受者通过技术手段下订单的情况下适用下列原则,除非其与非消费者当事人另有约定:

- 服务提供者应毫不延误地通过电子方式通知服务接受方已收到订单;
- 当订单和收讫通知的接收方能够有条件获取时,订单和收

讫通知视为已被收到。

2. 成员国应确保服务提供者应提供恰当、有效、易于理解的技术手段,使服务接受者能够在下订单前识别和修改输入错误。

3. 第1款第一项原则和第2款不适用于仅通过交换电子邮件或通过相当的个人信函达成的合同。

第四部分 中间服务提供商的责任

第十二条 传输服务

1. 当服务提供者提供在通信网络上传输服务接受者提供的信息的服务或提供通信网络的接入服务时,成员国应保证在下列情况下服务提供者对信息传输不负责任:

- (a) 服务提供者没有主动传输信息;
- (b) 服务提供者没有挑选传输信息的接受者;
- (c) 没有删选或修改传输信息。

2. 只要自动地、中间性地、短暂地储存传输信息的唯一目的,是为了实现信息在通信网络上的传输并且储存的时间没有超过传输所需的时间,那么这样的储存就属于第1款中规定的信息传输和提供接入服务行为。

3. 本条不妨碍法庭或行政机关根据成员国法律有可能要求服务提供者停止或防止侵权行为的发生。

第十三条 储存服务

1. 当服务提供者提供在通信网络上传输服务接受者提供的信息的服务时,如果服务提供者在其他服务接受者的要求下自动地、中间性地、短暂地储存传输信息的唯一目的是使信息传输更有效,则成员国应保证在下列条件下,服务提供者对这样的信息储存不负责任:

- (a) 提供者没有修改信息;
- (b) 提供者遵守信息准入的条件;
- (c) 提供者遵守业内普遍认可的信息更新规则;
- (d) 提供者没有干涉合法利用业内普遍认可和采行的技术获取信息使用的数据;

(e) 提供者一旦确切获知传输最初来源中的信息已经从网上删除或已经禁止获取,或法庭或行政机关已经下令删除或禁止获取,就迅速有效地删除了其储存的信息或使之禁止获取。

2. 本条不妨碍法庭或行政机关根据成员国法律有可能要求服务提供者停止或防止侵权行为的发生。

第十四条 主机服务

1. 当服务提供者提供储存服务接受者提供的信息的服务时,成员国应保证在下列情况下,服务提供者对在服务接受者的要求下储存的信息不负责任:

(a) 提供者确实不知为非法的活动或信息,并且在涉及损害赔偿时他也不知道非法活动或信息产生的事实背景;

(b) 提供者一旦确切获知或意识到为非法活动或信息,就迅速有效地删除了该信息或使之禁止获取。

2. 当服务接受者的行为是在提供者的授权或控制之下作出时,第1款不再适用。

3. 本条不妨碍法庭或行政机关根据成员国法律有可能要求服务提供者停止或防止侵权行为的发生,也不妨碍成员国有可能制定调整信息删除或禁止获取的程序规则。

第十五条 无一般性监督义务

1. 当服务提供者提供第12、13、14条项下的服务时,成员国不应对其施加监督其传输或储存的信息的一般性义务,也不应对之施加

积极查找表明为非法活动的事实或背景的一般性义务。

2. 成员国可以为信息服务者设定迅速向有权公共机构报告服务接受者实施或提供的有违法嫌疑的活动或信息的义务,或在有权机构的要求下通报能够识别与之订有储存协议的服务接受者身份的信息的义务。

第三章 实 施

第十六条 行为规范

1. 成员国和委员会应鼓励:

(a) 由行业、专业或消费者协会或组织起草欧盟水平上的旨在帮助本指令第 5~15 条正确实施的行为规范;

(b) 自愿向委员会通报国家或欧盟水平上的行为规范草案;

(c) 可以通过电子方式获取各欧盟语种版本的行为规范;

(d) 由行业、专业或消费者协会或组织向成员国和委员会通报适用这些行为规范的评估报告和对与电子商务相关的惯例、习惯或常规的影响;

(e) 起草有关未成年人保护和人格尊严的行为规范。

2. 成员国和委员会应鼓励代表消费者的协会或组织根据第 1

(a) 款参与起草和实施影响消费者利益的行为规范。适当时,考虑到视力损伤者和身体伤残者的特殊需要,还应征求代表这类群体利益的协会的意见。

第十七条 非诉解决争议

1. 当信息业服务提供者和接受者间产生争议时,成员国应保证其法律不会阻止使用国内法中的非诉解决争议机制,包括适当的电子方式。

2. 成员国应鼓励负责非诉争议解决机构,尤其是消费者争议解

决的机构,为相关当事人提供足够的程序保障。

3. 成员国应鼓励负责非诉争议解决的机构向委员会报告其作出的重要的有关信息服务的决定和任何有关电子商务的惯例、习惯或常规方面的信息。

第十八条 法庭诉讼

1. 成员国应保证按照国内有关信息业服务活动的法律进行的法庭诉讼,允许迅速采取措施以制止涉嫌侵权行为和防止相关利益受到进一步损害的措施,包括中间措施。

2. 98/27/EC 号指令的附件应作如下补充:“11. 欧洲议会和理事会 2000 年 6 月 8 日发布的关于信息服务尤其是关于内部市场电子商务(电子商务指令)某些法律问题的 2000/31/EC 号指令。”

第十九条 合作

1. 为有效实施本指令,成员国应有所需的足够的监督和调整手段并应保证服务提供者向其提供必要的信息。

2. 成员国应相互合作,为此,应设立一个或几个联络点并把联络点的具体情况通知其他成员国和委员会。

3. 成员国应尽快地和在遵守国内法的基础上向其他成员国或委员会提供所需的帮助和信息,包括通过适当的电子方式。

4. 成员国设立的联络点应至少可以通过电子方式进入并且服务提供者和接受者可以从中:

(a) 获取有关合同权利和义务与有关争议发生时可以适用的投诉和解决机制,包括涉及适用这些机制实际操作方面的问题的一般信息;

(b) 获取可以从中得到进一步信息或实际帮助的机构、协会或组织的具体情况。

5. 成员国应鼓励向委员会通报在其领土内作出的任何有关解决信息业服务的重大行政决定或法庭判决和电子商务相关惯例、习惯

和常规。

第二十条 制裁

成员国应对违反根据本指令制定的国内规定的行为予以制裁并且应采取一切必要的措施保证制裁的实施。制裁应是有效的、相当的和劝诫性的。

第四章 附 则

第二十一条 重新审定

1. 2003年7月7日以前并在其后的每两年,委员会应向欧洲议会、理事会与经济和社会委员会提交本指令实施情况的报告,必要时附上为适应信息业服务领域法律上、技术上和经济上的发展状况而对本指令的修改建议,特别是在预防犯罪、未成年人保护、消费者保护和保证内部市场正常运转方面。

2. 为审查本指令适应性的需要,上述报告尤其应分析提出有关链接和定位工具服务提供者的责任、“通知并下载(notice and take down)”程序和内容下载后的责任归属的修改建议的必要性。报告还应根据技术发展分析增加第12、13条提供的免责条件的必要性和将内部市场原则适用于未经请求商业信函的可能性。

第二十二条 国内适用(transposition)

1. 成员国应在2002年1月17日以前根据本指令制定并实施相应的国内法律、法规和行政规章并立即通知委员会。

2. 当成员国采行第1款规定的法律、法规和行政规章时,其中应包括本指令的附注或官方出版时附上这些附注。成员国自行决定作附注的方式。

第二十三条 生效

本指令自其在《欧盟官方期刊》上公布之日起生效。

第二十四条 报送

本指令报送所有成员国。

2000年6月8日制定于卢森堡。

附件 第三条中的例外(derogations)

根据第3条第3款,第3条第1、2款不适用于:

- * 版权、邻接权、87/54/EEC号和96/9/EC号指令中规定的权利和工业产权;
- * 机构发放电子货币,这方面,成员国已经适用的2000/46/EC号指令第8条第1款提供的例外的其中一条;
- * 85/611/EEC号指令第44条第2款;
- * 92/49/EEC号指令第30条和标题四,92/96/EEC号指令标题四,88/357/EEC号指令第7、8条和90/619/EEC号指令第4条;
- * 当事人选择合同准据法的自由;
- * 消费者合同项下的义务;
- * 受不动产所在地成员国法律强制性规定调整的产生或转移不动产权利的合同的形式有效性;
- * 是否允许存在以电子邮件的方式发送未经请求商业信函。

EU Directive on Electronic Commerce

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) Official Journal L 178 , 17/07/2000 p. 0001 – 0016

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3),

Whereas:

(1) The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; in accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free

movements of goods, services and the freedom of establishment are ensured; the development of information society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples.

(2) The development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry, provided that everyone has access to the Internet.

(3) Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; this Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services.

(4) It is important to ensure that electronic commerce could fully benefit from the internal market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities(4), a high level of Community integration is achieved.

(5) The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise

of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State.

(6) In the light of Community objectives, of Articles 43 and 49 of the Treaty and of secondary Community law, these obstacles should be eliminated by coordinating certain national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty.

(7) In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.

(8) The objective of this Directive is to create a legal framework to ensure the free movement of information society services between Member States and not to harmonise the field of criminal law as such.

(9) The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental

Freedoms, which has been ratified by all the Member States; For this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.

(10) In accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market; where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as electronic commerce is concerned, the Directive must ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity, consumer protection and the protection of public health; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies.

(11) This Directive is without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts; amongst others, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts(5) and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts(6) form a vital element for protecting consumers in contractual matters; those Directives also apply in their entirety to information society services; that same Community acquis, which is fully applicable to information society

services, also embraces in particular Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising (7), Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (8), Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (9), Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (10), Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer production in the indication of prices of products offered to consumers (11), Council Directive 92/59/EEC of 29 June 1992 on general product safety (12), Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis (13), Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (14), Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions concerning liability for defective products (15), Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (16), the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products (17); This Directive should be without prejudice to Directive 98/43/EC of the European

Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (18) adopted within the framework of the internal market, or to directives on the protection of public health; this Directive complements information requirements established by the abovementioned Directives and in particular Directive 97/7/EC.

(12) It is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage, be guaranteed under the Treaty or existing secondary legislation; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; taxation, particularly value added tax imposed on a large number of the services covered by this Directive, must be excluded from the scope of this Directive.

(13) This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce.

(14) The protection of individuals with regard to the processing of personal data is solely governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (19) and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (20) which are fully applicable to information

society services; these Directives already establish a Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive in order to ensure the smooth functioning of the internal market, in particular the free movement of personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet.

(15) The confidentiality of communications is guaranteed by Article 5 Directive 97/66/EC; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised.

(16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.

(17) The definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services (21) and in Directive 98/84/EC of the

European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (22); this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition.

(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent

individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

(19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.

(20) The definition of "recipient of a service" covers all types of usage of information society services, both by persons who provide information on open networks such as the Internet and by persons who

seek information on the Internet for private or professional reasons.

(21) The scope of the coordinated field is without prejudice to future Community harmonisation relating to information society services and to future legislation adopted at national level in accordance with Community law; the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member States' legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member States' requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; the coordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art.

(22) Information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established.

(23) This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with

the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.

(24) In the context of this Directive, notwithstanding the rule on the control at source of information society services, it is legitimate under the conditions established in this Directive for Member States to take measures to restrict the free movement of information society services.

(25) National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in this Directive.

(26) Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission.

(27) This Directive, together with the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services, contributes to the creating of a legal framework for the on-line provision of financial services; this Directive does not pre-empt future initiatives in the area of financial services in particular with regard to the harmonisation of rules of conduct in this field; the possibility for Member States, established in this Directive, under certain circumstances of restricting the freedom to provide information society services in order to protect consumers also covers measures in the area of financial services in particular measures aiming at

protecting investors.

(28) The Member States' obligation not to subject access to the activity of an information society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service⁽²³⁾ consisting of the physical delivery of a printed electronic mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification service.

(29) Commercial communications are essential for the financing of information society services and for developing a wide variety of new, charge-free services; in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements; these requirements are without prejudice to Directive 97/7/EC; this Directive should not affect existing Directives on commercial communications, in particular Directive 98/43/EC.

(30) The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and information society service providers and may disrupt the smooth functioning of interactive networks; the question of consent by recipient of certain forms of unsolicited commercial communications is not addressed by this Directive, but has already been addressed, in particular, by Directive 97/7/EC and by Directive 97/66/EC; in Member States which authorise unsolicited commercial communications by electronic mail, the setting up of

appropriate industry filtering initiatives should be encouraged and facilitated; in addition it is necessary that in any event unsolicited commercial communities are clearly identifiable as such in order to improve transparency and to facilitate the functioning of such industry initiatives; unsolicited commercial communications by electronic mail should not result in additional communication costs for the recipient.

(31) Member States which allow the sending of unsolicited commercial communications by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

(32) In order to remove barriers to the development of cross-border services within the Community which members of the regulated professions might offer on the Internet, it is necessary that compliance be guaranteed at Community level with professional rules aiming, in particular, to protect consumers or public health; codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; the drawing-up or, where appropriate, the adaptation of such rules should be encouraged without prejudice to the autonomy of professional bodies and associations.

(33) This Directive complements Community law and national law relating to regulated professions maintaining a coherent set of applicable rules in this field.

(34) Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely

to curb the use of contracts by electronic means; the examination of the legislation requiring such adjustment should be systematic and should cover all the necessary stages and acts of the contractual process, including the filing of the contract; the result of this amendment should be to make contracts concluded electronically workable; the legal effect of electronic signatures is dealt with by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (24); the acknowledgement of receipt by a service provider may take the form of the on-line provision of the service paid for.

(35) This Directive does not affect Member States' possibility of maintaining or establishing general or specific legal requirements for contracts which can be fulfilled by electronic means, in particular requirements concerning secure electronic signatures.

(36) Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts, public authorities, or professions exercising public authority; this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have an effect with regard to third parties as well as contracts requiring by law certification or attestation by a notary.

(37) Member States' obligation to remove obstacles to the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility of using electronic means in certain cases.

(38) Member States' obligation to remove obstacles to the use of

electronic contracts is to be implemented in conformity with legal requirements for contracts enshrined in Community law.

(39) The exceptions to the provisions concerning the contracts concluded exclusively by electronic mail or by equivalent individual communications provided for by this Directive, in relation to information to be provided and the placing of orders, should not enable, as a result, the by-passing of those provisions by providers of information society services.

(40) Both existing and emerging disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition; service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures; the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC.

(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and

standards can be based.

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities.

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the

disabling of access to it.

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

(49) Member States and the Commission are to encourage the drawing-up of codes of conduct; this is not to impair the voluntary nature of such codes and the possibility for interested parties of deciding freely whether to adhere to such codes.

(50) It is important that the proposed directive on the harmonisation of certain aspects of copyright and related rights in the information society

and this Directive come into force within a similar time scale with a view to establishing a clear framework of rules relevant to the issue of liability of intermediaries for copyright and relating rights infringements at Community level.

(51) Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders.

(52) The effective exercise of the freedoms of the internal market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extent; in view of this specific character and the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, this Directive requests Member States to ensure that appropriate court actions are available; Member States should examine the need to provide access to judicial procedures by appropriate electronic means.

(53) Directive 98/27/EC, which is applicable to information society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; this mechanism will contribute to the free movement of information society services by ensuring a high level of consumer protection.

(54) The sanctions provided for under this Directive are without

prejudice to any other sanction or remedy provided under national law; Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive.

(55) This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.

(56) As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract.

(57) The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State.

(58) This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, Uncitral) on legal issues.

(59) Despite the global nature of electronic communications, coordination of national regulatory measures at European Union level is necessary in order to avoid fragmentation of the internal market, and for the establishment of an appropriate European regulatory framework; such coordination should also contribute to the establishment of a common and strong negotiating position in international forums.

(60) In order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector.

(61) If the market is actually to operate by electronic means in the context of globalisation, the European Union and the major non-European areas need to consult each other with a view to making laws and procedures compatible.

(62) Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union's other trading partners.

(63) The adoption of this Directive will not prevent the Member States from taking into account the various social, societal and cultural implications which are inherent in the advent of the information society; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of information society

services; in any case, the development of the information society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment.

(64) Electronic communication offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields.

(65) The Council, in its resolution of 19 January 1999 on the consumer dimension of the information society (25), stressed that the protection of consumers deserved special attention in this field; the Commission will examine the degree to which existing consumer protection rules provide insufficient protection in the context of the information society and will identify, where necessary, the deficiencies of this legislation and those issues which could require additional measures; if need be, the Commission should make specific additional proposals to resolve such deficiencies that will thereby have been identified,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I GENERAL PROVISIONS

Article 1

Objective and scope

1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market,

the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

5. This Directive shall not apply to:

(a) the field of taxation;

(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;

(c) questions relating to agreements or practices governed by cartel law;

(d) the following activities of information society services:

– the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,

– the representation of a client and defence of his interests before the courts,

– gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

6. This Directive does not affect measures taken at Community or

national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

Article 2

Definitions

For the purpose of this Directive, the following terms shall bear the following meanings:

(a) “information society services”: services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

(b) “service provider”: any natural or legal person providing an information society service;

(c) “established service provider”: a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;

(d) “recipient of the service”: any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;

(e) “consumer”: any natural person who is acting for purposes which are outside his or her trade, business or profession;

(f) “commercial communication”: any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not in themselves constitute commercial communications:

– information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic – mail address,

– communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration;

(g) “regulated profession”: any profession within the meaning of either Article 1(d) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three-years’ duration(26) or of Article 1(f) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (27);

(h) “coordinated field”: requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

– the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,

– the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those

applicable to advertising and contracts, or requirements concerning the liability of the service provider;

(ii) The coordinated field does not cover requirements such as:

- requirements applicable to goods as such,
- requirements applicable to the delivery of goods,
- requirements applicable to services not provided by electronic means.

Article 3

Internal market

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

- (a) the measures shall be:
 - (i) necessary for one of the following reasons:
 - public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race,

sex, religion or nationality, and violations of human dignity concerning individual persons,

- the protection of public health,
- public security, including the safeguarding of national security and defence;

- the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest

possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

CHAPTER II PRINCIPLES

Section 1: Establishment and information requirements

Article 4

Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

2. Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at information society services, or which are covered by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services(28).

Article 5

General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;

(b) the geographic address at which the service provider is established;

(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;

(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:

– any professional body or similar institution with which the service provider is registered,

– the professional title and the Member State where it has been granted,

– a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment(29).

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated

clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2: Commercial communications

Article 6

Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

(a) the commercial communication shall be clearly identifiable as such;

(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;

(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

Article 7

Unsolicited commercial communication

1. In addition to other requirements established by Community law,

Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient.

2. Without prejudice to Directive 97/7/EC and Directive 97/66/EC, Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt - out registers in which natural persons not wishing to receive such commercial communications can register themselves.

Article 8

Regulated professions

1. Member States shall ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, Member States and the Commission shall encourage professional associations and bodies to establish codes of conduct at Community level in order to determine the types of information that can be given for the purposes of commercial communication in conformity with the rules referred to in paragraph 1.

3. When drawing up proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market

with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close cooperation with the relevant professional associations and bodies.

4. This Directive shall apply in addition to Community Directives concerning access to, and the exercise of, activities of the regulated professions.

Section 3: Contracts concluded by electronic means

Article 9

Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

- (a) contracts that create or transfer rights in real estate, except for rental rights;
- (b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;
- (c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(d) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

Article 10

Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

- (a) the different technical steps to follow to conclude the contract;
- (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
- (c) the technical means for identifying and correcting input errors prior to the placing of the order;
- (d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient

must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Article 11

Placing of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

- the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,
- the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 4: Liability of intermediary service providers

Article 12

Mere conduit

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13

Caching

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a

recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14

Hosting

1. Where an information society service is provided that consists of

the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of

their service with whom they have storage agreements.

CHAPTER III IMPLEMENTATION

Article 16

Codes of conduct

1. Member States and the Commission shall encourage:

(a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(c) the accessibility of these codes of conduct in the Community languages by electronic means;

(d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce;

(e) the drawing up of codes of conduct regarding the protection of minors and human dignity.

2. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1(a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

Article 17

Out-of-court dispute settlement

1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

Article 18

Court actions

1. Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

2. The Annex to Directive 98/27/EC shall be supplemented as follows:

"11. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce, in the internal market

(Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1)."

Article 19

Cooperation

1. Member States shall have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall cooperate with other Member States; they shall, to that end, appoint one or several contact points, whose details they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms;

(b) obtain the details of authorities, associations or organisations from which they may obtain further information or practical assistance.

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to information society services and

practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

Article 20

Sanctions

Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive.

CHAPTER IV FINAL PROVISIONS

Article 21

Re-examination

1. Before 17 July 2003, and thereafter every two years, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of information society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the internal market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and

13, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail.

Article 22

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 17 January 2002. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

Article 23

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 24

Addressees

This Directive is addressed to the Member States.

Done at Luxembourg, 8 June 2000.

For the European Parliament

The President

N. Fontaine

For the Council

The President

G. d'Oliveira Martins

(1) OJ C 30, 5.2.1999, p. 4.

(2) OJ C 169, 16.6.1999, p. 36.

(3) Opinion of the European Parliament of 6 May 1999 (OJ C 279, 1.10.1999, p. 389), Council common position of 28 February 2000 (OJ C 128, 8.5.2000, p. 32) and Decision of the European Parliament of 4 May 2000 (not yet published in the Official Journal).

(4) OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

(5) OJ L 95, 21.4.1993, p. 29.

(6) OJ L 144, 4.6.1999, p. 19.

(7) OJ L 250, 19.9.1984, p. 17. Directive as amended by Directive 97/55/EC of the European Parliament and of the Council (OJ L 290, 23.10.1997, p. 18).

(8) OJ L 42, 12.2.1987, p. 48. Directive as last amended by Directive 98/7/EC of the European Parliament and of the Council (OJ L 101, 1.4.1998, p. 17).

(9) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p. 22).

(10) OJ L 158, 23.6.1990, p. 59.

(11) OJ L 80, 18.3.1998, p. 27.

(12) OJ L 228, 11.8.1992, p. 24.

(13) OJ L 280, 29.10.1994, p. 83.

(14) OJ L 166, 11.6.1998, p. 51. Directive as amended by Directive 1999/44/EC (OJ L 171, 7.7.1999, p. 12).

(15) OJ L 210, 7. 8. 1985, p. 29. Directive as amended by Directive 1999/34/EC (OJ L 141, 4. 6. 1999, p. 20).

(16) OJ L 171, 7. 7. 1999, p. 12.

(17) OJ L 113, 30. 4. 1992, p. 13.

(18) OJ L 213, 30. 7. 1998, p. 9.

(19) OJ L 281, 23. 11. 1995, p. 31.

(20) OJ L 24, 30. 1. 1998, p. 1.

(21) OJ L 204, 21. 7. 1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5. 8. 1998, p. 18).

(22) OJ L 320, 28. 11. 1998, p. 54.

(23) OJ L 15, 21. 1. 1998, p. 14.

(24) OJ L 13, 19. 1. 2000, p. 12.

(25) OJ C 23, 28. 1. 1999, p. 1.

(26) OJ L 19, 24. 1. 1989, p. 16.

(27) OJ L 209, 24. 7. 1992, p. 25. Directive as last amended by Commission Directive 97/38/EC (OJ L 184, 12. 7. 1997, p. 31).

(28) OJ L 117, 7. 5. 1997, p. 15.

(29) OJ L 145, 13. 6. 1977, p. 1. Directive as last amended by Directive 1999/85/EC (OJ L 277, 28. 10. 1999, p. 34).

ANNEX

DEROGATIONS FROM ARTICLE 3

As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

- copyright, neighbouring rights, rights referred to in Directive 87/54/EEC(1) and Directive 96/9/EC(2) as well as industrial property rights,
- the emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in

Article 8(1) of Directive 2000/46/EC(3),

- Article 44(2) of Directive 85/611/EEC(4),

- Article 30 and Title IV of Directive 92/49/EEC(5), Title IV of Directive 92/96/EEC(6), Articles 7 and 8 of Directive 88/357/EEC(7) and Article 4 of Directive 90/619/EEC(8),

- the freedom of the parties to choose the law applicable to their contract,

- contractual obligations concerning consumer contacts,

- formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated,

- the permissibility of unsolicited commercial communications by electronic mail.

(1) OJ L 24, 27. 1. 1987, p. 36.

(2) OJ L 77, 27. 3. 1996, p. 20.

(3) Not yet published in the Official Journal.

(4) OJ L 375, 31. 12. 1985, p. 3. Directive as last amended by Directive 95/26/EC (OJ L 168, 18. 7. 1995, p. 7).

(5) OJ L 228, 11. 8. 1992, p. 1. Directive as last amended by Directive 95/26/EC.

(6) OJ L 360, 9. 12. 1992, p. 2. Directive as last amended by Directive 95/26/EC.

(7) OJ L 172, 4. 7. 1988, p. 1. Directive as last amended by Directive 92/49/EC.

(8) OJ L 330, 29. 11. 1990, p. 50. Directive as last amended by Directive 92/96/EC.

联合国国际合同使用电子通信公约

联合国国际贸易法委员会

第三十八届会议

2005年7月4日至15日,维也纳

本公约各缔约国,

重申相信平等互利基础上的国际贸易是促进各国之间友好关系的一个重要因素,注意到电子通信的使用增多提高了商业活动的效率,加强了贸易联系,并为过去相距遥远的当事人和市场提供了新的准入机会,从而对促进国内、国际贸易和经济发展发挥着极其重要的作用,

考虑到国际合同中使用电子通信的法律效力不确定性所产生的种种问题构成了对国际贸易的障碍,

深信采用统一规则消除对国际合同使用电子通信的障碍,包括消除现有国际贸易法文书在执行上可能产生的障碍,将加强国际合同的法律确定性和商业上的可预见性,有助于各国获得现代贸易途径,

认为统一规则应当尊重当事人在其所选择的手段符合相关法律规则的目的的限度内选择适当媒介和技术的自由;同时顾及不偏重任何技术和功能等同的原则,

希望以法律制度、社会制度和经济制度不同的国家所能接受的

方式对消除电子通信使用中的法律障碍提供一个共同解决办法,

兹商定如下:

第一章 适用范围

第1条 适用范围

1. 本公约适用于与营业地位于不同国家的当事人之间订立或履行合同有关的电子通信的使用。

2. 当事人营业地位于不同国家,但这一事实只要未从合同或当事人之间的任何交往中或当事人在订立合同前任何时候或订立合同时披露的资料中显示出来,即不予以考虑。

3. 在确定本公约是否适用时,不考虑当事人的国籍或当事人或合同的民事或商务性质。

第2条 不适用情形

1. 本公约不适用于与下列情形有关的电子通信:

(a) 为个人、家人或家庭目的订立的合同。

(b) (一)受管制交易所的交易;(二)外汇交易;(三)银行间支付系统、银行间支付协议或者与证券或其他金融资产或票据有关的清算和结算系统;(四)对中间人持有的证券或其他金融资产或票据的担保权的转让、出售、出借或持有或回购协议。

2. 本公约不适用于汇票、本票、运单、提单、仓单或任何可使持单人或受益人有权要求交付货物或支付一笔款额的可转让单证或票据。

第3条 当事人意思自治

当事人可以排除本公约的适用,或者删减或更改其中任何一项规定的效力。

第二章 总 则

第4条 定义

在本公约中:

(a) “通信”系指当事人在一项合同的订立或履行中需要作出或选择作出的包括要约和对要约的承诺在内的任何陈述、声明、要求、通知或请求;

(b) “电子通信”系指当事人以数据电文方式发出的任何通信;

(c) “数据电文”系指经由电子手段、电磁手段、光学手段或类似手段生成、发送、接收或储存的信息,这些手段包括但不限于电子数据交换、电子邮件、电报、电传或传真;

(d) 电子通信的“发端人”系指亲自或由他人所代表已发送或生成可能随后备存的电子通信的当事人,但不包括作为中间人处理该电子通信的当事人;

(e) 电子通信的“收件人”系指发端人意图中的接收该电子通信的当事人,但不包括作为中间人处理该电子通信的当事人;

(f) “信息系统”系指生成、发送、接收、储存或用其他方法处理数据电文的系统;

(g) “自动电文系统”系指一种计算机程序或者一种电子或其他自动手段,用以引发一个行动或者全部或部分地对数据电文或执行生成答复,而无须每次在该系统引发行动或生成答复时由人进行复查或干预;

(h) “营业地”系指除利用具体所在地临时提供货物或服务的情况之外,当事人保留一处非短暂性营业,所以便从事一项经济活动的任何所在地。

第5条 解释

1. 在解释本公约时,应当考虑到其国际性以及促进其适用上的统一和在国际贸易中遵守诚信的必要性。

2. 涉及本公约所管辖事项但未在本公约中明确解决的问题,应当按照本公约所依据的一般原则求得解决,或在无此种原则时,按照国际私法规则指定的适用法律解决。

第6条 当事人的所在地

1. 就本公约而言,当事人的营业地推定为其所指明的所在地,除非另一方当事人证明该指明其所在地的当事人在该所在地无营业地。

2. 当事人未指明营业地并且拥有不止一个营业地的,[依照本条第1款,[¹]就本公约而言,与有关合同关系最密切的营业地为其营业地,但须考虑到双方当事人在合同订立前任何时候或合同订立时所知道或所设想的情况。

3. 自然人无营业地的,以其惯常居所为准。

4. 一所在地并不仅因以下两点之一而成为营业地:(a)系一方当事人订立合同所用信息系统的支持设备和技术的所在地;(b)系其他当事人可以进入该信息系统的地方。

5. 仅凭一方当事人使用与某一特定国家相关联的域名或电子信箱地址,不能推定其营业地位于该国。

第7条 对提供情况的要求

本公约中的规定概不影响适用任何可能要求当事人披露其身份、营业地或其他情况的法律规则,也不免除当事人就此作出不准

[1] 委员会似宜考虑在第2款草案目前的措辞中是否仍需要提及第1款(秘书处已将有关的措辞放在方括号内),因为与前几稿不同,目前的第2款草案仅适用于未根据第1款草案指明营业地的当事人。

确或虚假说明的法律后果。

第三章 国际合同使用电子通信

第8条 对电子通信的法律承认

1. 对于一项通信或一项合同,不得仅以其为电子通信形式为由而否定其有效性或可执行性。^[1]

2. 本公约中的规定概不要求当事人使用或接受电子通信,但可以根据当事人的作为推断其是否同意使用或接受电子通信。

第9条 形式要求

1. 本公约中的规定概不要求一项通信或一项合同以任何特定形式作出、订立或证明。

2. 凡法律要求一项通信或一项合同应当采用书面形式的,或规定了不采用书面形式的后果的,若一项电子通信所含信息可以调取以备日后查用,即满足了该项要求。

3. 凡法律要求一项通信或一项合同应当由当事人签字的,或法律规定了没有签字的后果的,对于一项电子通信而言,在下列情况下,即满足了该项要求:

(a) 使用了一种方法来鉴别该当事人的身份和表明该当事人认可了电子通信内所含的信息;而且

(b) 从各种情况来看,包括根据任何相关的约定,该方法对于生成或传递电子通信所要达到的目的既是适当的,也是可靠的。

4. 凡法律要求一项通信或一项合同应当以原件形式提交或保留的,或规定了缺少原件的后果的,对于一项电子通信而言,在下列

[1] 委员会似宜考虑,为清晰起见,本款中是否应添加“或产生于电子通信往来”等词语。

情况下,即满足了该项要求:

(a) 自电子通信首次以最终形式——电子通信或其他形式——生成之时起,该电子通信所载信息的完备性有可靠保障;而且

(b) 要求出示电子通信所载信息的,该信息能够被显示给应向其出示的人。

5. 在第4(a)款中:

(a) 评价完整性的标准应当是,除附加任何签注和正常的通信、储存和显示过程中出现的任何改动之外,信息是否完备而且未被改动;而且

(b) 所要求的可靠性标准应当根据生成信息的目的和所有相关情况加以评估。

[6. 第4款和第5款不适用于法律规则或当事人之间的协议要求一方当事人出具某些原件方可根据信用证、银行担保或类似票据要求付款的情形。]^[1]

第10条 发出和收到电子通信的时间和地点

1. 电子通信的发出时间是其离开发端人或代表发端人发送电子通信的当事人控制范围之内的信息系统的时间,或者,如果电子通信尚未离开发端人或代表发端人发送电子通信的当事人控制范围之内的信息系统,则为电子通信被收到的时间。

2. 电子通信的收到时间是其能够由收件人在该收件人指定的电子地址检索的时间。电子通信在收件人的另一电子地址的收到时间是其能够由该收件人在该地址检索并且该收件人了解到该电

[1] 本款放在方括号内是因为工作组时间不够而未能第四十四届会议上完成对本款的审查。

作为对本款草案的替代,建议公约草案可规定各国可以根据第18条草案作出声明而排除适用第9条草案第4款和第5款(A/CN.9/571,第138段)。

子通信已发送到该地址的时间。当电子通信抵达收件人的电子地址时,即应推定收件人能够检索该电子通信。

3. 电子通信将发端人设有营业地的地点视为其发出地点,将收件人设有营业地的地点视为其收到地点,营业地依照第6条确定。

4. 即使支持电子地址的信息系统的所在地可能不同于根据本条第3款规定而认定的电子通信的收到地点,本条第2款的规定依然适用。

第11条 要约邀请

通过一项或多项电子通信提出的订立合同提议,凡不是向一个或多个特定当事人提出,而是可供使用信息系统的当事人一般查询的,包括使用互动式应用程序通过这类信息系统发出订单的提议,应当视作要约邀请,但明确指明提议的当事人打算在提议获承诺时受其约束的除外。

第12条 自动电文系统在合同订立中的使用

通过自动电文系统与自然人之间的交互动作或者通过若干自动电文系统之间的交互动作订立的合同,不得仅仅因为无自然人复查这些系统进行的每一动作或者由此产生的合同而被否认有效性或可执行性。

第13条 合同条款的备查

本公约中的规定概不影响适用任何可能要求一通过交换电子通信谈判部分或全部合同条款的当事人,以某种特定方式向另一方当事人提供载有合同条款的电子通信的法律规则,也不免除一方当事人未能这样做的法律后果。

第14条 电子通信中的错误

1. 一自然人在与另一方当事人的自动电文系统往来的电子通信中发生输入错误,而该自动电文系统未给该人提供更正错误的机会,在下列情况下,该人或其代表的当事人有权撤回发生输入错误的电子通信:

(a) 该自然人或其代表的当事人在发现错误后尽可能立即将该错误通知另一方当事人,并指出其在电子通信中发生了错误;

(b) 该自然人或其代表的当事人采取合理步骤,包括遵照另一方当事人的指示采取步骤,退还因该错误而可能收到的任何货物或服务,或者根据指示销毁这种货物或服务;而且

(c) 该自然人或其代表的当事人没有使用可能从另一方当事人收到的任何货物或服务所产生的任何重大利益或价值或从中受益。

2. 本条中的规定概不影响适用任何可能就相关合同类型的订立或履行当中发生的错误的后果而不是就第1款所列情况下发生的输入错误的后果作出规定的法律规则。

第四章 最后条款¹⁾

第15条 保存人

兹指定联合国秘书长为本公约保存人。

第16条 签署、批准、接受或认可

1. 本公约[自[……]至[……]在[……]开放供各国签署,随后]自[……]至[……]在纽约联合国总部开放供各国签署。

2. 本公约须经签署国批准、接受或认可。

[1] 工作组审议的公约草案上一稿(A/CN.9/WG.IV/WP.110)中已载有第15、16、17、18、19、20、21条草案和第22条草案备选案文A,以及第23条和第25条草案。草案第16条之二、第19条之二、第22条备选案文B和第24条反映了在工作组第四十四届会议上提出的关于增加一些条文的建议。当时,工作组审议并通过了第18条和第19条草案,并就最后条款的其他条文初步交换了意见,但由于时间不够,工作组未作正式核准。根据对第一章、第二章和第三章以及第18条和第19条的审议,工作组请秘书处在工作组审议的那一稿公约草案第四章最后条款草案中作相应的更改。工作组还请秘书处将工作组第四十四届会议上提议增加的条款草案放在方括号内插入拟提交委员会的最后草案中(A/CN.9/571,第10段)。

3. 自开放供签署之日,本公约对所有未签署国开放供加入。
4. 批准书、接受书、认可书和加入书应送交联合国秘书长保存。

[第16条之二:区域经济一体化组织的参与^[1]

1. 由若干主权国家组成并对本公约管辖的某些事项拥有管辖权的区域经济一体化组织同样可以签署、批准、接受、认可或加入本公约。在此情况下,区域经济一体化组织享有的权利和负有的义务应与缔约国相同,但仅限于本组织对本公约管辖的事项具有管辖权的范围。当本公约须考虑缔约国的数目时,除一区域经济一体化组织中已成为本公约缔约国的成员国之外,该组织不应算作一个缔约国。

2. 区域经济一体化组织在签署、批准、接受、认可或加入时应向保存人提出一项声明,指明对本公约管辖的哪些事项的管辖权已由其成员国转移给本组织。根据本款提出的声明中所指明的管辖权分配如发生任何变化,包括管辖权的新的转移,区域经济一体化组织应迅速通知保存人。

3. 在情况需要时,本公约中对“一缔约国”或“各缔约国”的任何提及均同等适用于区域经济一体化组织。]

第17条 对本国领土单位的效力

1. 一缔约国拥有两个或多个领土单位,^[2]各领土单位对本公

[1] 工作组审议的公约草案上一稿(A/CN.9/WG.IV/WP.110)中没有本条草案。本条草案反映了奥地利、比利时、克罗地亚、捷克共和国、丹麦、芬兰、法国、德国、意大利、西班牙、瑞典和欧盟委员会在工作组第四十四届会议上提出的一项提案(A/CN.9/WG.IV/XLIV/CRP.3)。

[2] 本条草案的措词反映了贸易法委员会拟订的其他文书中类似条款的措辞。然而,删除了公约草案上一稿(A/CN.9/WG.IV/WP.110)中“两个或多个领土单位”词语后的“而依照本国宪法规定”等词语,因为据指出,实际上特别是在作狭义解读时,这些词语造成了不确定性,因为同一国家所辖各领土单位可能存在不同的法律制度,其法律依据可能并非总是来自一部书面的宪法的规定。

约所涉事项适用不同法律制度的,该国得在签署、批准、接受、认可或加入时声明本公约适用于本国全部领土单位或仅适用于其中的一个或数个领土单位,并且可以随时提出另一声明来修改其所做的声明。

2. 此种声明应通知保存人,并且明确指明适用本公约的领土单位。

3. 由于按本条规定作出一项声明,本公约适用于缔约国的一个或数个领土单位但不是全部领土单位,而且一方当事人的营业地位于该国之内,为本公约之目的,除非该营业地位于本公约适用的领土单位内,否则该营业地视为不在缔约国内。

4. 缔约国未根据本条第1款作出声明的,本公约适用于该国所有领土单位。

第18条 关于适用范围声明

1. 任何国家均可根据第20条声明其仅在下述情况下适用本公约:

- (a) 第1条第1款中提及的国家是本公约的缔约国;
- (b) 国际私法规则导致适用某一缔约国的法律;或
- (c) 当事人约定适用本公约。

2. 任何国家均可将其在根据第20条所作的声明中指明的事项排除在本公约的适用范围之外。

第19条 根据其他国际公约进行的通信往来

1. 本公约的规定适用于与订立或履行本公约缔约国已加入或可能加入的下列任何国际公约所适用的合同或协议有关的电子通信的使用:

《承认及执行外国仲裁裁决公约》(1958年6月10日,纽约);
《国际货物销售时效期限公约》(1974年6月14日,纽约)及其

议定书(1980年4月11日,维也纳);

《联合国国际货物销售合同公约》(1980年4月11日,维也纳);

《联合国国际贸易运输港站经营人赔偿责任公约》(1991年4月19日,维也纳);

《联合国独立担保和备用信用证公约》(1995年12月11日,纽约);

《联合国国际贸易应收款转让公约》(2001年12月12日,纽约)。

2. 本公约的规定还适用于与订立或履行本公约一缔约国已加入或可能加入但未在本条第1款中具体提及的另一国际公约、条约或协定所适用的合同或协议有关的电子通信,除非该国已根据第20条声明其将不受本款的约束。

3. 根据本条第2款作出声明的国家也可声明其仍将对与订立或履行该国已加入或可能加入的已指明的国际公约、条约或协定所适用的任何合同或协议有关的电子通信的使用适用本公约的规定。

4. 任何国家均可声明其将不对与订立或履行该国已加入或可能加入的而且在该国的声明中指明的任何国际公约、条约或协定,包括本条第1款中提及的任何公约所适用的合同或协议有关的电子通信的使用适用本公约的规定,即使该国尚未通过根据第20条作出声明的方式排除本条第2款的适用亦如此。

[第19条之二 对第19条第1款的修正程序^[1]]

1. 第19条第1款所载文书清单可作修改,增列向所有国家开

[1] 工作组审议的公约草案上一稿(A/CN.9/WG.IV/WP.110)中没有本条草案。本条草案反映了比利时在工作组第四十四届会议上提出的一项提案(A/CN.9/WG.IV/XLIV/CRP.5)。

放加入的[由贸易法委员会拟定的其他公约][相关公约、条约或协定]。

2. 本公约生效后,任何缔约国可提议作出上述修改。要求修改的任何提议应以书面形式提交保存人。保存人应将符合第1款要求的提议通知所有缔约国,并就是否应通过拟议的修改征求它们的意见。

3. 除非有三分之一的缔约国在拟议的修改分发后一百八十天内提出书面通知表示反对,否则有关修改视为通过。]

第20条 声明的程序和效力

1. 可以在任何时候根据第17条第1款、第18条第1款和第2款以及第19条第2款、第3款和第4款作出声明。在签署时作出的声明须在批准、接受或认可时加以确认。

2. 声明及其确认,应以书面形式提出,并应正式通知保存人。

3. 声明在本公约对有关国家开始生效时同时生效。但是,保存人于此种生效后收到正式通知的声明,应于保存人收到该项声明之日起满六个月后的下一个月第一日生效。

4. 根据本公约规定作出声明的任何国家可以在任何时候以书面形式正式通知保存人更改或撤回该项声明。此种更改或撤回于保存人收到通知之日起满六个月后的下一个月第一日生效。

第21条 保留

不得对本公约提出保留。

第22条 修正

[备选案文A^[1]]

1. 任何缔约国均可对本公约提出修正案。所提出的修正案应

[1] 工作组审议的公约草案上一稿(A/CN.9/WG.IV/WP.110)中原本没有本条草案的备选案文A。

当以书面形式提交联合国秘书长,后者应将提案转发各缔约国,并要求它们表明其是否赞成召开缔约国会议。如果从转发提案之日起四个月内至少有三分之一的缔约国赞成召开此会议,则秘书长应当在联合国主持下召开此会议。修正案应当至少在会前提前九十天分发给各缔约国。

2. 本公约修正案须以出席缔约国会议并参加表决的缔约国的[三分之二][过半数]通过,并应于自缔约国会议通过修正案之时起[三分之二]的缔约国已交存修正案接受书之日满六个月后的下一个月第一日对已批准、接受或认可该修正案的国家生效。]

[备选案文 B]^[1]

1. [联合国法律事务厅][联合国国际贸易法委员会秘书处]^[2]应[每年或]在视情况所需的[其他]时间为缔约国编制报告,介绍有关本公约设立的国际制度的实际运作方式。

2. 应[不少于百分之二十五的]缔约国的要求,[联合国法律事务厅][联合国国际贸易法委员会秘书处]应随时召开缔约国复审大会,以审议:

(a) 本公约的实际运作及其在促进其条款中所涵盖的电子商务方面的成效;

(b) 对本公约的条款所作的司法解释以及条款的适用情况;

(c) 是否应对本公约作任何修订。

[1] 工作组审议的公约草案上一稿(A/CN.9/WG.IV/WP.110)中没有本条草案的备选案文 B。这段案文反映了美利坚合众国在工作组第四十四届会议上提出的一项提案(A/CN.9/WG.IV/XLIV/CRP.4)。

[2] 这些提法可能需要改为提及“联合国秘书长”或“保存人”,以确保在向会员国提供的行政服务方面与联合国的现有做法保持一致。秘书处正在研究提出的这些措辞所具有的影响,将就此事项在委员会第三十八届会议(2005 年 7 月 4 日至 15 日,维也纳)上向委员会提出建议。

3. 对本公约的任何修订,须经出席前款所述大会的至少三分之二的多数缔约国认可,并在根据第 23 条有关生效的规定经三个国家批准、接受或认可后,对已经批准、接受或认可该项修订的国家生效。]

第 23 条 生效

1. 本公约于第[……]件批准书、接受书、认可书或加入书交存之日起满六个月后的下一个月第一日生效。

2. 一国在第[……]件批准书、接受书、认可书或加入书交存之后才批准、接受、认可或加入本公约的,本公约于该国交存其批准书、接受书、认可书或加入书之日起满六个月后的下一个月第一日对该国生效。

[第 24 条 过渡规则]^[1]

1. 本公约仅适用于在公约生效之日后进行的电子通信。

2. 在根据第 18 条第 1 款作出声明的缔约国中,本公约仅适用于在公约对第 18 条第 1(a)款所述缔约国或对第 1(b)款所述缔约国生效之日后进行的电子通信。

3. 本公约仅适用于第 19 条第 1 款所列其中相关公约在缔约国生效之日后进行的如第 19 条第 1 款所述的电子通信。

4. 缔约国根据第 19 条第 3 款作出声明的,本公约仅适用于在该项声明根据第 20 条第 3 款或第 4 款生效之日后与订立或履行属于该项声明范围内的合同而相关的电子通信。

5. 根据第 18 条第 1 款或第 2 款或者根据第 19 条第 2 款、第 3

[1] 工作组审议的公约草案上一稿(A/CN.9/WG.IV/WP.110)中仅载有本条草案的第 1 款。目前形式的本条草案反映了美利坚合众国在工作组第四十四届会议上提出的一项提案(A/CN.9/WG.IV/XLIV/CRP.6)。

款或第4款作出的声明,或对声明的撤销或更改,不影响在该项声明根据第20条第3款或第4款生效之日前进行的电子通信所创设的任何权利。]

第25条 退约

1. 缔约国可以书面形式正式通知保存人,宣布退出本公约。
2. 退出于保存人收到通知之日起满十二个月后的下一个月第一日起生效。凡通知内订明退出的生效需更长期限的,退出于保存人收到通知后该段更长期限届满时生效。

[.....]年[.....]月[.....]日订于[.....],正本一份,其阿拉伯文本、中文本、英文本、法文本、俄文本和西班牙文本具有同等效力。

下列署名全权代表,经各自政府正式授权,在本公约上签字,以昭信守。

United Nations Convention on the Use of Electronic Communications in International Contracts

Resolution adopted by the General Assembly
[on the report of the Sixth Committee (A/60/515)]

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Noting that the increased use of electronic communications improves the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Considering that problems created by uncertainty as to the legal value of the use of electronic communications in international contracts constitute an obstacle to international trade,

Convinced that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade

law instruments, would enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes,

Being of the opinion that uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological neutrality and functional equivalence, to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law,

Desiring to provide a common solution to remove legal obstacles to the use of electronic communications in a manner acceptable to States with different legal, social and economic systems,

Have agreed as follows:

Chapter I Sphere of application

Article 1

Scope of application

1. This Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States.

2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract.

3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration

in determining the application of this Convention.

Article 2

Exclusions

1. This Convention does not apply to electronic communications relating to any of the following:

- (a) Contracts concluded for personal, family or household purposes;
- (b) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary.

2. This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.

Article 3

Party autonomy

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

Chapter II General provisions

Article 4

Definitions

For the purposes of this Convention:

(a) "Communication" means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;

(b) "Electronic communication" means any communication that the parties make by means of data messages;

(c) "Data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy;

(d) "Originator" of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;

(e) "Addressee" of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

(f) "Information system" means a system for generating, sending, receiving, storing or otherwise processing data messages;

(g) "Automated message system" means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;

(h) "Place of business" means any place where a party maintains a

nontransitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.

Article 5

Interpretation

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 6

Location of the parties

1. For the purposes of this Convention, a party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.

2. If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

3. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.

4. A location is not a place of business merely because that is:

(a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.

5. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

Article 7

Information requirements

Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate, incomplete or false statements in that regard.

Chapter III Use of electronic communications in international contracts

Article 8

Legal recognition of electronic communications

1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.

Article 9

Form requirements

1. Nothing in this Convention requires a communication or a contract

to be made or evidenced in any particular form.

2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

4. Where the law requires that a communication or a contract should be made available or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

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

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

5. For the purposes of paragraph 4 (a):

(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

Article 10

Time and place of dispatch and receipt of electronic communications

1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic

communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.

4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.

Article 11

Invitations to make offers

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

Article 12

Use of automated message systems for contract formation

A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual

actions carried out by the automated message systems or the resulting contract.

Article 13

Availability of contract terms

Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other party those electronic communications which contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.

Article 14

Error in electronic communications

1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:

(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and

(b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

2. Nothing in this article affects the application of any rule of law

that may govern the consequences of any error other than as provided for in paragraph 1.

Chapter IV Final provisions

Article 15

Depositary

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 16

Signature, ratification, acceptance or approval

1. This Convention is open for signature by all States at United Nations Headquarters in New York from 16 January 2006 to 16 January 2008.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 17

Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention.

The regional economic integration organization shall in that case have

the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the regional economic integration organization shall not count as a Contracting State in addition to its member States that are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession; make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in States members of any such organization, as set out by declaration made in accordance with article 21.

Article 18

Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to

extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 19

Declarations on the scope of application

1. Any Contracting State may declare, in accordance with article 21, that it will apply this Convention only:

(a) When the States referred to in article 1, paragraph 1, are Contracting States to this Convention; or

(b) When the parties have agreed that it applies.

2. Any Contracting State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 21.

Article 20

Communications exchanged under other international conventions

1. The provisions of this Convention apply to the use of electronic

communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980);

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980);

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991);

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995);

United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).

2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 21, that it will not be bound by this paragraph.

3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this

Convention to the use of electronic communications in connection with the formation or performance of any contract to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.

4. Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 21.

Article 21

Procedure and effects of declarations

1. Declarations under article 17, paragraph 4, article 19, paragraphs 1 and 2, and article 20, paragraphs 2, 3 and 4, may be made at any time. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. Any State that makes a declaration under this Convention may

modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 22

Reservations

No reservations may be made under this Convention.

Article 23

Entry into force

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 24

Time of application

This Convention and any declaration apply only to electronic communications that are made after the date when the Convention or the declaration enters into force or takes effect in respect of each Contracting State.

Article 25

Denunciations

1. A Contracting State may denounce this Convention by a formal

notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary.

Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this [...] day of [...], 2005, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.