
CRISTIANO RIZZI

E-COMMERCE LAW IN CHINA

THE FUNCTIONING OF
E-COMMERCE IN CHINA
AND THE INFLUENCE
OF THE EU MODEL



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About the Author

The author, **Cristiano Rizzi**, holds the position of “Foreign Legal Counsel” at Lehman, Lee & Xu, China Lawyers, Beijing Office.

The author is incorporated at the “*Illustre Colegio de Abogados de Salamanca*” (Spain), and he is registered as “*Avvocato Stabilito*” at the “*Consiglio dell’Ordine degli Avvocati di Milano*” (Italy). The author holds an LL.M in Chinese Law – obtained at Peking University (Beijing – China), LL.M. in Spanish Law – University of Valladolid (Spain), LL.M in International Business Law – University of Exeter (Exeter, U.K.). The author examined and treated all the different aspects of doing business over the Internet, focusing in particular on the functioning of e-commerce in China. This includes the explanation of the framework regulating online sales, protection of personal data, the use of e-money, e-marketing and frauds on the Internet when acting online. All the aspects touching upon the realization of a business activity on the Internet have been treated by the author including the protection of IPRs and the threats online shoppers could face.

Foreword

It might seem even too simple to note that e-commerce is perfectly fitting with one of the multiple facets of the Chinese economy and society continuing evolution: almost all the elements which have fostered the birth, growth and – in certain areas – almost dominating position of e-commerce in its country of origin, the United States, may be found, some of them multiplied in their dimensions, in today's China.

The first element remains possibly the geographic dimensions and distances, which were the basis of the quick rise of telemarketing since the Thirties and above all during the Fifties, in America, inducing the business openness, and the customers' inhabit to "sell and purchase to and from a far apart customer or vendor", the first, possibly only of collective psychology, but real barrier to the e-commerce expansion, as it was experienced in many parts of Western Europe up to a very few years ago.

Purchasing goods from a far vendor had also, in America, the social effect of lowering one of the possibly more ill-felt class dividers, the level of the available consumer goods: the sale through post and catalogues, at the beginning, then the sale through telemarketing and fax, did cause this kind of "quality gap" in the lives of – to make an example – peasants and workers in America to disappear, a gap much less felt in Western Europe, where cities, market cities, historically attracting those who live in the countryside, are never that far, and offer better goods and better services.

It is easy to see an analogy between such absolutely "material" elements of societies otherwise so far apart and different as the mid-1900 North America and the early 2000 China; and the impact of the delayed, but even for this reason extremely quick diffusion of the access to Internet in the latter country, which overcame quite material resistances, is in fact the starting point of this book, together with the introduction to the first Chinese set of rules specifically governing this area of trade.

As noted by the Author, the delay in becoming a "connected country" (in fact, with still extremely high perspectives of increase ahead, also with the "giant platforms" already operating, has caused an almost parallel development of e-commerce and its legal governance, avoiding the long and uncertain beginnings of the "Internet law", typical of many Western systems; on the other hand, the PRC legislators have given evidence, since the start of the new approach to the economy, to be ready to receive models of legislation from other experiences, with no ideological limits, sometimes

successfully adapting such models to the internal needs (as for the law on joint ventures and on “Wholly Foreign Owned Enterprises – WFOE”), sometimes keeping a closer approach to the foreign “precedents”, such as in the M&A regulation.

Consistently with these guidelines, this book offers also a preliminary, updated summary of the European Union e-commerce regulation, while detailing the exam of the Chinese rules on online purchase contracts (Chapter 2) and of these on privacy and data protection (Chapter 3), areas where the European approach – the one on data protection deriving from a Council of Europe Convention dating back to 1981 – appears to be satisfactory also because generally accepted and complied with by the operators, but for some recent pitfalls caused by the merely recreational expansion of the so-called social forums, which, however, seem to create more new forms of offenses, rather than make the existing rules on e-commerce obsolete.

Beyond these basic elements of the e-commerce regulation, the Western longer experience has evidenced further areas where ordinary rules have to be finely adapted to the special forms of the e-commerce transactions.

Among these, the preliminary – in law, albeit not in the daily practice – issues of jurisdiction and governing law, as examined in Chapter 5 of this book, even here properly starting from the EU experience in applying to e-commerce Regulation No. 44/2001 – as near to its extinction as it is, unfortunately –, so split as it is between rules governing ordinary business, and rules on sales and service to consumers, a distinction which might create difficulties if the European scheme should be treated as a reference elsewhere; on the other hand, the American experience, where many jurisdiction may conflict albeit not in an international framework, and the “doing business in a State” jurisdiction grounds, make it clear that the delocalization of the Web may not be brought as a limit to jurisdiction: the real alternative is – as detailed in the quoted part of this book – to create a special jurisdiction, which might avail itself also of digital communication, but keeping a full respect of the parties’ right to justice: “e-justice”, but for all!

This book studies at proper length also the first and the (hopefully, if no difference arises!) last moment of an e-commerce transaction: the negotiations aimed at entering into an agreement, and thus e-marketing (Chapter 6), and online payments (Chapter 4); in both cases, the peculiarities of the e-business come visibly on the stage: as examples, we would recall here the hidden modalities for tracing likely clients through cookies (quite bitter cookies!), an issue here studied up to the very recent investigation on Google’s use of such device; and advertising and “spam”, here studied with a particular appraisal of the present Chinese approach to the general area of advertising.

The same methodology is followed in this book in studying the many problems posed by online payment (Chapter 4, as noted), an area where the Chinese industry has reached such a level of growth, and of internal solidarity between operators, to cause WTO to open an investigation on the monopolistic walls so apparently created (the issue is described here in §4.05[B]).

Up to this step, this book deals with the physiology of e-commerce, and with deviations from the standards set for the day by day operations; the last part of it deals with violations of existing rights, of civil – although not only such – and criminal

nature: intellectual property rights, especially copyright infringements (Chapter 7), and the great area of computer frauds (Chapter 8).

Beyond the accurate exam of the Chinese approach to both areas, and the details on the new Chinese rules on the intellectual property rights, within the background of the expansion of their protection thanks to new approaches by the leading Courts, such as those of Shanghai, and on the fight against any kind of attack to the Net, it is noteworthy how the Author of this book has no condoning attitudes towards the sometimes and somewhere emerging trends in favor of an alleged “freedom of use” of what may be reached through the Net, which is simply a theft, or – worse – showing a lenient appraisal of hackers’ trespass, acts which show in fact a violent mind, and got to be blocked from their first attempts.

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Milan, May 27, 2013

Acknowledgments

The present manuscript is the result of initial work I prepared in order to explain the functioning of online sales in China to an Italian multinational company wishing to expand its presence in the Chinese market through this online modality.

The content and organization of the present manuscript was discussed with my friend, Mr. Joseph Christian, whose assistance was of paramount importance for the structuring of the manuscript's different parts. It was also discussed with Prof. Guo Li (Assistant Dean at Peking University –School of Law). To both I would like to express my gratitude for their support and advice in the development of this guide on the functioning of e-commerce in China. This work is a complete reference to the functioning of online sales in China, which encompasses different issues related to online transactions. The myriad issues range from the formation of a contract, the applicable law and the protection of personal information, – the latter has become a very important topic nowadays for every kind of activity conducted over the Internet – to e-payment, e-marketing and protection of IPRs. These themes are covered in-depth without transcending other aspects, such as “Internet frauds” and the risks when acting online, which complement and complete the theme treated in this manuscript.

I also would like to express my appreciation for the supporting assistance of my colleagues at Lehman, Lee & Xu, at the Beijing Office; especially my gratitude to Mr. Edward Eugene Lehman for “educating” me on all the aspects of foreign investment in China. Working in the mentioned Law Firm helped me in expanding my knowledge and expertise, not only in this specific area, but also in other fields specifically related to Foreign Direct Investments.

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Though the writing was the effort of one author only, it would not have been possible to structure and develop the manuscript in its final version without the help and suggestions of all these people.

Cristiano Rizzi

List of Abbreviations

B2B	Business-to-Business
B2C	Business-to-Consumer
CECA	China Electronic Commerce Association
C2C	Consumer-to-Consumer
C2B	Consumer-To-Business
CSTC	China Software Testing Service
DNS	Domain Name System
E-commerce	Electronic-commerce
EDPS	European Data Protection Supervisor
ICANN	Internet Corporation for Assigned Name and Numbers
ICP	License Internet Content Provider License
ISC	Internet Society of China
ISP	Internet Service Provider
IT	Information Technologies
LAN	Local Area Network
MIIT	Ministry of Industry and Information Tech- nology
OECD	Organisation for Economic Co-operation and Development
Web	Short for: World Wide Web

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