

IP / IT LAW

Part II: Information Technology law

❖ Title 1: E business

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➤ **CHAPTER 1:** **COMPUTER LAW –** *Legal consequences of the e business and applicable law*

❖ **The main sources of the electronic contracts:**

- The community and international laws
- The French law of the March 13, 2000 *on the various adaptations of the evidence law for the information technologies and on the electronic signature*
- The French law of the June 21, 2004 *on the confidence in the economic digital*

❖ The **electronic contracts** concerns three kinds of persons:

- The consumers or internet users
- The web companies
- The public administrations

❖ **E business** = *“The e business is the economic activity in which a person offers the delivery of goods and services by an electronic mean.”*

→ *L 2004: Law on Confidence in the digital economy*

❖ Several situations : internet, the specialized digital networks, the banking networks, the extranets, the intranets, the networks of exchanges of computerized form data, the emails, the secure fax,...

❖ Applicable law

Some definitions:

- **Jurisdiction** = right to a court or a judge to decide a case.
- **Matter jurisdiction** = determinates the court seized on the base of each types of matters.
- **Territorial jurisdiction** = determinates the court seized on the base of geographic location criteria.

➤ **What is the law applicable in the particular context of the e-contract ?**

➔ 3 situations:

- Law chosen by the parties to the e-contract **(a)**
- Law not chosen by the parties to the e-contract **(b)**
- Arbitration and mediation **(c)**

a) Law chosen by the parties to the e-contract

- Principle: the freedom of choice: the law parties will be the contract law.
- Exception: if one of the parties to the contract is a consumer (*option with the French common law*). **

b) Law not chosen by the parties to the e-contract

- Principle: law on the territory of which the service provider is established is enforceable (*L 2004*).
- Exception: if one of the parties to the contract is a consumer (*option with the French common law*).

c) **Arbitration and Mediation**

→ **Definition** = legal means to settle a present or future conflicts out of the trial. A third person shall be appointed by the parties to resolve any dispute in connection with the contract.

- Arbitration = The parties have recourse to one or more private individuals, called “arbitrator(s)”.
- Mediation = The parties have recourse to one person called “mediator”.

Difference → the arbitrator imposes a binding decision on the parties .

➤ In case of an arbitration agreement or an arbitration clause included in the e-contract:

→ There will be an arbitration if the party to which this clause is opposed was aware at the time of conclusion of the contract.

➤ CHAPTER 2: **COMPUTER CONTRACTS -** *Pre-contractual phase*

- The e business can expose the internet user to difficulties: he is constantly solicited through spams, false or misleading advertisements, or also non-compliant certification labels.
- ➔ The implementation of a legal consumers protection is essential.

❖ Implementation of a legal consumer protection :

- The “**hard law**” = laws, regulations, major cases law
- The “**soft law**” = Good conduct Codes, charters or other professional recommendations
- Charters : set the rules of internet behaviors and guide the internet users until the law regulates this domain.

- The consumer will be protected in all the following steps:
- Before any transaction and preliminary phase of the cyber-contract :
 - General information obligation of the e-merchant (a)
 - Regulation of marketing means used by the e-merchant (b)
 - Unfair clauses legislation (c)
- During the phase of the contract conclusion (*See Next chapter*)
 - Specific requirements for the formation of the cyber-contract
 - The withdrawal right of the consumer

❖ Protection of the consumer during the steps of the contract formation:

a) **General information obligation of the e-merchant**

→ **Transparency requirement:** information about the goods and /or services for the sale.

3 kinds of information requirements:

- For all the contracts
- For any form trade
- For the e-business

- Information obligation for all the contracts:
 - The main characteristics of the good and/or service
 - The conditions of the contract (*ex: price*)
 - Duty of counsel in certain cases (*ex: financial services*)

- Special obligation of information for any form of trade:
 - The previous requirements
 - The language (*see “TOUBON law”*)

❑ Specific obligations for the e-contracts (4):

- General obligation of the provider identification (*company name, address, phone number, email address ...*)
- Details of the price (*price, taxes, delivery charges, ...*)
- Details of the contractual terms (*withdrawal right, terms of payment, information about the service and commercial guarantees...*)
- Compulsory provisions of the contract proposal

➔ **Failure to the obligation of information** = no invalidity of the e-contract (except in the case of vitiated consent of the consumer).

c) **The unfair terms legislation**

- These clauses alone or in combination are characterized by a **manifest imbalance** created between the rights and obligations of parties to a contract.
- These unfair terms are **void** (*contract with a consumer or a unprofessional*).
- The implementation of this legislation under **cumulative conditions**:
 - The consumer or unprofessional is domiciled in the national territory.
 - The contract is proposed, concluded or executed in the same territory.

- ▶ **Another guarantee** for the consumers → labels, or certifications as a quality indication of products and/ or services placed on the market.

b. Regulation of marketing means used by the e-merchant

- The internet is often considered as an advertising medium.
- **Internet advertisement** = “ *Any means permitting to a potential customer to get an opinion on the result that may be expected from the good and/or service offered*”.
- Are concerned by these definition: the internet banners, the content of a website, spamming,...
- When** → the message promotes the service provided.

- **Legal requirements on the e- advertisement:**

- General principles of the advertisement

- The use of the French language (*TOUBON law*);
- The compliance with the principles of the public order and the morality;
- The principle of the fairness, lawful, decent, honest advertisement;
- The specific legislations for some products such as the alcohol or the pharmaceutical products.

→ Specific principles of the e-advertisement:

The following indications should be **clearly identifiable** for any mail recipient:

- The commercial communication;
- The natural or legal person on behalf of the commercial communication is made ;
- The promotional offers (discounts, gifts, promotional games, ...).

❑ Particular case : the “spamming” practice

- Implementation of a the “opt-in” system = consent regime
- A prospecting by spams may be possible if 3 prerequisites are fulfilled:
 - The recipient information are collected directly from the recipient at the time of the sale or the service delivery;
 - The recipient must be able to oppose to the use of these contact details when they are collected (*whenever a mail will send to his address*);
 - The direct prospecting is only possible for the products or services furnished by the same natural or legal person.

➤ CHAPTER 4: **COMPUTER CONTRACT-** *Contractual phase*

Definition = The electronic contract is the contract without the simultaneous physical presence of the parties.

- The contracts formed by an exchange of electronic mails.
- The contracts formed by a **manifestation of willingness** expressed on the website of a professional (*standing offer*).

❖ Validity of an electronic agreement:

→ The Civil Code establishes 4 essential conditions for the validity of any contract:

- A free and informed consent **(a)**
- The capacity of contractors **(b)**
- A lawful cause **(c)**
- A lawful and determined object **(d)**

a. **A free and informed consent**

- An express consent is required.
- **What about in case of a vitiated consent ?** : the consent will not be valid if it was given by mistake, fraud (*willful misrepresentation*), or under violence.
- The contract will be canceled with the proof of:
 - The error on the essential qualities of a thing or person;
 - The violence on a reasonable person;
 - The fraud or fraudulent reluctance.

b. The capacity of the contractors

- The person who places an order on the internet must have the legal capacity to contract.
- The contractor must be an adult or emancipated minor and not be placed under a supervision regime for the incapable adults.*
- Difficult control of the capacity to contract on the internet.

c. A lawful object and determined

- The object of the contract is the thing or the right upon which the contract relates.
- To be valid the agreement must have an existing object, determined or determinable and does not be a non-trade thing.

d. A lawful cause

- The cause is the immediate and direct purpose motivating the contractor to enter into the contract.
- The cause must both exist and be lawful and the binding force of the obligation.

→ Specific requirements for the e-agreements:

- **If a handwritten is a legal requirement:** the law considers that the electronic form is valid if it is certain that this writing comes from the person itself !
- **Exclusion** of two classes of instruments for the “electronic validity”:
 - The private deeds relating to family and inheritance laws.
 - The private deeds relating to personal guarantees unless they are passed by a person for the needs of his profession.

❖ The formation of the e-contract:

A contract is formed by a meeting of the minds:

- An offer (1)
- An acceptance (2)

1. **The electronic offer**

- An offer to contract on a merchant website = the offer is addressed to an indeterminate public.
- An offer by email = the offers is directed voluntarily to a company or individual.

→ The offer must be sufficiently:

- Firm

- Clear and precise

- Understandable

→ The offer may can **revoked** within a reasonable time.

Notion of “standing Offer”: The offeror is bound by the order placed by the client within the limits of the available stocks.

→ In principle, the offeror is committed as its offer is available on its website.

2. The electronic acceptance

→ The acceptance of the offer implies the contract formation.

→ The acceptance must be:

- Expressly

- Without reservation

- Unequivocal

❖ The ordering

Legal requirements:

- The writing or translation of the offer in French;
- The service provider must acknowledge an electronic receipt of the recipient's order without delay;
- The client is deemed to accept the offer when he confirms it (*“double click” procedure*);
- The customer must be able to verify the details of its order and the total price, in order to correct the possible errors and to confirm its acceptance.

❖ The specific withdrawal right:

- Right granted to the consumers for the e-contract (*sale domain*).
- Possible exercise of this right during **7 days** from the receipt of the good purchased or from the acceptance of the service provide.
- The consumer may revoke his consent **without any reasons and pay penalties** (*excepted for the costs of return shipping if provided*).
- **Consequences:** the merchant must **reimburse** the consumer within **30 days** (*from the receipt of the revocation application*).

❖ The completion of the order:

- The supplier must execute within **30 days** from the date of the issuance of the order by the customer (*unless the parties have agreed otherwise*).
- When the good or service is **unavailable** = The professional informs the consumer and reimburses her in the same deadline.

➤ CHAPTER 5: **COMPUTER CONTRACTS –** *Electronic signature*

❖ **Context of the adoption of this Act:**

- The development of the e-business is the origin of this law.
- A real need for legal safety for the economic actors.

Origin principle = the requirement of the literal evidence for 2 types of acts:

- Civil transactions with an amount exceeding 750 euros
- Transactions between merchants

- A legislative intervention in order to adapt the evidence law to the electronic writings was essential.
- The “**GUIGOU law**” proceeds in 2 steps:
 - It changes the notion of the literal proof in order to include the electronic proof **(a)**.
 - It determines the probative value assigned to this electronic proof **(b)**.

a. **Concept of electronic signature**

- Definition of the literal proof = results of a serie of letters, characters, numbers or any other signs or symbols which have **an intelligible meaning** (*regardless of their support and their modes of transmission chosen*).
- Essential condition → the information should be provided in intelligible meaning.
- Acts concerned = All acts subject to the principle of the literal proof.

❖ The signature

- **Definition** = identity of the person who affixes his signature on a document.
- **2 functions** = Identifies the signatory and demonstrates the expression of the consent.

What about in case of the conflicts of evidences ?

- The judge will settle the conflict in determining **the most likely title** (*whatever the support*).
- **Exception** = If the parties chose a particular mode of proof in the contract.

2 types of acts:

- Private deeds (1)
- Authentic acts (2)

1. The private deeds

To provide an contrary proof to a private deeds you should oppose another private deeds or authentic act.

2. The authentic acts

An act is an authentic act when a public officer appends his signature.

→ The electronic writing is accepted under conservation requirements for these previous acts (*see below*).

2. The probative value of electronic writing

2 conditions:

- The reliable identification process shall guarantee its connection with the juridical act to which the signatory is attached.
- The writing must be kept in conditions which ensure its integrity (*from its establishment to its conservation*).

➤ A reliable identification of the signatory

→ 2 types of electronic signatures:

- The electronic signature “simple” : the user shall demonstrate that it is reliable.
- The electronic signature “secure”: the law establishes a **reliable presumption**.

- The electronic signature “secure”:

The presumption of reliability exists when the secured method meets the legal and technical requirements:

- The electronic signature must be established by a **secure-signature-creation device**;
- The signature verification must be based on the use of a qualified electronic certificate.

→ These certificates are issued by services providers of electronic certifications.

▶ What is the cryptography ?

A technology which ensures the **integrity** of the signed message with the “hash” function (“control”):

→ With this function and using a software, a summary of the message is encrypted with a private key signature.

→ This summary is then linked to the email.

Digital signature:

The subject (*person, author of the act, signatory*), the text (*contents of the document signed*) and the electronic signature then form an inseparable whole.

→ Legal presumption of reliability**

- The providers of certification services

→ “*Any entity or legal or natural person who issues certificates or provides other services related to electronic signatures*”.

→ The accreditation is valid for **4 years** and may be renewed for the same duration after a revaluation.

Legal effects: Recognition of the probative value of the electronic documents → The process used is deemed to be reliable.

→ Several legal requirements are the responsibility of these providers.

ex:

- Checking the identity of the signatory,
- To ensure the quality of its services by both the staff employed by y the technique used;
- Requirement to a prior information of the signatory;
- A safety requirement (*storage of certificates*) ... *Etc.*

→ **Legal presumption of liability**

- The qualified certificates

- Document under electronic form that certifies the relationship between a person and a signature double key (asymmetric key):
 - a **private key** that is used to sign;
 - a **public key** that is used to verify the identity of the signatory (and so used to validate a digital signature).
- The two keys are inseparable.
- Compulsory information in the certificate

➤ Conservation of certificates

Conservation = the rights of the parties to a contract

Archiving = the media

→ The **conservation** is a requirement of the probative value of electronic deed.

The **integrity** requirement:

- The conservation must ensure that the archived act is the translation of the will of its author.
- The veracity of the act must be proved at any time.

- ❖ The formalism of certain acts prevents their electronically realization:
- The private deeds relating to the **family and inheritance** law.
- The private deeds relating to **personal guarantees** (except when these acts are conclude for the professional needs).

➤ CHAPTER 5: **COMPUTER CONTRACT-** *Electronic payment*

❖ **Definition**

= Payment that terminates the electronic command of a good or a service through an electronic process.

❖ **Nature**

According to the rules of the Civil Code:

“Whoever claims to be discharge of its obligation must justify the payment or the fact that produced the extinction of its obligation”.

❖ The electronic payment order

= Legal act by which the creditor of an obligation to pay connects the credit institution (*which has the care of his liquid assets*) with the debtor, through an electronic mean of payment.

→ The **credit institution** must verify:

- The origin of the order
- The availability of liquid assets (credits)
- The credit institution of the transfer's recipient

→ The credit institution confirms (or not) the validity of the transaction.

❖ The “discharge act”

The debtor is discharged of this obligation in 2 cases:

- When the validation procedure following the input of the **identification code** by the owner of the means of payment (= *payment order*).
- When the actual payment of the debt by the credit institution has received the **transfer order** by and on behalf of the debtor.

❖ The irrevocability of the payment

Same legal regime for the electronic payment and the credit cards: The right of the opposition is only possible in case of:

- Loss
- Robbery
- Initiation of an insolvency proceeding for the trader

In all other cases → The e payment is **irrevocable**.

Exception → withdrawal period for the consumer.

❖ The burden of the proof

- Relationship credit institution / merchant → The credit institution supports the burden of the proof concerning to the regularity of the funds transfer.
- Relationship merchant / purchaser → The purchaser must prove that the payment was made.

❖ **Specific regulations for the payment over the open networks**

Three main elements:

- Protection of the holder **(a)**
- Criminal offenses against the payment **(b)**
- Powers of control and standardization of the national credit institution (*Banque de France*).

a) Protection of the holder

- Legal regime of the banking opposition with strict cases provided for the law.
- A maximum losses for the owner of a lost or stolen credit card is established, except in case of negligence on the part of the holder.

→ 2 specific cases:

- **Fraudulent remote payments** without the physical use of the credit card.
- **Counterfeiting of the credit card** when at the time of the unlawful transaction, the holder was in possession of its credit card.

b) **Criminal offenses against the payment**

→ **7 years** of imprisonment and a fine of **750 000 €**.

→ Are concerned the person who: manufactures, owns, acquires, sells, offers or provides equipment, tool or computer programs, to commit an offense.