Law of Electronic Commercial Transactions

Contemporary issues in the EU, US and China

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Part V

The future

11 Conclusions and recommendations

11.1 Future legislative trends in the EU, US and China

The advance of information technology creates new patterns of commercial enterprises and changes the life of individuals. It changes the essence of traditional paper-based and face-to-face international trade and domestic business. Buying and selling online has become a common practice without regard to physical meetings and geographical boundaries. The ever-increasing usage of the internet has dramatically driven an explosion of electronic commerce. Legal challenges are emerging.

Broadly, the law of electronic commercial transactions should promote free and fair trade between nations and within nations. In a narrow scope, the law of electronic commercial transactions should regulate the conduct of businesses and individuals online. The law of electronic commercial transactions is within the regime of traditional commercial law and international trade law, covering wide-ranging legal issues. However, it also challenges the legal recognition of the validity of electronic contracts because traditional laws were promulgated before the widespread use of electronic commerce and without consideration of the usage of electronic means.

International, regional and national legislative organisations have been making efforts to produce particularised legal instruments to facilitate the development of electronic commerce. There are different approaches adopted in those organisations equipped for different cultural and economic situations. The EU intends to establish comprehensive rules in directives and regulations for Member States. The US prefers to adopt a market-oriented approach encouraging self-regulation. China chooses to adopt subject-specific international instruments, i.e. conventions or model laws to keep up with the international standard. During this ongoing legislative process in the laws of electronic commercial transactions, nations have faced some similar problems:

Firstly, it is argued that electronic commerce does not add new insights into the operation of traditional laws, such as contract law; instead, it adds a different layer of communication by electronic means, and thus a new body of laws governing issues in electronic commercial transactions would not

need to be established.[1] Although it would avoid causing confusion and complicating the legal system unnecessarily, it is debatable whether the traditional laws are sufficient and efficient enough to deal with newly emerging e-disputes.

Secondly, the majority of transnational electronic transactions involve people that will never physically meet. How to create trust and establish confidence in online interaction and transactions is challenging for international, regional and national law makers. Promoting trust and confidence in electronic commerce is one of the prioritised aims in laws of electronic commercial transactions.

Harmonisation or convergence of national laws, whether by international conventions or model laws, conscious or unconscious judicial parallelism or uniform rules for specified types of contract will remove the obstacles of transnational commercial transactions. In the author's opinion it is understandable that it would cause confusion if there were two sets of international and national trade laws, one for offline and the other for online. It is normal to doubt the practicality of such an approach. But fear of facilitating different sets of laws should not become an obstacle to modernising existing laws to adapt to the future development of various technologies in electronic commercial transactions. From the research in this book there is strong evidence that electronic commercial transactions do have their unique characteristics. The entire concept of electronic transactions is the same as the traditional ones, but the actual conduct of electronic transactions is fundamentally different.

It is certain that electronic transactions can be deemed to be a means of communication from a technological point of view. However, from a legal perspective, there are two dominant factors that could distinguish the legal consequences of electronic transactions from traditional ones – the determination of 'time and place of dispatch and receipt of an electronic communication',[2] and 'the place of business'[3] in cyberspace. When involving digitised goods with delivery online, these two factors, as explained in the book, would lead to different outcomes in relation to ascertaining the rules of electronic offer and acceptance, jurisdiction and applicable law. Traditional contract law and private international law will not be sufficient to govern these issues.

It is notable that before drafting completely new electronic commerce laws, careful consideration should be given to existing laws. If nations decide not to produce new laws for electronic commerce it is recommended that those nations adopt the international instruments in electronic commerce in order to promote an international trade relationship. An explanatory note to the existing laws should be also produced to explain and complement the legal issues of electronic commerce. If nations decide to have particularised legislation, they can either insert new provisions of electronic commerce into existing laws as well as modernise the existing provisions, or create new sets of laws in electronic commercial transactions.

Some IT specific legal issues concerning electronic signatures and authentication, as well as the conduct of online dispute resolution, should be regulated in a separate set of laws because, although requirements of signature as well as rules of litigation, arbitration, mediation and negotiation can remain the same as the offline legislation, using electronic means creates new concepts, raises new issues and challenges the validity of evidence in these legal areas.

Most of the nations have made efforts to remove legal barriers to electronic commerce. International legislative organisations push forward the process of the harmonisation of international electronic commerce by proposing general principles to create confidence for doing business online. However, some legal obstacles to electronic commercial transactions remain unresolved as there is a lack of substantive rules.

11.2 Solutions to obstacles in the law of electronic commercial transactions

The book proposes solutions to the eight main legal obstacles to electronic commercial transactions as highlighted in Part I.

The first solution concerns the determination of electronic offer and acceptance in electronic contracts. After examining the characteristics of electronic communications, including email contracting and clickwrap agreements, it is concluded that a contract formed by electronic means is similar to a contract made by telephone or facsimile as they are all instantaneous. Although dispatching an email is like dropping a letter in a red post box, email communication is much quicker than traditional post. Electronic mail overcomes the disadvantages of the postal mail as it is possible to determine the time of dispatch and receipt of electronic communications, providing evidential certainty as to the receipt of an offer and acceptance. Therefore the postal rule loses its purpose in electronic communications. Where an offer and acceptance are to be communicated by electronic means a contract should be concluded upon receipt of the acceptance by the offeror. The author's proposal is that the acceptance rule should prevail over the postal rule in electronic offer and acceptance. Hence, the acceptance should be effective when it is received.

The second solution refers to the availability of contract terms, errors in electronic communications, and battle of forms. In relation to the availability of contract terms, most current e-commerce legislation does not require such a duty. In the author's view, it is necessary for model laws, directives or conventions to impose a duty of making contract terms available or reproducible online, because it is crucial to have evidence when disputes arise. With regard to errors in electronic communications, technologies enabling the amendment in error inputs and the withdrawal of error communications must be available on the website, because in instantaneous and automated communications, negligence can appear easily and unintentionally. For example, pressing the wrong button on the internet can create serious legal

consequences. The time restriction of notification of error in electronic communications should also be defined. Referring to battle of forms, the combination of the ruling in the UCC, CISG, PICC, PECL and CLC can apply to online battle of forms, that is, electronic acceptance which contains additions, limitations or other modifications, is a rejection of the offer and constitutes a counter-offer. However, if the additional or different terms in the general conditions of the acceptance do not materially alter the offer, they should form part of the contract to the extent that they are common in substance, or otherwise parties agree.

The third solution focuses on the removal of barriers to the recognition of electronic signatures and authentication, in particular, recognition of foreign certificates and electronic signatures. An electronic signature is essential because it identifies the contracting parties, secures the electronic transactions and indicates recognition and approval of the contents of a document. In all the existing electronic signatures laws, electronic signatures have been recognised as equivalent to handwritten signatures. Certificate Authorities (CAs), trusted third parties, can be licensed or unlicensed, public or private. The industry of CAs has not developed as expected since the 1990s because private sector entities are reluctant to establish CAs due to the uncertainty of their legal liability. There are no substantive rules governing the standard of an electronic signature and the recognition of foreign certificates of authentication. In the author's view, the establishment of a model law regulating the conduct of international certificate authorities is necessary because electronic commercial transactions are often transnational and there is a high risk of dealing with fraudulent certificates from a third country. Furthermore, parties using foreign certificates will have no certainty of legal protection because national laws are different.

The fourth solution tackles the sufficiency of technical measures and legal protocols of data privacy protection. Data privacy security is vital in creating users' trust and confidence in online interaction and transactions. On the other hand, the free flow of data information between different nations is necessary to stimulate international business transactions and globalisation. In the information society, legislation of data privacy protection should be equipped to keep the balance between the free flow of data information and the fundamental human right of privacy. Self-regulation in data privacy protection has also been encouraged by international legislative instruments; however, there should be procedures in laws examining whether companies strictly comply with their privacy policies. Private trusted third parties services, such as TRUSTe program, can also provide supervision and enhance enforceability to data privacy protection in companies.

The fifth solution focuses on the issue of ascertaining jurisdiction in electronic contracts. There are different rules of jurisdiction in the EU, US and China. The EU applies general and special jurisdiction according to the Brussels I Regulation, whilst the US Courts, following the *International Shoe* case, focus on whether a defendant's activities constitute 'minimum contacts'

with a forum state, as well as applying the sliding scale from the *Zippo* case which distinguishes between three broad categories of websites based on their interactive and commercial characteristics. Chinese law is different from that of the EU and the US as it does not address provisions of general and special jurisdiction separately. However, Chinese law, just like in the EU and the US, favours two factors, domicile and the place of performance, to determine jurisdiction. This book concludes that for disputes involving contracts of tangible or digitised goods with physical delivery, rules of internet jurisdiction are the same as the rules of offline jurisdiction, as the place of performance has a physical location in both. However, for disputes involving contracts of digitised goods with delivery online, the rule concerning the place of performance online must be specifically examined. In the author's view, in this case, the place of performance should be the recipient's place of business indicated by the party. If the party fails to indicate the place of business or has more than one place of business, the place of business should be the one with the closest relationship to the relevant contract or where the principal place of business is situated.

The sixth solution refers to determining the applicable law in electronic contracts. The EU, US and China distinguish the applicable law in cases of choice and in absence of choice by parties. As a general rule parties are free to choose the governing law. Otherwise the contract will be governed by the law of the country with which the contract is most closely connected or has the most significant relationship to the transaction in cases of absence of express choice. Just as in the determination of internet jurisdiction, tangible or digitised goods transacted online with physical delivery do follow the same rules for the determination of the applicable law as in the offline world. The difference arises with contracts involving digitised goods with delivery online. According to the findings in the book, in this case, the seller's place of business is the most enduring connecting factor, which has an economic impact on its area. Thus, the law of the seller's place of business should be the law governing B2B electronic contracts in the absence of a choice of law clause.

The seventh solution aims to clarify the mechanism of online dispute resolution (ODR) referring to electronic contracting disputes. ODR is a new solution to build trust in electronic commercial transactions. Four successful examples, WIPO with UDRP, eBay with SquareTrade, AAA with Cybersettle and CIETAC with HKIAC have been examined in this book, proving that the linking of ODR service providers and primary market makers, as well as the self-enforcement mechanism of resolution outcomes, are key credentials to their success. The conduct of ODR should include six core principles: accountability, confidentiality, accessibility, credibility, security and enforceability. Enforceability is essential, since its success will encourage electronic traders or businesses to use ODR to resolve their disputes. The outcome of online mediation and negotiation should be easily converted into settlement agreements, whilst the decisions of online arbitration should constitute arbitral awards.

Otherwise, the ODR service providers should have self-enforcement or self-execution mechanisms to enforce contractual dispute settlements.

The eighth solution relates to the lack of trust in online business transactions. Building trust and confidence in electronic commerce not only requires the availability and knowledge of advanced information technology but also legal protection. The technical infrastructure and legal framework of building e-trust and e-confidence, as the theme of the book, have been discussed, analysed and evaluated throughout the subject matter of the validity of electronic contract, the recognition of domestic and foreign certificates and electronic signatures, the measures of data privacy protection, the determination of internet jurisdiction and choice of law, as well as the efficiency and suitability of online dispute resolution.

Overall, during the pre-internet era companies traded with foreign companies even though their legal systems were different. The absence of unified laws did not prevent them from conducting effective cross-border business. Therefore, unifying electronic commerce laws should not be regarded as a significant legal impediment. Modernisation, harmonisation and facilitation of the law of electronic commercial transactions at the international level should be continually employed in building e-trust and e-confidence.