

Law of Electronic Commercial Transactions

Contemporary issues in
the EU, US and China

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Routledge Research in IT and E-Commerce Law

Notes

1 The business and legal landscape of electronic commercial transactions

- 1 [1971] 2 QB 163, at 169.
- 2 The 23rd Statistical Survey Report on the Internet Development in China (July 2005), China Internet Network Information Center (CNNIC), available at <http://www.cnnic.cn/uploadfiles/pdf/2009/3/23/153540.pdf> (last visited on 29 June 2009).
- 3 E-Stats, US Census Bureau, US Department of Commerce, 28 May 2009, available at <http://www.census.gov/eos/www/2007/2007reportfinal.pdf> (last visited on 29 June 2009).
- 4 BBC News: eBay seeks sellers for expansion, on 24 June 2005 published at <http://news.bbc.co.uk/1/hi/business/4619079.stm> (last visited on 25 June 2009).
- 5 Internet World Stats (updated on 31 March 2009).
- 6 Eurostat: Information society statistics (2009), reported by the Commission Staff Working Document Report on cross-border e-commerce in the EU, Commission of the European Communities, Brussels, 5.3.2009, SEC(2009) 283 final, available at http://ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf (last visited on 29 June 2009).
- 7 Terrett & Monaghan (2000) in Edwards & Waelde (2000), p. 2.
- 8 European Commission, working paper eEurope, an Information Society for All, available at http://europe.eu.int/comm/information_society/eeurope/objectives/area03_en.htm (last visited on 20 January 2007).
- 9 Electronic Commerce: Opportunities and Challenges for Government (1997), at 11.
- 10 A European Initiative in Electronic Commerce, COM (97) 157 at I (7).
- 11 Commerce: the activities involved in buying and selling things (*Cambridge Advanced Learner's Dictionary*).
- 12 Trade: the activity of buying and selling, or exchanging, goods and/or services between people or countries (*Cambridge Advanced Learner's Dictionary*).
- 13 Business: the activity of buying and selling goods and services, or a particular company that does this, or work you do to earn money (*Cambridge Advanced Learner's Dictionary*).
- 14 Rosner (2004), p. 483. An example of performance against performance can be when one party supplies statistical data in exchange for the results of a market research.
- 15 A Global Action Plan for Electronic Commerce, Prepared by Business with Recommendations for Governments, ICC, 2nd edition, October 1999, available at <http://www.iccwbo.org/policy/ebitt/id2422/index.html> (last visited on 29 June 2009).
- 16 The Organization for Economic Co-operation and Development (OECD) Ministerial Meeting on the Future of the Internet Economy: a Statistic Profile,

- June 2008, available at <http://www.oecd.org/dataoecd/49/28/40839436.pdf> (last visited on 26 June 2009).
- 17 Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods 2007, UNCITRAL, United Nations, Vienna, 2009, available at http://www.uncitral.org/pdf/english/publications/sales_publications/PromConfEcom_e.pdf (last visited on 29 June 2009).
 - 18 The 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), Agenda Item 79, A/RES/60/21, 9 December 2005.
 - 19 Explanatory Note – United Nations Convention on the Use of Electronic Communications in International Contracts, New York, 2007, available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (last visited on 18 April 2007), (hereafter Explanatory Note 2007).
 - 20 Available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html (last visited on 7 April 2007).
 - 21 The Model Law on Electronic Signatures of the United Nations Commission on International Trade Law, Resolution adopted by the General Assembly, on the report of the Sixth Committee (A/56/588 and Corr.1), Agenda Item 16, A/RES/56/80, 24 January 2002.
 - 22 Available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html (last visited on 7 April 2007).
 - 23 Moreno (2001).
 - 24 The Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law (UNCITRAL), Resolution adopted by the General Assembly on the report of the Sixth Committee (A/51/628), Agenda Item 148, A/RES/51/162, 30 January 2007.
 - 25 Available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html (last visited on 7 April 2007).
 - 26 Article 11 of the UNCITRAL Model Law on Electronic Commerce.
 - 27 Articles 6–8 of the UNCITRAL Model Law on Electronic Commerce.
 - 28 Article 16 of the UNCITRAL Model Law on Electronic Commerce.
 - 29 ‘What is ICC’ at http://www.iccwbo.org/home/menu_what_is_icc.asp (last visited on 9 June 2009).
 - 30 The ICC eTerms 2004, available at <http://www.iccwbo.org/policy/law/id3668/index.html> (last visited on 28 June 2009).
 - 31 The ICC Guide of eContracting, available at <http://www.iccwbo.org/policy/law/id3670/index.html> (last visited on 28 June 2009).
 - 32 ICC Global Action Plan for Electronic Business, July 2002, available at http://www.iccwbo.org/home/e_business/word_documents/3rd%20Edition%20Global%20Action%20Plan.pdf (last visited on 29 June 2009).
 - 33 The OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, 9 December 1999, available at <http://www.oecd.org/dataoecd/18/13/34023235.pdf> (last visited on 19 June 2009).
 - 34 OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, available at <http://www.oecd.org/dataoecd/18/13/34023235.pdf> (last visited on 29 June 2009).
 - 35 Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internet Market (Directive on electronic commerce), O.J. 2000 L 178/1.
 - 36 Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community Framework for Electronic Signatures, O.J. 2000 L 13/12.

- 37 Article 1 of the EC Directive on Electronic Commerce.
- 38 Article 1 of the EC Directive on Electronic Signatures.
- 39 As of October 2004, 48 states and the District of Columbia had enacted UETA, ULC Bulletin, available at http://www.nccusl.org/nccusl/newsletters/ULC/ULCbull_Oct04_print.pdf (last visited on 18 November 2004).
- 40 A summary of the UETA, available at http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ueta.asp (last visited on 7 September 2007).
- 41 UCITA and Related Legislation In Your State, last updated in May 2006, available at <http://www.ala.org/ala/washoff/woissues/copyrightb/ucita/states.cfm> (last visited on 7 September 2007).
- 42 A summary of the UCITA, available at http://www.nccusl.org/nccusl/ucita/UCITA_Summary.pdf (last visited on 12 June 2007).
- 43 National Conference of Commissioners on Uniform State Laws – Summary of Uniform Computer Information Transactions Act, available at http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ucita.asp (last visited on 12 June 2009).
- 44 Law of the People’s Republic of China on Electronic Signatures (hereafter Chinese Electronic Signatures Law), PRCLEG 3691, 2004, available at http://www.transasialawyers.com/translation/legis_03_e.pdf (last visited on 17 June 2009).
- 45 Article 1 of the Chinese Electronic Signatures Law.
- 46 Article 3 of the Chinese Electronic Signatures Law.

2 Technical and legal barriers to online commerce

- 1 General Usage for International Digitally Ensured Commerce (GUIDEC) Version II, International Chamber of Commerce (ICC), available at www.iccwbo.org (last visited on 1 June 2009).
- 2 [1971] 1 Lloyd’s Rep 439, at 444.
- 3 Goode (1997), pp. 1–36, 3.
- 4 *Arnhold Karberg & Co v Blythe Green Jourdain & Co* [1916] 1 KB 495, CA.
- 5 Incoterms, produced by the International Chamber of Commerce, are a set of delivery terms that may be voluntarily incorporated into international contracts by agreement between the seller and the buyer.
- 6 Article 1 of the CISG and Article 2(a) of the UN Convention.
- 7 Article 1 of the CISG.
- 8 Article 1 of the UN Convention.
- 9 Articles 8 and 9 of the UN Convention.
- 10 Electronic Communications under the CISG, CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003, available at <http://cisgw3.law.pace.edu/cisg/CISG-AC-op1.html> (last visited on 30 June 2009).
- 11 *Ibid.*
- 12 Articles 6 and 10(3) of the UN Convention.
- 13 Article 10 of the UN Convention.
- 14 Article 15 of the CISG.
- 15 Article 18(2) of the CISG.
- 16 Electronic Communications under the CISG, CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003, available at <http://cisgw3.law.pace.edu/cisg/CISG-AC-op1.html> (last visited on 30 June 2009).
- 17 *Ibid.*
- 18 Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, Commission of European Communities, Brussels, 8.10.2008, COM(2008) 614 final, 2008/0196 (COD), available at http://ec.europa.eu/consumers/rights/docs/COMM_PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRECTIVE.pdf (last visited on 29 June 2009).

- 19 Proposal for a Directive on Consumer Rights, EUROPA, Consumer Affairs, available at http://ec.europa.eu/consumers/rights/cons_acquis_en.htm (last visited on 29 June 2009).
- 20 Recital 10 of the Proposal for a Directive on Consumer Rights.
- 21 *Leduc v Ward* [1888] 20 QBD 457.
- 22 Per Salmon J. in *British Imex Industries Ltd v Midland Bank Ltd* [1958] 2 QB 542, at 551.
- 23 *Sanders Bros v Maclean* (1983) 11 QBD 327.
- 24 Beecher (2006), pp. 627–48.
- 25 Girvin (2007), pp. 162–63.
- 26 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, United Nations, New York, 1999, available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (last visited on 29 June 2009).
- 27 The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, UNCITRAL, General Assembly, Sixty-third session, A/RES/63/122, available at http://www.uncitral.org/pdf/english/working-groups/wg_3/CTCRotterdamRulesE.pdf (last visited on 30 June 2009).
- 28 The Organization for Economic Co-operation and Development (OECD) Ministerial Meeting on the Future of the Internet Economy: a Statistic Profile, June 2008, available at <http://www.oecd.org/dataoecd/49/28/40839436.pdf> (last visited on 26 June 2009).
- 29 Articles 4 and 5 of the UCP 600.
- 30 [1981] 2 WLR 1233.
- 31 [1966] 1 Lloyd's Rep 367.
- 32 Article 1(a) of the eUCP VI.1.

Part II Electronic contracts

- 1 Faria (2006), pp. 689, 691.
- 2 United Nations Convention on the Use of Electronic Communications in International Contracts, 2005, A/RES/60/21, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/488/80/PDF/N0548880.pdf?OpenElement> (last visited on 10 June 2007).
- 3 Article 13 of the UN Convention.
- 4 Article 10(3) of the EC Directive on Electronic Commerce.
- 5 Explanatory Note 2007, p. 71.
- 6 Ghoshray (2005), pp. 609, 619.
- 7 UETA, §14.
- 8 Explanatory Note 2007, p. 40.
- 9 Article 12 of the UN Convention.
- 10 *Ibid.*
- 11 Explanatory Note 2007, p. 69.
- 12 Explanatory Note 2007, p. 70.

3 What is an electronic contract?

- 1 General Usage for International Digitally Ensured Commerce (GUIDEC) Version II, International Chamber of Commerce (ICC), available at www.iccwbo.org (last visited on 1 October 2005).
- 2 United Nations Convention on the Use of Electronic Communications in International Contracts, 2005, A/RES/60/21, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/488/80/PDF/N0548880.pdf?OpenElement> (last visited on 10 June 2007).
- 3 Article 4(b) of the UN Convention.

- 4 Wei & Suling (2006), pp. 116, 136.
- 5 Article 11 of the UNCITRAL Model Law on Electronic Commerce.
- 6 Ong (2004), pp. 101, 103.
- 7 Murray (2000a), pp. 17–35, 19.
- 8 Campbell & Berenstein (2002), p. 3.
- 9 §209 of the Uniform Computer Information Transactions Act.
- 10 Article 9 of the UN Convention.
- 11 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), 17.7.2000 *Official Journal of the European Communities* L178/1, Article 9 (Treatment of contracts); Article 10 (Information to be provided); Article 11 (Placing of the order).
- 12 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee – First Report on the application of 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), COM/2003/0702 final.
- 13 Zhang & Lei (2005).
- 14 Contract Law of People's Republic of China, adopted and promulgated by the second session of the Ninth National People's Congress on 15 March 1999.
- 15 Article 10 of the Chinese Contract Law states: 'A contract may be made in a writing, in an oral conversation, as well as in any other form'.
- 16 Article 11 of the Chinese Contract Law.
- 17 Article 1(1) of the UN Convention.
- 18 Article 1(2) of the UN Convention.
- 19 Explanatory Note 2007, p. 51.
- 20 Explanatory Note 2007, p. 51.
- 21 Explanatory Note 2007, p. 53.
- 22 A/CN.9/527, Report of the Working Group IV (Electronic Commerce) on the work of its fortieth session (Vienna 14–18 October 2002), para.108 (hereafter A/CN.9/527).
- 23 Leng (2006), pp. 234, 237.
- 24 A/CN.9/527, para.108.
- 25 §2 and §14 of the Uniform Electronic Transactions Act.
- 26 Articles 30 and 31 of the China Electronic Signatures Law.
- 27 Article 6(b) of the EC Directive on Electronic Commerce.

4 When is an electronic contract made?

- 1 Report of the Working Group on Electronic Commerce on the Work of its 42nd session (Vienna, 17–21 November 2003) (A/CN.9/546), p. 103 (hereafter A/CN.9/546).
- 2 Explanatory Note 2007, p. 59.
- 3 Report of the Working Group on Electronic Commerce (A/CN.9/571), p. 142.
- 4 Wei & Suling (2006), pp. 116, 137.
- 5 Article 15(1) of the Model Law on Electronic Commerce; §15(a) of the UETA.
- 6 Explanatory Note 2007, p. 51.
- 7 *Ibid.*
- 8 Comments of the UETA from the Annual Conference Meeting in its One-hundred and eighth Year in Denver, Colorado, 23–30 July 1999, p. 53.
- 9 Article 10(2) of the UN Convention.
- 10 *Ibid.*

- 11 Article 15(b)(2) of the UETA.
- 12 Explanatory Note 2007, p. 63.
- 13 Ramberg (2001), p. 3. 'Electronic record' means a record created, generated, sent, communicated, received, or stored by electronic means under §2(7) of the UETA, whereas, 'electronic communication' means any communication that the parties make by means of data messages under Article 4(b) of the UN Convention.
- 14 '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.
- 15 The section of offer and acceptance is an update and reprint of the author's journal article: Wang (2008b), pp. 271–78.
- 16 Electronic Communications under the CISG, CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003, available at <http://cisgw3.law.pace.edu/cisg/CISG-AC-op1.html> (last visited on 30 June 2009).
- 17 Electronic Communications under the CISG, CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003, available at <http://cisgw3.law.pace.edu/cisg/CISG-AC-op1.html> (last visited on 30 June 2009).
- 18 [1955] 2 QB 327; [1955] 2 All ER 493.
- 19 Stone (2005), p. 52.
- 20 [1983] 2 AC 34.
- 21 Stone (2005), p. 55.
- 22 Savirimuthu (2005), pp. 105, 115.
- 23 Gringras (2003), p. 24.
- 24 Article 11 of the UN Convention on the Use of Electronic Communications in International Contracts.
- 25 [1953] 1 QB 401 (CA).
- 26 Explanatory Note 2007, p. 66.
- 27 Article 11 of the UN Convention.
- 28 Explanatory Note 2007, p. 67.
- 29 *Ibid.*, p. 68.
- 30 [1896] AC 325 (HL).
- 31 [1976] 1 WLR 1 (HL).
- 32 Article 11(1)(a) of the EC Directive on Electronic Commerce.
- 33 *Ibid.*, Article 11(3).
- 34 UCITA §202(a) (2001), available at <http://www.law.upenn.edu/bll/ulc/ucita/ucita200.htm> (last visited on 2 January 2007).
- 35 *Ibid.*, §203(4) (2001).
- 36 Watnick (2004), pp. 175, 197.
- 37 E-SIGN sec 101(h).
- 38 McKay (2000).
- 39 UCITA, §201(a)(1).
- 40 UCITA, §102 (a)(55); UETA, §2(13).
- 41 Article 13 of the Chinese Contract Law.
- 42 Article 23 of the Chinese Contract Law.
- 43 Chen (2001).
- 44 *Adams v Lindsell* [1818] 1 B & Ald 681; 106 ER 250.
- 45 Stone (2005), p. 49.
- 46 *Adams v Lindsell* [1818] 1 B & Ald 681; 106 ER 250.
- 47 [1879] 4 Ex D 216.
- 48 Stone (2005), p. 50.
- 49 *Ibid.*, p. 48.
- 50 Gardner (1992).
- 51 Lloyd (2000), p. 242.
- 52 Stuckey (2005), §1.02.

- 53 Ong (2004), p. 101.
- 54 *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155 at 161.
- 55 Restatement (Second) of Contracts, §64 (1979), cited from Stuckey (2005), §1.02.
- 56 Ong (2004), p. 101.
- 57 Article 10 of the UN Convention. It provides that ‘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’.
- 58 Maxeiner (2003), pp. 109, 114.
- 59 Explanatory Note 2007, p. 71.
- 60 Wei & Suling (2006), pp. 116, 126–27.
- 61 Explanatory Note 2007, p. 71.
- 62 *Ibid.*, p. 72.
- 63 *Ibid.*, pp. 71–72.
- 64 ‘Legal Study on Unfair Commercial Practices within B2B e-markets – Final Report’, European Commission Study ENTR/04/69, (May 2006), pp. 73–74.
- 65 *Sweeny v Mulcahy* [1993] ILRM 289.
- 66 *The Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] 3 WLR 1617.
- 67 [2008] EWHC 157.
- 68 Savirimuthu (2005), pp. 105, 126.
- 69 Explanatory Note 2007, p. 74.
- 70 Article 14 of the UN Convention.
- 71 Article 10 of the EC Directive on Electronic Commerce.
- 72 *Ibid.*
- 73 Contract Law of the People’s Republic of China, 1999, available at <http://www.law-bridge.net/english/LAW/20064/0222320014345.html> (last visited on 30 June 2009).
- 74 Time to get real about the net, BBC, 21 March 2003, available at <http://news.bbc.co.uk/1/hi/technology/2872429.stm> (last visited on 30 June 2009).
- 75 Ramberg (2001), p. 20.
- 76 Article 14 of the UN Convention.
- 77 A/CN.9/546, pp. 102–103.
- 78 Wei & Suling (2006), pp. 116, 162.
- 79 Explanatory Note 2007, p. 77 (Sales No.E.07.V.2).
- 80 Microsoft Outlook ‘Recall or replace a message you’ve already sent’, available at <http://office.microsoft.com/en-us/outlook/HP052421841033.aspx?pid=CH062556091033> (last visited on 30 March 2009).
- 81 *Ibid.*
- 82 [1982] 1 All ER 293.
- 83 Wei & Suling (2006), pp. 116, 162–63.
- 84 *Ibid.*, p. 163.
- 85 A/CN.9/546, pp. 188–90.
- 86 Gringras (2003), p. 28.
- 87 PECL Report (2005), p. 4.
- 88 *Ibid.*, p. 2.
- 89 Ecommerce Report (2005), p. 8.
- 90 *Ibid.*, p. 9.
- 91 *Ibid.*, p. 17.

5 Where is the contract made?

- 1 Gringras (2003), p. 16.
- 2 Murray (2000a), pp. 17–35.
- 3 Lloyd (2000), p. 243.

- 4 Article 4(a) of the UNCITRAL Model Law on Electronic Commerce.
- 5 *Ibid*, Article 4(b).
- 6 Article 4(h) of the UN Convention.
- 7 *Ibid*, Article 6(1).
- 8 *Ibid*, Article 6(2).
- 9 *Ibid*, Article 6(4) and (5).
- 10 §109(d) of the UCITA.
- 11 Article 4(2) of the Council Regulation (EC) No 593/2008 of the European Parliament and of Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. L 177/6–16, 4.7.2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF> (last visited on 30 June 2009).
- 12 Article 5(1)(b) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L12/1–22, 16.1.2001, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:EN:PDF> (last visited on 30 June 2009).

6 Contemporary issue: electronic battle of forms

- 1 Bartell (2000), p. 208.
- 2 Maxeiner (2003), pp. 109, 110.
- 3 ‘Boilerplate’ means general conditions, whilst ‘front-form’ refers to essential or important conditions.
- 4 Maxeiner (2003), pp. 109, 111.
- 5 Stone (2005), p. 41.
- 6 Forte (2006), p. 98.
- 7 [1979] 1 WLR 401.
- 8 *Ibid*, pp. 404–405.
- 9 Forte (2006), pp. 98, 101.
- 10 *Ibid*, p. 102.
- 11 Stemp (2005), pp. 243, 244.
- 12 Forte (2006), pp. 98, 102.
- 13 United Nations Convention on Contracts for the International Sale of Goods (CISG), U.N. Doc. A/COF. 97/18 (11 April 1980), available at <http://www.uncitral.org> (last visited on 28 September 2007).
Article 19 of CISG states: ‘A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.’
- 14 Stemp (2005), pp. 243, 261.
- 15 *Ibid*.
- 16 Del Duca (2005–06), pp. 133, 146.
- 17 UCC §2–207 Additional Terms in Acceptance or Confirmation:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- the offer expressly limits acceptance to the terms of the offer;
- they materially alter it; or
- notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Conduct by both parties which recognises the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

18 §2–207(2) of UCC.

19 Available at <http://dictionary.cambridge.org> (last visited on 2 August 2007).

20 Available at <http://www.askoxford.com/dictionaries/?view=uk> (last visited on 2 August 2007).

21 Forte (2006), pp. 98, 113.

22 Torre & Allen (2006), pp. 195, 202–209.

23 Murray (2000b), 1, p. 41.

24 UNIDROIT Principles of International Commercial Contracts (1994), 34 I.L.M. 1067 (1995), available at <http://www.unidroit.org/english/principles/contracts/principles1994/fulltext.pdf>

UNIDROIT Principles of International Commercial Contracts (PICC) Article 2.1.11 states:

- (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
- (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror without due delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

UNIDROIT PICC Article 2.1.22 furthermore provides: ‘Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.’

25 The Principles of European Contract Law (PECL) Article 2:208 states:

- (1) A reply by the offeree which states or implies additional or different terms which would materially alter the terms of the offer is a rejection and a new offer.
- (2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.
- (3) However, such a reply will be treated as a rejection of the offer if:

- (a) the offer expressly limits acceptance to the terms of the offer; or
- (b) the offeror objects to the additional or different terms without delay; or
- (c) the offeree makes its acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

PECL Article 2:209 provides:

- (1) If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substances.
- (2) However, no contract is formed if one party:
 - (a) has indicated in advance, explicitly, and not by way of general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1); or
 - (b) without delay, informs the other party that it does not intend to be bound by such contract.
- (3) General conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties.

26 Forte (2006), pp. 98, 117.

27 Stemp (2005), pp. 243, 266.

28 Article 40 of the Contract Law of the People's Republic of China.

29 The Contract Law of People's Republic of China, 1999, available at <http://www.law-bridge.net/english/LAW/20064/0222320014345.html> (last visited on 30 June 2009).

30 Article 30 of the Contract Law of the People's Republic of China.

31 Article 15(1) of the UN Convention.

32 *Ibid.*, Article 13.

33 *Ibid.*, Article 14.

34 Mootz (2007), pp. 14–18.

35 Stone (2005), p. 53.

36 Kidd, Jr & Daughtrey, Jr (2000), pp. 215, 265. Article 11 of the CISG states that 'a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses'. Article 1.2 of the PICC provides that 'Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses'. Article 2:101(2) of the PECL provides that 'a contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses'.

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- 96 Articles 244–45 of the Civil Procedure Law of the People's Republic of China.
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- 102 Article 3(1) of the EC Directive on Electronic Commerce.
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- 121 Article 4(1) of the Rome I Regulation.
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- 124 'Green Paper on the Conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation', COM (2002) 654 final, Brussels 14.1.2003, Commission of the European Communities, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0654en01.pdf (last visited on 25 August 2007).
- 125 According to Article 9 of the Rome Convention, it governs formal validity by providing:
1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.
 2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.
 3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.
 4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act *was done*.
- 126 Document 373–33/8, p. 6; 'Response of the Government of the United Kingdom',

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- 133 Employed from Article 3(c) of the Choice of Court Convention.
- 134 Article 4(1)(a) of the Rome I Regulation.
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- 136 Scoles, Hay, Borchers & Symeonides (2000), p. 858.
- 137 *Ibid*, p. 861.
- 138 (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
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- 143 Article 9(4) of the UN Convention.
- 144 §6 of the Second Restatement – the Choice of Law Principles:
- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
 - (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.
- 145 Except as otherwise provided in §189–99 and 203, provided by §188(3) of the Second Restatement.
- 146 Scoles, Hay, Borchers & Symeonides (2000), p. 898.
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- 148 *International Harvester Credit Corp. v Risks.*, 16 N.C. App. 491, 192 S.E. 2d 707 (1972).
- 149 *McLouth Steel Corp. v Jewell Coal & Coke Co.* 570 F. 2d 594, 601 (6th Cir. 1978), cert. dismissed 439 U.S. 801, 99 S. Ct. 43, 58 L.Ed.2d 94 (1978).
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- 155 Zhang (2006), pp. 289, 298; See also Article 178 of Organic Law of the People's Courts, promulgated by the National People's Congress in 1979.
- 156 China National People's Congress, Public Notice 1999 No 14.
- 157 Article 126 of the Contract Law of the People's Republic of China 1999 (hereafter the Chinese Contract Law), available at <http://cclaw.net/> (last visited on 27 August 2007).
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- 159 Article 126 of the Chinese Contract Law.
- 160 *Ibid.*
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- 164 Katsh & Rifkin (2001), p. 10.
- 165 American Bar Association Task Force on E-Commerce and ADR, 'Addressing Disputes in Electronic Commerce, Final Report and Recommendation', available at <http://www.abanet.org/dispute/documents/FinalReport102802.pdf> (last visited on 29 July 2008).
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- 167 Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Brussels, 21.4. 2009, COM(2009) 175 final, Commission of the European Communities, p. 8, available at http://www.ipex.eu/ipex/cms/home/Documents/doc_COM20090175FIN (last visited on 18 June 2009).
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- 173 Article 4 of the Mediation Directive 2008.
- 174 Article 9 of the Mediation Directive 2008.
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11 Conclusions and recommendations

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