

赵秋雁◎著

# 电子商务中消费者权益的法律保护： 国际比较研究



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策划编辑:郑海燕

封面设计:肖 辉

### 图书在版编目(CIP)数据

电子商务中消费者权益的法律保护:国际比较研究/赵秋雁 著.

-北京:人民出版社,2010.3

(世界经济重点学科建设丛书)

ISBN 978-7-01-008696-5

I. 电… II. 赵… III. 电子商务-消费者权益保护法-对比  
研究-世界 IV. D913.04

中国版本图书馆 CIP 数据核字(2010)第 024181 号

## 电子商务中消费者权益的法律保护:国际比较研究

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**人民出版社** 出版发行

(100706 北京朝阳门内大街 166 号)

北京瑞古冠中印刷厂印刷 新华书店经销

2010 年 3 月第 1 版 2010 年 3 月北京第 1 次印刷

开本:880 毫米×1230 毫米 1/32 印张:9.875

字数:237 千字 印数:0,001-3,000 册

ISBN 978-7-01-008696-5 定价:25.00 元

邮购地址 100706 北京朝阳门内大街 166 号

人民东方图书销售中心 电话 (010)65250042 65289539

# 序 言

现代市场经济关系的特点是现代化、社会化和国际化，经济法正是适应现代社会经济的客观需要而产生，而且随着经济全球化的进程逐步发展与完善。消费者是经济法的核心主体，在科技迅速发展的时代，消费服务不断推陈出新，消费者与生产经营者在有关商品的原理、性能、品质、使用方法等方面的信息越来越不对称，消费者在商品交换中往往处于弱势地位，因此，消费者的权益保护问题是经济法研究的一个重要问题。网络经济对消费者权益保护制度造成了巨大冲击，如何优化网络消费环境、规范网络秩序、切实保护消费者的合法权益，是一个具有重要理论价值和实践意义的课题。当前，消费者权益保护问题已成为制约包括中国在内的许多国家经济和社会可持续发展的瓶颈，加强对该领域及相关制度的研究，刻不容缓。

作为法律的研究者和实践者，秋雁博士早在 1997 年就开始关注电子商务立法，并开展科学研究，参加北京市经济法学会 1998 年、1999 年年会提交的论文《网上银行的法律问题研究》荣获学术论文二等奖，她的论文和发言得到与会者的高度评价。2005 年她撰写的博士论文《电子商务环境中消费者权益的法律保护》获得答辩委员会专家的一致好评。她深刻认识到，尽快完善与社会主义市场经济体制相适应的消费者权益保护法律的学科体系与法规体系，不仅是一个重要的理论问题，也是一个亟待解决的实践

问题。因此，她怀着强烈的社会责任感和使命感，在电子商务中消费者权益保护的研究方面，孜孜不倦地探索，取得了可喜的成果。本书以“电子商务中消费者权益的法律保护：国际比较研究”为题，广泛吸收近年来该领域的国内外最新研究成果，从消费者的权益入手，运用比较法和经济法学分析等研究方法，探讨了消费者权益保护的基础理论和基本制度，提出了许多有建设性的意见，具有较高的学术研究价值。

这部阐述电子商务中消费者权益法律保护的学术著作，内容丰富、体系完善，在理论和实践上均有创新。尤其难能可贵的是，较好把握了该课题学科的交叉性，融合了法律、经济和技术等领域的知识，提出了一些创新性见解，如书中运用了经济法学基础理论的“社会责任本位”和“平衡协调原则”，并以国际背景作为切入点，进行比较研究，提出了我国电子商务中消费者权益保护的“同等保护原则”、“特别保护原则”和“综合保护原则”等，我相信，本书的出版将有助于促进我国电子商务中消费者权益保护法律体系问题的研究，并对我国的相关立法与政策的制定具有参考价值。我认为，这是对我国和谐消费环境建设的一份贡献。同时，也为该领域的研究者、工作者和学习者提供了很好的资料。为此，我深感欣慰，写下片语以示鼓励，是为序。



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2009年9月26日

## 内 容 摘 要

网络经济的蓬勃发展拓宽了消费市场，增大了消费信息量，给消费者带来了福音，但是，由于目前网上交易双方非面对面直接交流，尤其是交易安全存在一定隐患等因素的影响，网上购物的发展受到很大的限制，又不可避免地使消费关系复杂化，并增大了消费者的合法权益受侵害的可能性。然而，纵观国际立法和各国国内立法，笔者发现，尽管国际上和各国国内的电子商务相关立法很多，但是，关于网络消费者权益保护的专门立法却寥寥无几，而且内容主要集中于数据保护、身份确认和电子支付等方面。笔者作为消费者，同时作为法律学习者，深刻认识到消费者权益保护制度在网络经济的法律制度中的重要地位和作用，因此，以“电子商务中消费者权益的法律保护：国际比较研究”为题，选取 B2C 作为探讨的立足点，研究网络经济环境下消费者权益的法律保护问题。

消费者权益保护应当秉承何种原则，体现何种精神，是贯穿整个立法活动的精髓和衡量立法实效的标准，这成为消费者权益保护的首要问题。这里至少应当回答三个重要问题：传统经济和网络经济条件下消费者享有的保护是否同等？网络经济中是否还需秉承特别保护原则？解决消费者问题是否主要依靠国家政府为主导制定并贯彻的消费者保护政策？笔者借鉴国际立法并结合中国国情，运用经济法学基础理论，秉承“社会责任本位”和

“平衡协调原则”，提出同等保护原则、特别保护原则、综合保护原则的创新见解。

网上消费法律关系主体在法律关系中居中心地位。网络经济条件下的主体制度与传统经济形态中的主体制度相比，具有广泛性、虚拟性、主体形象多维化和权利行使多样化等与众不同的特点。涉及主体的广泛性，需要建立科学的市场准入制度，保证主体资格适法；身份确认制度针对主体身份的虚拟化和数码化而建立，以保证其真实性；主体形象的多维化，迫切需要主体权益的全面保护；而主体权利行使方式的拓展，需要明确界定主体的权利、义务和责任。

网上消费法律关系的客体与传统消费法律关系的客体相比较，有共性也有个性，具有的共性呈现出新特点，个性涌现出新问题。笔者探讨了客体的划分，根据是否在线交付，划分为离线交付的客体和在线交付的客体。分析了离线交付客体消费安全与消费便利为主导的消费取向，研究了在线交付客体易复制、易传播和易篡改性的三大特性，从而提出双方当事人合法性交易原则。

消费者的权利和经营者的义务，是消费者权益保护法律规范的重心，也是本书研究的核心。笔者采用了以消费者权利为主线，经营者义务为辅线的写作体例，探讨消费者权利体系与相应的经营者的义务体系。安全权是消费者所享有的最基本的权利，是消费者追求的最基本的价值目标，是人身安全权、财产安全权和隐私安全权的有机统一体。因此，经营者应当保证商品或者服务符合安全消费要求，依据法律法规、行业惯例等制定出规范的隐私权保护政策，履行告知义务、合法收集和依法使用义务、防范泄密义务、提供信息救济等义务，并致力于实现绿色消费和可持续消费。信息不对称造成的信誉危机是电子商务发展和消费者

权益保护的瓶颈，必须打破经营者所谓的“销售控制”，削减信息不对称，建立和完善在线信息披露制度，使消费者便捷地获取关于交易对象、交易标的、交易条件等在内的真实充分和容易理解的信息，实现知情权。完整的自主选择权贯穿合同订立和履行的各个环节，包括消费者自主选择商业邮件，自主选择商品或者服务，自主选择提供商品或者服务的经营者，其中，笔者提出了科学界定邮件许可营销和商业垃圾邮件的维权新思路。公平交易权实现的途径是网上格式合同的规制，笔者提出系统规制方案：行政规制前置手段以示范和备案制度为中心，经营者应当接受规制和监督；法律规制应当作为最重要和最终解决手段，经营者应当遵循法律对条款纳入的合同要求，包括事前提供、便于复制存储、通俗易懂、简短醒目等，并满足公平正义的合同效力评价；民间团体规制为辅助手段，经营者应当自觉接受监督。无因退货权是消费者在收到货物的一定期限内，有权要求经营者无条件退货，经营者不得拒绝，负责退还货款，并承担消费者为此付出的额外费用的义务，笔者强调了退货是无条件的，一定期限是法定的，商品是法定范围内的。鉴于网上消费的法律关系内容与传统消费的法律关系内容的不可分割性和交叉性，笔者对其他如结社权、获得有关知识产权、人格尊严和民族风俗习惯受尊重权、监督权等权益不做详细探讨。

随着互联网技术的飞速发展和国际经济交往日趋频繁，消费者问题也日益增加和多样化，传统的消费者争议的解决方式已经无法实现争议的及时和妥善的解决，笔者以建立灵活、便捷、费用低廉而高效的争议解决机制为目标，探讨了建立网上和解与调解平台、在线快速仲裁、公益诉讼和小额诉讼并行的三项机制，以及如何完善消费者原地管辖制度的问题。

电子商务中消费者权益法律保护的立法趋势与展望是全书的



升华。笔者提出以人为本、平衡协调和社会责任本位的立法精神。消费者本质回归于人，以人为本，就是一切从人的需要出发，促进人的全面发展；科学发展观的核心是统筹兼顾，是全面平衡协调发展。消费者权益保护法作为经济法的一部分，必然将平衡协调理念贯彻始终。可持续发展的理论，正是社会责任本位的集中体现，各方主体必须在对社会共同尽责的基础上，处理和协调好彼此之间的关系，实现可持续发展。基于此，笔者探讨了修订原有法规与新立法两步走的立法体系建设问题，并提出完善立法技术和提高立法质量的建议。

在我国，虽然网上购物还处于发展初期，但其发展的速度、影响力是不容低估的。我们必须把借鉴国际理念与中国国情有机结合起来，逐步健全中国的网上消费法律体系，这是一项长期、艰巨、复杂的社会工程，必将对建设社会主义和谐社会，即建设一个民主法治、公平正义、诚信友爱、充满活力、安定有序、人与自然和谐相处的社会起到积极的促进作用。

# Abstract

Flourish of network economy extends the consumer market as well as the amount of consuming information which is a gospel to the consumer, unfortunately the development of network shopping is blocked by the indirectly exchange manner between parties and the hidden trouble within the internet transactions, moreover, it also inevitably causes more complicated transaction relationship, as well as increases the possibility of consumer's legitimate rights violation. However, after investigating the international and domestic legislation of the various countries, the author discovered that although there are a lot of international and domestic electronic commerce related legislation, rights protection specific legislation for network consumers is very less, which mainly concentrates on data protection, identification and electronic payment, as a consumer as well as a legal learner, the author profoundly realizes the importance of the regulation of consumer rights protection in legal system of network economy, therefore, chooses the topic of "international comparison on the legal protection of consumer rights in the electronic commerce", selects B2C as a standpoint of the discussion, studies on the legal protection of consumer rights in the environment of network economy.

What kind of principle and what kind of spirit of consumer rights

protection are the soul of the entire legislation process and the measurement of legislation effect, and they are also the principal questions on the consumer rights protection. We need to at least find out the answer of the following three important questions: Whether or not the consumer can obtain the same level protection both in the traditional economy condition and network economy condition? Are there any special protection's principles need to follow in the network economy? Does it mainly depend on government to address the issues of consumer by constituting and carrying out the policy of consumer protection? According to the international legislation and the condition of China, based on economical legal theory, holding the standard of social responsibility and the principle of balance coordination, the author creatively proposes the principle of equal protection, the principle of special protection, the principle of synthesis protection and the principle of balance coordination.

The subject of legal relationship on internet shopping is in the central position of the legal relationship. Subject system of network economy, comparing to the traditional economic form, has some different characters, such as universality, unreality, multi-dimensional image and diversification of execution and so on. Due to the comprehensive subject, it needs to establish the scientific market access system in order to guarantee the legality of subject; to establish the identification system to guarantee the authenticity of virtual subject; The multi-dimensional image of subject induces the anxious need of comprehensive protection of subject right; But the way of subject right execution needs to identify the right, the duty and the responsibility of subject.

Comparing the object of the legal relationship between network

shopping and traditional shopping, there has commonness as well as individuality, commonness presents the new characteristic, the individuality emerge new issues. The author discusses the object division, according to payment method, divides to off-line payment object and the on-line payment object; and also analyzes the payment security and payment convenience of off-line payment object, points out the consuming trend with the bright future while the path is winding; Studying on the three characters: easy to duplicate, easy to disseminate and easy to tamper, in on-line payment object, the author proposes a legal transaction principle of bilateral party, which includes the legality of products and services that business operator offers, the legality of electronic control and electronic self-rescue method, and also includes exclusive right protection of products and services from consumer, legally utilizes the sharing right of product or the service.

Consumer's right and business operator's duty, are the center of consumer right protection law, and also is core of this article. The author uses a new writing style which takes the consumer right as the master line, the business operator duty as the auxiliary line, discusses the consumer right system and the corresponding business operator's voluntary system. Security right is the most basic right that the consumer should have, which is also the most basic goal that the consumer pursues, it is also the entity of personal safety, property safety and privacy safety. Therefore, the business operator must guarantee the products or the service to conform the safely consuming requirement, and establishes a policy of privacy right protection based on laws, regulations and industry convention and so on, fulfill the duty of inform, the duty of legitimate collection and usage, the duty of

information anti-leak and information relief, and devote to realize green consuming and sustainable consuming. The prestige crisis created from asymmetrical information is the bottleneck of the electronic commerce development and the consumer right protection, it must to break the so-called “the sales control” from the business operator, reduce the asymmetrical information, establish and consummate the disclosure regulations of on-line information, enable the consumer to conveniently obtain the real and easy understanding information which includes the transaction object, the transaction bidding, the transaction condition and so on, and realize knowing right. The complete independent choosing right goes through each part of the contract working out and fulfillment, independently chooses the commercial mail, independently chooses the products or the service, the independently chooses the service provider, the author proposed the new thought of right protection by scientifically limiting mail marketing and the commercial junk mail. The realization way of fair transaction is to regulate Standard Contract in the network, the author proposes the system rules and regulations plan: Demonstration and file system are the center of the preposition method of administrative rules and regulations, the business operator should accept the rules and regulations and inspection; The legal rules and regulations should be the most important method and final solution, the business operator must be law compliance and provides briefly information that is easily duplication, store, understand in advance, and brings into the contract requirement, and meets the assessment of the contract effectiveness; The civilian association rules and regulations is the assistant method, the business operator must consciously accept the

surveillance. Withdrawal right without condition means the consumer has the right to return the products or service to business operator without any condition during a period after purchase, the business operator can not reject this withdrawal requirement, and also has the responsibility of refund and compensation for withdrawal, the author emphasizes that no condition of withdrawal and the period and product should be in the scope of legal. Whereas the content inalienable and crossable of the legal relationship of net consumption and traditional consumption, the author will not particularly discuss association right, intelligence right, the human dignity, the nationality manners and customs' respected right and supervisory authority and so on.

Along with the rapid evolution of Internet technology and more frequent intercommunion of international economy, the consumer issues also increase and have more diversification, the traditional solution of consumer controversy can not realize a prompt and proper controversy solving today, the author sets a target of establishing a convenient, cheap and high efficiency mechanism of disputes settlement, discusses the establishment of three mechanisms: online conciliation and mediation platform, the on-line fast arbitration, the group and small-claim lawsuit, as well as how to consummate the home jurisdiction system.

Legislation tendency and forecast of the consumer right legal protection in electronic commerce are the sublimation of this article, the author proposes a legislation spirit standing on humanist, the balanced coordination and the social responsibility standard. The essence of consumer returns in the human, humanist means that everything starts from human needs, and promotes human's full scale

development; The core of scientific development is the all-round consideration, is the comprehensive balance coordinated development, the consumer right protection law as a part of the economic rules and regulations inevitably will carry through the coordinated idea from start to end; The sustainable development theory is a precise presentation of the social responsibility standard, all the main bodies under the foundation of responsibility fulfillment to the society should well process and coordinate the relations of each other, and realize the sustainable development. Based on this, the author discusses the question of two step of legislation system construction by revision and new legislation, and proposes a suggestion of consummating the legislation technology and enhancing legislation quality.

In China, although the internet shopping is still in the initial period, the development speed and the influence can not be underestimated. We must combine the vision of international with the condition of China, and gradually improve the legal framework of Chinese internet shopping, this is an long-term, arduous and complex social project, it will certainly boost to constructs an harmonies socialistic society which is a more democratic, jural, fair, justical, faithful, companionate, vital and stable society.

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