

电子订约法研究



A STUDY ON THE LAW
OF ELECTRONIC CONTRACTING

孙占利 著



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摘 要

本书对电子订约法的研究主要采用基于全球电子订约立法的规则分析和对电子订约法律实践的实证分析,着重对其中的法律问题进行研究。全书共分为六章。

第一章,电子订约及其立法。本章首先对电子商务和电子订约及其特殊性做了介绍,并在此基础上概括提出电子订约中的特殊法律问题,接着对电子订约及相关的国际、国内立法做了介绍,最后探讨了电子商务法的基本原则。当前立法或理论主张的电子商务法基本原则或立法原则共有十余项,但这些原则主张大多属于电子商务法的立法指导思想、立法技术、具体原则及传统商法的基本原则的范畴,其中技术中立原则和媒介中立原则才属于电子商务法的基本原则。融合了公平原则、过错责任原则和技术局限免责理念的技术风险合理分配原则作为电子商务法的基本原则在立法中已有反映但未能在理论上得到重视。

第二章,电子订约的主体。虚拟主体是现实法律主体将其行为拓展到网络虚拟空间而创建的数字化身份代表。虚拟主体并非法律主体,立法也无需赋予其法律主体资格,其行动后果或法律责任应归属于其所代表的现实法律主体。电子签名和认证等方法可用以确定虚拟主体的真实身份,但各有其局限。虚拟主体实践促使法律责任的承担在一定程度上由物理空间转向了虚拟空间,恢复原状和赔偿损失等法律责任的内容也被赋予了新的内涵。关于自然人的电子订约能力,电子订约的特殊性不足以全面否定传统的自然人民事行为能力制度,但完全适用的观点也没有考虑到电子订约的特殊性。对自然人的电子订约能力问题应当区别经营主体和非经营主体进行讨论。如果经营者确有合理理由相信非完全民事行为能力人有相应的行为能力时,不应否定合同的效力,然该非完全民事行为能力人仅负有以合理价格付款的义务。身份认证、买方对交易条件再确认及完善我国的民事行为能力制度等措施有助于预防电子订约能力纠纷的发生。关于虚拟经营主体,其基本特点是组织虚拟、功能虚拟及员工虚拟。虚拟经营主体应办理工商设立登记并领取电子营业执照,但我国立法应区别电子商务网站和提供互联网信息服务的网站,并规定不同的设立条件。网址、域名或信息系统所在地对确定虚拟经营主体的身份和营业地的价值有限,我国立法可借鉴《国际合同使用电子通信公约》(UECIC)对营业地的确定进行规定。此外,虚拟经营主体披露其身份和营业地信息的义务及相应的法律后果或法律责任也应在立法中予以规定。关于电子代理人,即 UECIC 中的自动电文系统,其并非法律主体,只是电子订约的工具或手段。自动电文系统订立的合同归属于自动电文系统的使用人,立法不应因没有人的事先审查而否定其法律效力,我国对自动电文系统及其法律效力可借鉴 UECIC 进行补充立法。

第三章,电子订约的方式——电子通信。电子通信的特殊性决定了要为其确立新的发出和收到时间规则,UECIC 较联合国贸易法委员会制

定的《电子商务示范法》更为科学。电子通信的发出时间是其离开发件人或代表发件人发送其的当事人控制范围之内的信息系统的时间,如果电子通信尚未离开发件人或代表发件人发送其的当事人控制范围之内的信息系统,则为其被收到的时间。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,但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子通信已发送到该地址的时间。电子通信抵达收件人的电子地址时应推定收件人能够检索。电子通信技术的使用导致难以确定收到信息的地点,UECIC 也较《电子商务示范法》的相关规则更为科学,使用电子通信时应将发件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。信息系统的支持设备和技术的所在地或其他当事人可以进入该信息系统的地方及域名和电子信箱地址本身不构成营业地,对于判定营业地的作用是有限的。我国立法应改变“主营业地”标准并借鉴 UECIC 予以完善。电子通信的归属是为了确定一项电子通信是由何人所发出的,UECIC 并无关于此问题的直接规定,但从 UECIC 的部分条款可推理出 UECIC 关于电子通信的归属规则。《电子商务示范法》关于数据电文归属的统一规则有助于提高当事方为确定数据电文责任归属可依赖的要素的法律确定性。我国《电子签名法》的相关规定存在立法缺陷并应借鉴《电子商务示范法》和 UECIC 的合理规定进行完善。电子通信的确认收讫有助于解决电子通信的误发、未发、重发及迟发问题,《电子商务示范法》对确认收讫的适用要求、方法、形式及效力等做了较为科学、合理的规定,我国相关立法宜借鉴该示范法的合理规定进行补充完善,同时也应对该示范法的缺陷予以避免并对其未规定的事项在国内法中予以规定。

第四章,电子订约的程序。电子订约中要约和要约邀请的区别需要考虑电子通信、自动电文系统、信息交易、网站广告、点击即成立合同及电子拍卖等更为复杂的因素。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,包括使用交互式应用程序通过这类信息系统发出订单的提议,应当视为要约邀请,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。我国立法也宜根据非歧视原则和最小化原则并借鉴国际立法予以完善。电子要约和电子承诺的特殊性需要在其发出时间、生效时间和地点、撤回、撤销及输入错误等方面确立适当的法律规则。与《电子商务示范法》相比较,UECIC 对有关问题的规定更为科学、合理,但 UECIC 毕竟是不同于国内法的国际公约,且也未对所有的问题都做出规定,我国合同法宜借鉴 UECIC 并在对具体的法律问题深入研究的基础上予以完善。

第五章,电子订约的合同效力。电子通信的法律承认及其对合同效力的影响是电子合同效力的首要法律问题,《电子商务示范法》与 UECIC 都规定不得仅以其为电子通信形式为由而否定一项通信或一项合同的有效性或可执行性,但二者的具体规定也有不同之处。我国合同法等相关立法存在缺陷并应借鉴 UECIC 和《电子商务示范法》的有关合理规定予以完善。电子合同并不符合传统法律中的书面形式要求,功能等同法较直接纳入法更科学地解决了电子合同的书面形式要求问题。我国的相关立法虽然也解决了电子合同的书面形式要求问题,但在立法内容和立法协调方面存在诸多缺陷,国际立法为此也提供了科学的立法选择和示范,我国立法应采用功能等同法并通过立法协调解决这些问题。签字的基本功能是确定一份文件的作者和证实该作者同意了该文件的内容。在电子环境中,只要使用一种方法来鉴别数据电文的发件人并证实该发件人认可了该电子通信的内容,即可达到签字的基本法律功能(即功能等同法)。处理签字和认证技术的主要立法要求模式有三种:最低限度模式、特定技术模式和两级模式。我国《电子签名法》应选择两级模式而放弃目前的最低限度模式,具体规则也宜借鉴 UECIC 等国际立法的合理内容予以完善。原件是与复制件相对应的概念,交易稳定、权属登记和

证据法对合同的原件往往提出法律要求。凡法律要求电子合同应当以原件形式提供或保留的或者规定了缺少原件的后果的,在下列情况下即满足了该项要求:该电子通信所含信息的完整性自其初次以最终形式——电子通信或其他形式——生成之时起即有可靠保障;而且要求提供电子通信所含信息的,该信息能够被显示给要求提供该信息的人。我国立法需要在立法体系上做好立法协调并在内容上借鉴 UECIC 予以完善。电子订约的自动化订约等特点使得格式合同在电子商务中得到了更为广泛的应用,也进一步丰富了格式合同的产生理论。点击包装合同和浏览包装合同是电子订约中的常用格式合同但均非完全理想的合同,点击包装合同由于给予用户提前审查机会和其积极点击选择行为使得其法律效力得到了普遍的认可,浏览包装合同的效力却因此方面的缺陷而受到了广泛的质疑,但点击包装合同和浏览包装合同的效力应在符合各自不同的条件下得到法律支持。《电子商务示范法》只是规定利用超级链接技术生成的“以提及方式纳入条款”不应仅因以提及方式纳入而否定其法律效力,我国立法应对“以提及方式纳入条款”的法律效力设定具体、合理的条件。

第六章,电子订约中的合同错误。电子订约错误属于合同错误的范畴,但其错误情形已不限于传统合同错误,出现了电子错误、输入错误、格式错误等特殊的合同错误,信息技术局限及网络服务提供商等第三人的行为也成为新的合同错误原因。电子订约错误的特殊性决定了其法律救济的特殊性,在订约错误责任分配和合同之撤销等问题上已突破了传统合同法观点。我国立法应借鉴相关立法对电子订约错误及其责任分配、法律救济及预防措施进行立法完善。

Abstract

This book is on the special legal issues in electronic contracting based on the legislations on electronic contracting and practices of electronic contracting. It consists of six chapters.

Chapter I. Electronic Contracting and Its Legislation. This chapter first introduces the particularity in electronic commerce and electronic contracting, and generalizes the main legal issues in electronic contracting on this basis. Then an introduction is given to the international and domestic legislations on electronic contracting. Finally, the fundamental principles of E-commerce law are discussed. In the legislation and research of E-commerce law before, about ten legal principles have been put forward, yet most of them are not fundamental principles but legislative guidances, techniques, characteristics or specific principles, according to the

criteria of legal principles. Instead, Technology Neutrality and Media Neutrality are the two fundamental principles of E-commerce law. Although not paid due attention so far, it should be also recognised as a fundamental principle that technology risks must be reasonably distributed in E-commerce law.

Chapter II. Subject of Electronic Contracting. Virtual subject is not a legal subject but a digital representative of the legal subject in cyber-space according to existing law, and it is unnecessary to give virtual subject a legal qualification in the future law. The legal subject should burden the liability caused by its virtual subject. The real identity of virtual subject would be confirmed by evidence and Certification Authority, etc. Legal liability caused by virtual subject would be burdened in cyber-space in a certain extent, and the traditional legal liability concept has been given new contents. The particularity of electronic contracting may not refuse the applicability of the traditional legal system of contracting capacity except that the merchant has reasonable trust on natural person's contracting capacity with the condition that natural person has the right to pay the goods in reasonable price. Chinese legislation on legal system of civil capacity should be completed and give consumers the right to confirm the transaction in Business to Custom in order to prevent the relevant disputes. Virtual merchant is established by a legal entity or a person in cyber-space, which should be registered and get an electronic business certification. Web-site or domain name or location of information system is not valuable to presume its place of business and China should legislate on place of business according to United Nations Convention on the Use of Electronic Communications in International Contracts (UECIC). Chinese legislation should require the parties to disclose their identities or places of business and the legal consequences of making inaccurate,

incomplete or false statements in that regard. Electronic agent, namely automated message system used in UECIC, is not a legal entity but a tool or method of electronic contracting. 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. Chinese legislation need to be improved in issues such as errors in electronic communications and legal effect of automated message system.

Chapter III. The Manner of Electronic Contracting—Electronic Communication. 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. 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 be 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. The relevant law of China needs to be completed in accordance with UECIC. 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. The place where the information system supporting an electronic address is located or the addressee's electronic address or domain name may be different from the place where the electronic communication is deemed to be received. The relevant law of China needs to be completed in accordance with UECIC, especially the standard of main place of business for locating the place of dispatch and receipt of electronic communications. Attribution of electronic communication can solve the problem of who dispatches of an electronic communication, but it is not written in UECIC evidently except in some relevant clauses. Uniform rules of the Model Law for attribution of data messages may be useful to enhance legal certainty as to the elements upon which a party may rely for the attribution of responsibility for data messages. Chinese legislation needs to be completed in accordance with the reasonable rules of the Model Law and UECIC. In many instances, the procedure of "acknowledgement" would parallel the system known as "return receipt requested" in postal systems. The rules of Model Law for acknowledgement of receipt of data messages may be useful to solve the problem of whether receipt of a data message or not. Chinese legislation needs to be completed in accordance with the reasonable rules of the Model Law with the modification of the relevant rules in the Electronic Signature law and the Contract law.

Chapter IV. The Procedure of Electronic Contracting. The difference between offers and Invitations to make offer is influenced by the following factors in electronic contracting: electronic communication, automated message system, information transaction, WEB-advertisement, clicking contract and WEB-auction, etc. A proposal to conclude a contract made through one or more electronic communications which are not addressed to one or more specific parties, but are 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 offer, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance. Relevant Chinese law needs to be completed according to non-discrimination and minimal principles based on UECIC. The particularity of electronic offers and electronic acceptances needs new legislation on their time and space of dispatch, time and space of receipt, withdrawal, revocation, and errors in electronic communication, etc. Compared with the Model Law on Electronic Commerce, the relevant rules of UECIC are more reasonable, except that UECIC is a convention and only solves part of the issues on electronic offers and electronic acceptances. Chinese legislation on electronic offers and electronic acceptances should be completed based on the UECIC and an in-depth study on electronic offers.

Chapter V. Legal validity of Electronic Contracting. 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 according to the Model Law on Electronic Commerce and UECIC, at the same time they are different in some clauses and for the main cause of difference between UECIC and the Model Law on Electronic Commerce. Relevant Chinese legislation should be completed according to the above convention and model law. Where the traditional law requires contract to be formed in writing, that requirement is not met by an electronic contract. The better approach is "functional-equivalent" approach compared to direct-absorbing approach for the settlement of this problem. The relevant international law provides a successful model law for domestic legislation. Chinese legislation needs to be perfected in the legal rules and harmony of law with the "functional-equivalent" approach and scientific legislative techniques. The two basic functions of a signature are to identify the

author of a document and to confirm that the author approved the content of that document. In an electronic environment the basic legal functions of a signature are performed by way of a method that identifies the originator of an electronic communication and confirms that the originator approved the content of that electronic communication, namely to the approach of functional equivalence. Three main approaches for dealing with signatures and authentication technologies at the international and domestic levels can be identified: the minimalist approach; the technology specific approach; and the two-tiered or two-pronged approach. The Chinese Electronic Signature Law needs to be completed in accordance with the reasonable rules of the Model Law on Electronic Commerce and UECIC, especially the two-tiered approach. Original form of the contract is required in the contract law and relevant law for transaction security and other reasons. Where the law requires that an electronic contract should be made available or retained in its original form, or provides the consequences for absence of an original, that requirement is met in relation to an electronic communication if 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 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. Chinese legislation should be completed based on the UECIC and an in-depth study on original form. Standard contract has been widely applied in electronic commerce for the features of automation of electronic contracting, thus further enriching the theory of the cause of standard contract. Click-wrap contract and Browse-wrap contract are the most popular standard contract in electronic contracting, neither browse-wrap nor click-wrap contracts are fully ideal for either the consumer or for businesses wishing to sell software or other

intangible products online. Of the two however click-wrap is the superior, this is due mainly to the 'fairness' it offers consumers in the ability to view the terms first and require an affirmative act for user to convey assent. Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message according to the Law on Electronic Commerce. Domestic legislation should establish the specific conditions for the legal effect and validity of Incorporation by reference.

Chapter VI. Errors in Electronic Contracting. Errors in electronic contracting are a subcategory of contract errors, which occurred in electronic contracting. The particularity of input errors in electronic contracting needs special legal remedies. Chinese contract law also needs to be developed and completed, following UECIC and other relevant legislations on electronic contracting, in order to meet the demands of electronic contracting.

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