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**COMPUTER AND TELECOMMUNICATIONS
THE FORMATION OF CONTRACTS ON THE
INTERNET**

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1. Introduction

The major growth of the Internet must be attributed essentially to the fact that the World Wide Web provides a user-friendly and attractive means for firms quickly and inexpensively to advertise and offer their goods, services and information worldwide.

Although the range of products and services which can be bought through the Internet is not particularly wide at present, we can expect that, within the foreseeable future, the Internet will become an essential factor used by influential economic sectors, such as banks and financial institutions, for handling their business activities because of the savings on costs which can be made¹.

Since exchanges of goods or services are always based upon contracts, the envisaged further commercialisation of the Internet requires legally dependable general conditions for forming electronic contracts through the Internet.

The formation of contracts through electronic networks is nothing new. Numerous contracts have been concluded for some years as part of the Electronic Data Interchange (EDI). There are now some 100,000 EDI users in Europe, compared with about 10,000 in 1991. So it seems obvious to assess the question of contract formation through the Internet in keeping with the legal principles which have been developed for EDI; but this is not always possible, as explained below.

1.1. Comparison with EDI

Using EDI, business information is exchanged between computers in standardised formats. EDI is employed for electronically exchanging large volumes of data. Those involved in such exchanges are clearly identified before the transactions begin and are bound by Interchange Agreements².

Amongst other matters, those agreements fix the format used for the exchange of data and the operating procedure. Because of the firmly pre-established format, the data can be exchanged directly between the computers of the EDI subscribers without human intervention being required during the exchange procedure.

EDI is widely recognised as the exchange of routine business transactions in a computer-processable (i.e. EDI) format, covering such traditional applications as inquiries, planning, purchasing, acknowledgements, pricing, order status, scheduling, test results, shipping and receiving, invoices, payments and financial reporting.

Contracts can also be made automatically when the data transmitted by a computer concern orders accepted by the receiving device and instigate the appropriate deliveries within the firm.

These automatically concluded sales contracts are legally binding for the firms involved because of the Interchange Agreement they have made beforehand. Within

¹ See Financial Times, 12.8.1996, page 1

² For further reading on EDI Interchange Agreements see A.H. Boss and J.B. Ritter, Electronic Data Interchange Agreement, A Guide and Sourcebook, ICC Publication No. 517, Paris 1993

the general framework of the Interchange Agreement, specific agreements can also be used to regulate numerous legal issues which cannot be definitively resolved without an appropriate agreement between the parties, that is to say solely on the basis of the applicable laws and general legal principles.

For example, the status of electronic communications as proof may be established in the Interchange Agreement by those parties with regard to the relationship between them by recognising electronic communications as full proof and also by determining that any dispute must be resolved before an arbitral tribunal which recognises the agreement concerning the evidentiary value of electronic communications.

Conditions concerning the execution of the contracts concluded through EDI can also be fixed in the Interchange Agreement, e.g. concerning the lead-times and payment dates, the consequences of a party's delay in providing its performance, the warranty and liability for faulty transmission, etc.

So EDI operates within the context of a constant, contractually established business relationship.

As for the routes used for transmitting the data, these too are fixed in advance in that the subscribers use a specific electronic network which they operate themselves or link up with a network operated by a third party. This makes it possible to allocate the transmission risks and regulate them in detail by contract.

So contracts are formed via EDI within a pre-determined framework and on fixed conditions but this does not apply with regard to the formation of contracts via the Internet. Even the transmission routes used for exchanging the data are unclear. Because of the package routing by the TCP/IP protocol which is used on the Internet, the transmission routes for the data forming part of a communication, e.g. an e-mail order, are not necessarily the same.

A general agreement similar to an EDI Interchange Agreement may indeed exist between the parties to a contract formed through the Internet. One must even assume that a very large number of such agreements will be made in the future, e.g. between banks and their customers who will process banking transactions, such as payment instructions or stock exchange orders, through the Internet.

The significance of electronic commerce via the Internet lies, however, in the fact that goods, information and services can also be procured without a pre-regulated business relationship. Impulse buys are to be just as possible in the virtual Internet shopping malls and market places as they are in the traditional stores or markets outside the Internet.

Another important difference from EDI is that EDI operates more or less exclusively between firms or public authorities (e.g. customs and excise). On the Internet, however, contracts are formed principally between firms and consumers. This gives rise to numerous questions which are irrelevant with regard to EDI. They concern, for instance, the increasing number of legal regulations for consumer protection.

The legal principles developed for EDI cannot therefore be automatically transferred to the formation of contracts through the Internet. Consequently, reliable general legal rules for the formation of contracts are essential for further rapid development of electronic Internet commerce.

1.2. Different methods of forming contracts through the Internet

Contracts can be formed through the Internet in various ways. One possibility is for a firm offer contained in a Website to be accepted by transmitting an e-mail order. Another alternative is the completion of a form contained on a Website. Contracts may also be formed by exchanging e-mails. The possibility of telephony over the Internet also allows contracts to be formed through the Internet in that way, i.e. orally.

At present, a human being is involved in the formation of the contract for at least one of the parties, usually the customer. One can envisage, however, that fully automatic formation of contracts will also be possible on the Internet with the development - still in its infancy - of sophisticated Internet agent services or software.

1.3. Categories of contracts

Contracts formed over the Internet can be divided into the following main categories:

- a) The sale of a very wide range of goods, such as books, sound media, clothes or food and wine. In these cases, the Internet is used to form the contract but not to fulfil it, i.e. the delivery of the goods by the vendor. Payment by the purchaser can, however, be made through the Internet, whether on the basis of a credit card or by means of electronic cheques or money.
- b) The sale or licensing of digitised products and information, such as software, books, pictures, music or multimedia products. In this case, both the formation of the contract and the delivery by the vendor can be effected through the Internet in that the customer downloads the products he has bought onto his hard disk.
- c) The provision of services, such as data-processing, telebanking, financial services, consultancy, telephone services, video-conferences.

The majority of the contracts now formed through the Internet are still simple transactions with a relatively small value. As the reliability, security, protection of confidential data and increased legal certainty for electronic Internet commerce are achieved, more complex transactions of greater value will undoubtedly be processed.

2. The creation of the contract

A contract is a legally enforceable agreement between two or more parties. In this paper, we shall confine ourselves to the treatment of contracts concluded between two parties.

Contracts to which several persons are party may also be formed through the Internet. Thus a simple partnership may be formed between two or more persons by exchanging e-mails. At present, however, multilateral contracts of this kind can be disregarded in relation to the Internet. Moreover, the principles governing contracts between two parties apply, *mutatis mutandis*, to contracts between several parties.

According to the Swiss Code of Obligations (OR), a contract is created by “a manifestation of the parties’ mutual assent”³. That manifestation of mutual assent must contain agreement on every essential point of the contract. On the other hand, lack of agreement on ancillary points does not, in principle, prevent the creation of the contract unless one of the contracting parties or both jointly state that agreement upon an ancillary point is essential for the creation of the contract⁴.

If ancillary points have not been regulated by the parties, in the event of any dispute it is the task of the court to rule upon those points. In so doing, the appropriate legal provisions must be applied first and foremost for types of contract which are regulated by the law.

The appropriate legal rules for the types of contract regulated by law stipulate which points of the contract are essential for its creation. Thus the law of purchase⁵ stipulates that the purchase agreement is determined by the fact that the vendor undertakes to deliver up the purchased item to the purchaser and to provide title thereto while the purchaser undertakes to pay the purchase price.

As Swiss law does not require the parties to conclude only the types of contract regulated by law, there are contracts for which the law does not stipulate which are the points essential to their creation. The licensing agreement is one example. In such cases, in the event of disputes between the parties it is the courts’ task to establish first of all whether the agreement made between the parties is, by its content, appropriate for forming a legally binding contract.

Offer and acceptance

The contracting parties’ bilateral agreement is created by their concordant declarations of intent. Distinction is drawn between the **offer** or the proposal to enter into a contract, and the **acceptance**. These are declarations of intent which must be received. This means that they must be received by the addressee so that the legal effects intended by the declaring party can develop.

This is of vital significance with regard to the Internet. Although proof can often be provided that a specific statement, e.g. an e-mail, has been sent, it is very often impossible for the sender to prove its receipt by the addressee. Yet this is necessary for anyone who wishes to invoke the legal consequences linked to the e-mail, such as the binding nature of an offer or an order.

³ OR Art.1(1)

⁴ OR Art.2(1)

⁵ OR Art.184(1)

The declarations of intent for an offer and acceptance may be **explicit** or **tacit**. Thus, the purchaser of a downloadable text, picture or piece of music does not make an explicit declaration of his intent to enter into a purchase contract when, by clicking on the appropriate areas of his screen, he allows the transfer of e-cash and also the transfer of the product he wants to his hard disc. In this case, the offer is accepted tacitly by the appropriate acts which initiate those transfer procedures.

If, on the other hand, a Website is arranged in such a way that, by clicking on the “Yes” or “No” areas, the visitor answers the question superimposed on the screen as to whether he actually wishes to conclude the purchase contract he requires, then the clicking action represents an explicit declaration of acceptance.

The completion of a form on the Web is also an explicit declaration. In such cases, however, it is not generally established whether this constitutes the acceptance of a Website offer made by the operator or an offer by the customer to the Website operator to enter into a contract.

Under certain conditions, mere silence may even constitute a declaration of acceptance of an offer. Such cases are also conceivable on the Internet.

For example, a Website operator may state in his terms of delivery that all the orders he receives by means of a Web form or e-mail are executed within 10 days unless, within that period, he sends the customer a communication to the contrary refusing the order because of a shortage of stock. One must assume that a contract is created at the end of the stated period if the Website operator does not refuse the order.

Formation of contracts between persons present or not present?

One essential distinction which the Swiss OR draws in relation to the formation of contracts is between **formation of contracts between persons present and between persons not present**⁶.

In the case of contracts formed between persons physically present in the same room, the giving of the declaration of intent and the noting thereof are directly coincident. In the case of contracts formed between persons not present, the giving of the declaration and the noting thereof are separate because a process of transmission intervenes, for which an exchange of declarations by post was taken as the model for the legal rule when the OR came into being.

The distinction between contracts formed between persons present, on the one hand, and persons not present, on the other hand, is complex.

⁶ cf. OR Arts. 4 and 5. This difference between the formation of contracts between persons present and persons not present is found in many legal systems. The content of those rules and especially for contracts formed between persons not present vary considerably. Cf. Y. Pouillet & G.P.V. Vandenberghe (eds.), *Telebanking, Teleshopping and the Law*, Deventer 1988, pp.78 et seq. with examples from Germany where the contract is created upon receipt of the declaration of acceptance while in Spain, for example, the time when note is taken of the declaration of acceptance is determinant.

Contracts entered into using the telephone are deemed to be made between persons present (Art. 4[2], OR) even though the contracting parties are not physically present in the same room and a technically complex transmission process occurs between the giving of the declarations of intent and the noting thereof.

As regards the Internet the question arises as to which rules on the formation of contracts are to be applied; those for contracts made between persons present or those for contracts between persons not present?

The answer is vitally important because the time when the offer is received, the time of its acceptance, the periods within which an offer must be accepted and the conditions for withdrawal are all regulated in different ways.

3. Offer or request to submit an offer?

The question arises as to when an offer or “merely” a request to submit an offer exists.

By means of the **offer**, the other party to the proposed contract is given the opportunity of forming a contract in that the party accepting the offer can conclude the contract only by assenting thereto (a “Yes” is sufficient). So a valid offer must define all the essential points of the contract and those ancillary points which the offeror also considers essential to its creation from his own point of view.

It is conceivable for the offeror deliberately to leave it to the party receiving the offer to decide upon certain points himself within a specific limit, such as design details. It is important that, for all the possible choices allowed to the addressee, the offer must provide a definitive solution concerning the essential points of the contract as well as any ancillary points which the offeror has defined as essential.

If the offeror intends to allow the addressee to determine the quantity of the goods which are to be supplied but not the price, he must fix in advance the various prices applicable for the various possible choices.

If the addressee does not accept the offer without amendment but changes its content or adds further points, the offer is deemed to have been refused. The declaration made by the addressee of the original offer does, however, constitute a new offer which the original offeror may now either accept or decline; he may do the latter by making further modifications or additions to the second offer he has received.

The **invitation to submit an offer** must be distinguished from the offer itself. The difference is that, unlike the party making an offer, the party inviting the offer does not wish to be committed to a contract by the other party’s declaration. Instead, he wants to be allowed the possibility of stating his acceptance of the offer he requested or of refusing it.

In content, the invitation to submit an offer may accord with an offer: the invitation itself may contain all the essential points of the contract and also ancillary points which the inviting party wishes to see included in the offer to be submitted to him.

As the difference between an offer and an invitation to submit an offer is often difficult to define, the law contains clarification of individual cases. For example, the sending of tariffs, price lists and the like, e.g. mail order catalogues, is not considered as an offer. On the other hand, the display of goods in a window with an indication of their price is generally considered to be an offer⁷.

It is interesting to see how the law assesses Website offers: are they to be seen as “shop windows” and thus as binding offers, or as an invitation to submit an offer to future customers, similar to the sending of tariffs, price lists or catalogues?

Since, in the last analysis, the fundamental criterion must be the intention of the Website operator, the latter is advised to state clearly on the Website how the contracts are to be created with the customer. If he expressly reserves the right not to be bound by the incoming orders and reserves the possibility of returning them or not fulfilling them, the Website does not constitute a firm offer to form contracts.

Clarification of this kind is absolutely essential when the Website operator is unsure whether he has sufficient stocks to fulfil all the incoming orders or, at least, to fulfil them within the stated delivery period.

The right to return orders must also be reserved if the Website operator wishes to provide his service only to people who satisfy certain requirements with regard to age, sex, residence, etc. This applies particularly to services which are legal only in certain countries or which may not be provided to young people or if the Website operator himself wishes to supply only specific customers for religious, moral, ideological or other reasons.

Offers to enter into contracts may be made on the Internet in the form of e-mails or Websites. To be valid, they must be received by the addressee. In practice, the question of valid receipt of offers arises less frequently than the question of valid receipt of declarations of acceptance because the contract is created by the latter but not in the case of invalid receipt. So, in this paper, we shall not examine further the question of valid receipt of offers but, instead, we shall deal with the declaration of acceptance.

4. Declaration of acceptance

The contract is created by the declaration of acceptance. This must accord with the unamended offer.

⁷ OR Art. 7(2) and 7(3)

E-mail communications or the completion of a Web form are possible ways of declaring acceptance on the Internet. It is also possible, however, to accept an offer on the Internet by way of a fax or a letter sent by post.

If the offeror does not want to have to accept different types of declarations of acceptance, he must state this in the offer. The offer can then be accepted only in the form stipulated by the offeror, e.g. by completing a Web form which the offeror incorporates in his Website for that purpose.

Acceptance is possible by means of an action implying legal intent. We have already mentioned the example whereby specific texts, pictures, pieces of music, etc. from a choice offered on a Website can be downloaded simply by clicking on them.

So we are faced with the question of what conditions must be fulfilled for a declaration of acceptance to have legal effect. The declaration of acceptance is a declaration of intent which must be received. For it to become valid and thus for the contract to be created it must have arrived on the premises of the addressee, the offeror, and thus have been received by him.

It must be received within the period during which the offer remains valid. That period may be explicitly mentioned by the offeror in the offer. If that period expires before the offeror has received the offer, he is released and is no longer bound by the offer.

If no period is stipulated in the offer itself, the law determining the period distinguishes between formation of contracts between persons present and formation between persons not present.

In the case of persons present, an offer without a time-limit must be accepted immediately. This means that it must be accepted by the addressee directly after he has received it. No time is allowed for reflection but, at most, a reasonable time for understanding the content of a more complicated offer. If acceptance does not immediately follow the offer, the offeror is released from it.

Formation of contract by telephone is also considered as formation between persons present. On the Internet, in so far as the rules concerning formation of contracts between persons present can be applied to it, the significant element for the formation is that, if the call is cut off before the declaration of acceptance could be given, it is still received in time when it is given immediately after the connection is restored⁸.

In the case of formation of contracts between persons not present, the offeror is committed until such time as he could expect to have received the declaration of acceptance if it had been correctly and promptly despatched. In this respect, he must give particular consideration to the time usually needed for despatching his offer and

⁸ Concerning this problem, see B. Schmidlin, in: Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Band VI Obligationenrecht, 1. Abteilung Allgemeine Bestimmungen, 1. Teilband Allgemeine Einleitung in das schweizerische Obligationenrecht und Kommentar zu Art. 1-18 OR, Berne 1986, note 9 to Art. 4 OR.

the declaration of acceptance; the offeror should assume that his offer was received promptly, i.e. within the ordinary despatch time for the method of despatch he chose.

As yet, there are no firm principles for applying these rules to Internet offers. Nonetheless, for contracts entered into by e-mail exchanges, one can assume that the recipient empties his in-box at least once a day and so will normally learn of an e-mail no later than the day following its despatch and thus it must be accepted on the day following despatch.

In the case of offers made on a Website, the promptness of acceptance depends upon the means of communication allowed by the offer. Acceptance by means of a Web form incorporated in the Website causes no legal problems; the offer can be accepted for as long as it appears on the Website.

In the case of other ways of despatching the declaration of acceptance, however, that declaration remains valid even if the offer ceases to be included on the Website and even if it is removed before the end of the normal despatch time (e.g. mailing time when an Internet offer is accepted by post).

The legal provision⁹ whereby, if a declaration of acceptance despatched in good time arrives too late (because of delay in delivery), the offeror must immediately give notice if he does not intend to be bound by the contract is extremely important for firms.

The time when the declaration of acceptance is received determines compliance with the offer's period of validity. Receipt has taken place when the declaration of acceptance has arrived within the recipient's sphere of influence and can come to his knowledge. So it is insignificant whether the recipient has actually learnt of the declaration of acceptance.

The requirement is that the declaration of acceptance must have been received by the recipient in a way which allows the assumption that he has learnt of it. So if a method of despatch is chosen from which it is impossible to assume that the recipient will learn of the declaration received by him in the normal course of business, there has been no valid receipt.

If, however, the offer contains no restriction concerning the means of despatch, one must assume that all of the normal methods of despatch can be used: ordinary mail, fax, telex and, as regards the Internet, especially e-mail. In these circumstances, the offeror is required to organise his firm so that correct processing of incoming communications is ensured for all the said methods of despatch.

The courts have already defined more precisely the legal rules concerning the receipt of an offer and acceptance between persons present and between persons not present, using the traditional means of despatch.

⁹ OR Art. 5(3)

There has, however, been scarcely any clarification of how they apply to the Internet. It is uncertain, for instance, whether the rules for the formation of contracts between persons present or between persons not present apply to the exchange of offer and acceptance.

The determinant aspect for the formation of contracts between persons present is not the physical presence of both parties because the formation of a contract by telephone is also considered as formation between persons present. The crucial element is whether the contract is entered into in a situation in which interactive communication in real-time conditions is possible, permitting immediate receipt of the other party's statements and immediate reaction to them.

Consequently, in the same way as for telephone communication with the traditional copper or glass-fibre cable, it must be assumed with regard to telephony through the Internet that the rules for the formation of contracts between persons present apply to the formation of contracts through the Internet. The same must also apply for the formation of contracts by video-conferencing through the Internet.

The legal assessment of interactive communication in Internet chat-groups is unclear. At the present time, contracts are not usually concluded in these chat-groups. Yet the same technology could also be used in other connections (contractual negotiations by Internet).

The fact that an interactive dialogue occurs in this case also advocates application of the rules on the formation of contracts between persons present. One could counter, however, by saying that, unlike direct conversation, any lacunae in the transmitted content caused by transmission malfunctions are not immediately noticeable when texts are transmitted. Another crucial difference is that, in conversation, the person one is talking to can be identified by his voice and speech even when the quality of the communication is bad. No direct possibilities of identification exist for dialogues through the PC screen.

On the other hand, the rules on the formation of contracts between persons not present apply to contracts formed by exchanging e-mail or completing Web forms. A direct dialogue does not occur in such cases. It is not possible to require that the recipient learns immediately of an e-mail or a declaration made by means of a Web form; indeed, this does not really happen in most cases.

Time when a communication is received

So the question of the **receipt** of e-mail and Web forms or the communications they contain is particularly important because the validity of the offer and acceptance and thus the creation of a contract depends upon prompt receipt in the case of formation between persons not present. Receipt of a communication requires that it has come within the recipient's sphere of influence, so that he can learn and can be reasonably expected to have learnt of it.

For e-mail traffic, the communication is received when it is stored in its entirety in the addressee's receiving device and can be shown on the screen or printed out.

The same applies with regard to a Web form completed on the screen. The declaration it contains is received by the Website operator when all the appropriate data have been stored on his server.

Many Internet users are not directly linked to the Internet but have access through an access provider. Similarly, many firms operate Websites not on their own Webserver linked to the Internet but on the servers of service providers. In these cases, the question arises as to when a declaration transmitted through the Internet is received: when the declaration is stored by the recipient's provider or only when the addressee has downloaded the appropriate data to his hard disc from the provider's server?

As the provider is acting on the addressee's instructions in receiving the communication addressed to him, it must be considered as a messenger receiving it on behalf of the addressee. So the declaration has been received as soon as it has reached the provider¹⁰.

Seeing that the arrival of the acceptance within the addressee's sphere of influence alone determines the creation of the contract and not the addressee's cognisance thereof, it is immaterial whether, for example, the declaration of acceptance is destroyed after that time or, for example, is deleted in error when downloaded from the provider's computer to the recipient's computer.

If, however, the recipient of the declaration of acceptance disputes the creation of the contract in such an event, the despatching acceptor is required to prove that his declaration was in fact received with due legal effect. Mere proof of the despatch of an e-mail is insufficient evidence in such cases because this is not indubitable proof that the declaration of acceptance was actually received.

The requirement that a declaration, whether an offer or a declaration of acceptance, has been received in order for it to be effective means that despatch is always at the sender's risk. The risk of any destruction or loss of the declaration is not transferred to the recipient until it arrives within his sphere of influence. Persons whom the recipient instructs to receive declarations, such as providers, are considered to come within his sphere of risk.

5. Revocation of a declaration¹¹

An offer or declaration of acceptance which has been despatched may be revoked in the case of formation of contracts between persons not present. The principal determinant element is whether or not the revocation reaches the addressee before or simultaneously with the offer or declaration of acceptance which is to be revoked

¹⁰ P. Gauch/W. Schlupe, *Schweizerisches Obligationenrecht Allgemeiner Teil I*, 6th edn., Zurich 1995, notes 202 and 203.

¹¹ Concerning details of revocation, cf. E. Kramer, in: *Berner Kommentar, Kommentar zum Schweizerischen Privatrecht, Band VI Obligationenrecht, 1. Abteilung Allgemeine Bestimmungen, 1. Teilband Allgemeine Einleitung in das Schweizerische Obligationenrecht und Kommentar zu Art. 1-18 OR*, Berne 1986, notes 155 et seq. to Art. 9 OR

because the time of receipt determines when the offer or acceptance becomes effective¹².

So, if a revocation is to be effective, it must during its communication overtake or at least catch up with the declaration to be revoked so that the revocation is received before or simultaneously with the receipt of the declaration which is to be revoked. The revocation does not have to be expressed in the same form as the declaration which is to be revoked. So an acceptance sent by post can be overtaken and revoked by an e-mail. Should a revocation reach the addressee after the declaration to be revoked, the revocation may still however become effective, if the addressee first takes note of the revocation¹³.

It must be noted that the revocation has to be sent to the same place as the declaration which is to be revoked if it is to be effective at the time of its receipt. This is not always guaranteed when different methods of despatch are used; the address given for a declaration of acceptance sent by post may well be located in a different establishment from the one to which an e-mail is despatched.

In such an event, the revocation can become effective only if the recipient learns of the revocation before the declaration which is to be revoked. In such cases, the place of receipt is irrelevant. The declaring party, however, usually has no influence upon whether the recipient first learns of the revocation.

In firms, the revocation must be delivered to an agent who has authority to accept it. He does not have to be the same person as the agent who received and probably will take note of the declaration which is to be revoked.

An effective revocation which reaches the addressee before the declaration which is to be revoked is scarcely feasible for the purpose of revoking an e-mail or an declaration of acceptance given by means of a Web form. Yet, technically, it is not impossible for an e-mail sent earlier to arrive after one which was despatched later. If necessary, one possibility is an immediate telephone call informing the addressee of the revocation before he learns of the declaration of acceptance (e.g. an e-mail) which is to be revoked.

For reasons connected with consumer protection, special rules exist for revoking door-to-door sales transactions¹⁴ and instalment contracts¹⁵.

Door-to-door transactions are considered to be contracts entered into with customers for goods or services for personal or family use supplied by professional or commercial offerors and for which the customer's payment exceeds CHF 100. The customer is approached at his place of work, in living accommodation or its immediate surroundings, in public transport, on public streets and places or at promotional functions with a view to entering into a contract. This requires direct

¹² OR Art. 9(1)

¹³ OR Art. 9(1)

¹⁴ OR Arts. 40a-g

¹⁵ OR Arts. 226a-m, 227a-i

personal contact, whether physical or by telephone. These provisions do not cover cases where an offer is made to the customer in written form by mail or fax.

Consequently, the rules on door-to-door transactions are not yet generally applicable to contracts formed over the Internet. The situation will be different in future when telephony or video-conferencing through the Internet becomes much more common.

6. **General Terms and Conditions of Business in Internet contracts**¹⁶

General terms and conditions of business which are established in advance by one contracting party for a number of contracts with his customers may be incorporated into a specific contract in various ways. It is interesting to see how those general terms and conditions can be validly incorporated in electronic commerce.

The possibility of being able validly to agree upon general terms and conditions by means of a reference to them is significant with regard to the formation of contracts on the Internet. The crucial element are the requirements that, firstly, the reference is clearly recognisable by the customer and, secondly, that he may reasonably take note of the content of those terms and conditions. It is immaterial whether the customer does then in fact take note of the general terms and condition.

Thus, if an offer placed on a Website contains a clearly recognisable reference to general terms and conditions which the customer can retrieve by clicking on a link on the screen, then, in principle, the above requirements for the validity of the general terms and conditions are fulfilled. As the courts have so far had hardly any occasion to give an opinion upon the incorporation of general terms and conditions in Internet contracts, offering firms would be well-advised to take the following aspects into consideration.

The general terms and conditions may be incorporated in a Website in such a way that they are automatically inserted as a window on the screen whenever the customer intends to complete an order-form and the customer cannot complete the order until he has clicked on a special field to indicate his agreement with the general terms and conditions.

It is also advisable explicitly to mention that the customer can print out the general terms and conditions for himself. Apart from being able to take note of the general terms and conditions in paper form, the customer is also given an opportunity to acquire proof of the content of the general terms and conditions. So, in any later dispute, the accusation of subsequent manipulation (another version of the general terms and conditions) by the offeror is invalidated. To counter that accusation, it is advisable for the offerors too to provide for a perfectly documented change management with regard to the changes made over the course of time to the general terms and conditions they use on the Internet.

¹⁶ See, *inter alia*, A. Koller, Schweizerisches Obligationenrecht, Allgemeiner Teil, Band I, Berne 1996, pp. 356 et seq.

When drafting the general terms and conditions, care must be taken to ensure that they are not too lengthy because it is no longer guaranteed that they can be reasonably examined on the screen. In this connection, particular attention must be paid to the fact that, from the customer's point of view, online examination of general terms and conditions when forming the contract involves telecommunication costs and, to avoid these, the customer may refrain from reading the conditions.

A particular problem when using general terms and conditions on the Internet is that the courts in Belgium, France or Luxemburg, for example, require that the customer must understand the language in which the conditions are written. So when an English-language Website is also used for offers to customers in countries with a different language, care must be taken at least to ensure that no complicated wording and no unusual words are used and that the general terms and conditions can be understood with the knowledge of English possessed by the average Internet user.

To protect the customer from inequitable general terms and conditions, the case-law has developed the principle that unusual unexpected clauses have no validity in general terms and conditions which are accepted unread. In this respect, only clauses which would not be expected in connection with the pertinent contract, i.e. which are alien to business, are considered to be unusual¹⁷.

Distinction must be made between protection against unusual clauses in accordance with the "Rule on the Unusual" developed by the courts, and protection of the customer against harmful clauses. The Federal Statute on Unfair Competition (UWG) applies here¹⁸. According to that Statute, it is an infringement of the principles of fair competition if, deceptively, general terms and conditions of business depart to any considerable extent from the general legal norms to the disadvantage of the contracting partner or provide for an allocation of rights and obligations which seriously conflicts with the nature of the contract.

The Swiss Federal Supreme Court has accepted the criterion of deceit in relation, for example, to a liability clause which was unclearly drafted so that the resultant legal consequences for the customer were unforeseeable¹⁹.

The UWG does not, however, afford the customer any protection in cases where a disadvantageous contractual clause is not drafted to deceive.

7. Form of the contracts; requirement of the written form

In principle, under Swiss law²⁰ contracts do not need to be in any particular form unless the law explicitly prescribes one.

¹⁷ It must be mentioned that Switzerland has no law regulating general terms and conditions of business, as Germany and other countries do.

¹⁸ UWG Art. 8

¹⁹ BGE 119 II 447

²⁰ OR Art. 11(1)

So contracts which are not subject to any special legal rules concerning their form can freely be entered into electronically through the Internet.

The law imposes formal conditions for real property transactions, for example, which require a public record prepared by a notary.

The law does, however, require the written form²¹ in a comparatively large number of cases. For these the deed itself must be signed by the persons who undertake to provide a performance in the contract. Such written form is needed, for example, for the assignment of debts, instalment contracts, promises to make a gift and articles of apprenticeship²²

For some contracts the law does not prescribe that they may be formed only in writing. Any departure from the legal rules must, however, be established in writing. The main examples of this are provisions in the law on employment contracts and agency agreements²³.

So the large majority of contracts are valid irrespective of form, especially the purchase contracts, contracts for work, leases and mandates (service agreements) which are most prevalent in ordinary day-to-day life.

The question of how far contracts for which the law requires the written form can be also entered into through the Internet is not of particular practical importance because of the present-day use of the Internet for electronic commerce. The question is, however, interesting in view of the future development or expansion of electronic commerce.

According to the view still prevalent in Switzerland, digitised stored declarations do not fulfil the requirements of a written deed, as imposed by the law for the simple written form. It is contended that these are not a permanent embodiment of the declaration in written form even if the stored declaration can be reproduced in writing, e.g. by calling it up on the screen or printing it out²⁴. It is also argued that, compared with traditional written documents, electronically stored declarations can be more easily manipulated and would not permit sufficient proof of the issuer's identity. One cannot accept these misgivings and the legislator should adapt to technical progress.²⁵

²¹ OR Arts. 12-15

²² OR Art. 165(1), Arts. 226c(2)/227a(2).

²³ OR Arts. 332(2), 335c(2), 418a(2).

²⁴ See I. Schwenzler, in: Honsell/Vogt/Wiegand (eds.), *Kommentar zum schweizerischen Privatrecht, Obligationenrecht, Band I*, Art. 1-529, Basle 1992, note 3 to Art. 13 OR.

²⁵ Legal rules on the recognition of the legal validity of electronically stored documents and digital signatures are found primarily in the USA where Utah State was the first to enact legislation on that point and Florida was the most recent. The text of the Florida law is available on the Internet under <http://www.scri.fsu.edu/fla-leg/bill-info/1996/h1023.html>. In Germany the Federal Ministry for Home Affairs is preparing an ordinance on digital signatures. The draft has been printed in *Computer und Recht* 5/1996, pp.319 et seq.

According to the law, a manuscript signature by the party assuming obligations is needed for the simple written form. Any other type of signature is considered insufficient, especially a mechanical signature or one produced in any other way. The traditional manuscript signature is impossible on the Internet. Consequently, the formal requirement of the simple written form for contracts entered into on the Internet cannot be fulfilled.

Although the law²⁶ does allow the manuscript signature to be replaced, it refers only to the copying of a manuscript signature by mechanical means. It is referring to the facsimile signature produced by stamps, printing or photocopying. Furthermore, this substitution is permissible only when it is customary in commercial or legal transactions, for which the law cites the example of financial instruments which are traditionally issued in large numbers. Insurance policies are another example.

Under these conditions, one cannot assume that requirements of the written form for contracts entered into on the Internet could be soon fulfilled without amendment of the law, even though the various methods of digital signature may also make it possible to fulfil at least some of the functions linked with the manuscript signature in the foreseeable future²⁷. This applies particularly to the function of identification and authentication, using appropriate coding methods.

8. Summary of the points which must be given consideration when forming contracts through the Internet

When firms form contracts through the Internet, attention should be given to the following points:

- **Formation of the contract:** It may be sensible for a firm offering goods or services on the Internet to fix in advance the form in which its offer can be accepted or the form in which offers must be made in response to an invitation to submit an offer. It is also advisable to stipulate how long an offer remains valid.
- **Geographical restrictions of the offer:** In some circumstances the offer must be restricted with regard to the countries in which it is intended to be valid. Perhaps because the item covered by the offer is prohibited in some countries or because the supplier has no authorisation to provide the services or offers in certain countries (e.g. for telecommunications) or, again, because the supplier considers that it is not worth his while to deliver to some countries.

²⁶ OR Art. 14(2)

²⁷ Concerning the great importance of digital signatures which confirm the identity of contracting partners on the Internet and the authenticity of electronic documents exchanged on the Internet, cf. The Economist, 27th July 1996, p.56. The CyberNotary Project of the American Bar Association goes further with the aim of guaranteeing the traditional paper-based functions of a notary, using electronic methods. The CyberNotaries are also intending to work on registration of public keys which are necessary for producing electronic signatures. Concerning the CyberNotary Project cf. the description given by its manager, T.S. Barassi, on the Internet under <http://www.internetmarket.com/ecl/cybernote.html>.

- **Delivery:** The delivery periods as well as the method of delivery must be fixed, if necessary as a function of the methods of payment (e.g. electronic cash).
- **Risk and insurance:** In the case of goods which are delivered, it must be stipulated who bears the risk of damage or loss during delivery; whether any insurance must be taken out by the supplier or purchaser and which party bears the insurance costs.
- **Price, currency and method of payment:** As offers on the Internet can be taken up not only by customers in the supplier's country of domicile but also worldwide, it is particularly important clearly to state the currency in which the prices are quoted and what are the accepted methods of payments. It must also be specified which incidental expenses are included in the price and who is to pay government charges such as customs duty, import or value-added tax.
- **Copyrights/licence conditions:** If the item supplied consists of material protected by intellectual property rights (e.g. software), it is advisable for the supplier to stipulate in the contract the extent to which the material may be used. Some of the laws concerning protection of intellectual property rights vary considerably from country to country. So a supplier cannot be confident that he will enjoy the same protection in every country where he markets his protected material as he does in his country of domicile.
- **Restrictions of liability:** Although restrictions of liability are desirable and, in principle, sensible from the supplier's point of view, the problem is that they are not possible or legally valid to the same extent and under the same conditions in every country. So it is absolutely essential to combine them with a clause concerning of the applicable law.
- **Choice of the applicable law:** The supplier should certainly stipulate which law is to apply to the contract. Although one cannot assume that a clause of that kind is recognised as valid in every court of every country in the world, if it is drafted in such a way that it does at least comply with the requirements imposed upon such clauses in those legal systems in which most of the offeror's customers are domiciled or resident, it serves a good purpose.
- **Clause stipulating jurisdiction:** Even more security can be obtained by stipulating the court which has competency for any disputes. The stipulation of the competent court also determines the conditions under which a choice of law clause is considered valid. So the choice of the court makes it easier to calculate the risk of the applicable law.

9. Consumer protection

Swiss law does not provide comprehensive specific consumer protection in the law of contract. Provisions concerning consumer protection are found unsystematically in various contexts. In the majority of cases, they consist of special rules concerning the form of the contract (e.g. written form) and special requirements for its content as

they relate to specific types of contract²⁸. The consumer may, for example, be given the opportunity of withdrawing from the contract within a specific period²⁹.

In this connection, mention must also be made of the principles, referred to above, concerning protection against unusual provisions and against disadvantage caused by deception in general terms and conditions of business.

A firm offering and marketing its services through the Internet must, however, observe the consumer protection provisions not of just one country but of all the countries in which it intends primarily to develop its clientèle. In this connection, special importance is attached to the developments of the law of the European Union. The following EU regulations concerning protection for consumers must be mentioned:

- The Unfair Contract Terms Directive of 1993³⁰ which states that unfair clauses in contracts concluded with consumers in relation to goods or services cannot be enforced.
- The planned Directive on the Protection of Consumers in respect of Distance Contracts³¹ which will apply expressly to contracts formed by e-mail (but not to those formed through Websites). According to the Directive, before the contract is formed the customer will be entitled to specific information in written form concerning the goods and the supplier and will also be able to withdraw from the contract within 7 days. The Customer's order must be executed by the supplier within a maximum of 30 days from receipt.

10. International law of contract; which national law is applicable?

As the Internet market-place is global, many contracts are concluded between persons who are not established in the same country. The question arises as to which law is applicable to international contracts: the law of the vendor's country of domicile or of the purchaser's country of domicile or possibly a third country, e.g. the country in which delivery is to be made or where the vendor's Webserver is located?

²⁸ This applies, for example, to instalment transactions pursuant to Arts. 226a-m and Arts. 227a-j OR, to suretyships pursuant to Arts. 492-512 OR, or to consumer credit agreements pursuant to Art. 8 of the Federal Statute on Consumer Credit. If the written form is required for contracts, one must assume that the formal requirement cannot (yet) be fulfilled for contracts through the Internet. So those contracts have no relevance here.

²⁹ OR Arts. 40a-g and OR Arts. 226c(2), 228

³⁰ Directive 93/13 of April 1993

³¹ The Directive reached the "common position" stage on 29.6.1995 (Common Position [EC] No. 19/95) which is normally the final phase before adoption. However, the European Council and Parliament have not yet been able to agree upon the final wording.

Legislation covering similar ground to the Directive has recently been introduced in California (California Business and Professions Code §17538) for selling and leasing goods or services on the Internet. In particular, the maximum permitted delivery period is again 30 days, reckoned from the time of the customer's payment. Cf. Cyperspace Lawyer Vol.I, No.4, pp.25 et seq.

In Switzerland, the answer to this question is determined by the rules concerning the law applicable to international transactions in the Federal Statute on Private International Law (IPRG)³². The IPRG contains general rules with regard to the law applicable to contracts and some specific rules which are only relevant for specific types of contracts.

a) General Rules

In principle, contracts are governed by the law chosen by the parties. The choice of law must be either explicit or clearly indicated by the contract or the circumstances. No special form is necessary but, needless to say, it is bound to be advantageous to stipulate the chosen law in writing in view of the resultant clarity concerning the choice of law which has been made.

The chosen law is decisive when it comes to the question of whether or not the law can also be validly chosen in general terms and conditions of business.

If the applicable law is not chosen by the contracting parties, as often occurs in the case of Internet contracts, under Swiss private international law the contract is governed by the law which has the closest connection with the contract. In this respect, the assumption is that the closest connection exists with the country in which the contracting party who is to make the characteristic contractual performance has its habitual residence or business establishment³³. The characteristic performance and thus the applicable national legal system is determined in the Statute for the following types of contracts³⁴:

- in contracts to pass title, the performance of the transferor;
- in contracts to grant the use of a thing or a right, the performance of the party granting the use;
- in mandates, construction and similar contracts for services, the service;
- in contracts for storage, the performance of the keeper;
- in guarantee and surety contracts, the performance of the guarantor or surety.

³² Apart from the applicable law, this Statute also regulates the question of the international jurisdiction of Swiss courts to rule upon disputes brought before them and the jurisdiction of foreign courts if their judgments are to be recognised and enforced in Switzerland.

³³ IPRG Art. 117(1) and (2). On the other hand, the place of formation has no essential significance for determining the applicable law. According to Art.124(1) IPRG the place of formation is relevant only with regard to the form of a contract. If the parties are in different countries, it is, however, sufficient for the contract to fulfil the formal requirements of one of the two countries. According to Art.124(1) IPRG the contract is also valid if it conforms to the formal requirements of the law fixed in keeping with the rules previously set out in the text (choice of law; characteristic performance). So there is no need to answer the question of where is the place of formation, a question which has merely arbitrary significance for contracts formed on the Internet. For information on the different pertinent rules applicable in the various legal systems cf. for example, Y.Poullet & G.P.V. Vandenberghe (eds.), *Telebanking, Teleshopping and the Law*, Deventer 1988, pp.78 & 79 et seq.

³⁴ IPRG Art. 117(3)

For some types of contracts these general rules do not apply but specific provisions. With regard to the Internet the following are of relevance.

b) Contracts with consumers³⁵

Contracts with consumers are considered to be every contract for products and services which are intended for the personal or family consumption of the consumer and which are not connected with his professional or business activities. These contracts with consumers are governed by the law of the country in which the consumer has his habitual residence, i.e. in which he has lived for a considerable time. This requires, however, that

- the supplier has accepted the order in the country where the consumer has his habitual residence, or
- in the country in question the contract was concluded as the result of an offer or an advertisement and the consumer performed in the country in question the legal actions which allow a contract to be made, or
- the supplier has induced the consumer to travel abroad and give his order there (e.g. a publicity trip). Needless to say, this last requirement is irrelevant for contracts made online.

If none of the three above requirements are satisfied, the applicable law is determined by the general rules which do not apply specifically to contracts with consumers, as they have been discussed sub a).

With regard to the Internet, closer examination must be given to the conditions under which one must assume that the supplier has accepted an order in the country of the consumer's habitual residence or that an offer or advertisement in the country in question preceded the formation of the contract and that the consumer performed the acts required for forming the contract.

One must assume that a supplier who operates a Webserver in his country of domicile and accepts orders from foreign customers on that Webserver, using a Web form, or instructs his customers to place orders by e-mail to his e-mail address in his country of domicile does not accept orders outside his country of domicile.

The situation is different, however, if a supplier has e-mail accounts with a provider operating abroad for the purpose of accepting foreign orders or if he makes his offer abroad, i.e. on a Webserver belonging to his own or to an authorised provider established abroad. It is accepted³⁶ that the law of the country in which the consumer has his residence applies if the order is received by an agent of the supplier who passes it on to the supplier. Under the conditions mentioned above, this would be the supplier's foreign provider.

³⁵ IPRG Art. 120

³⁶ IPRG Art. 120(1)a applies

As regards the aforesaid second point³⁷, one must indeed assume that solely to maintain a Website, even if it is accessible from abroad, does not imply that an offer or advertisement has been made abroad within the meaning of the said provision. The situation would, however, be different if a supplier advertised abroad by means of e-mail or if he indicated the possibility of ordering by the Internet on advertising media distributed abroad, such as advertisements, direct mail, etc.

c) Contracts concerning movable goods³⁸

If contracts concerning movable goods are not contracts with consumers as discussed above, the applicable law is determined by the Hague Convention of 15.6.1995 on the Law Applicable to International Sales of Goods.

According to this convention, first and foremost the law chosen by the parties is applicable to the contract. If, for example, a bookshop domiciled in Switzerland includes on its Internet order-form for its customers a clearly visible clause stating that Swiss law is applicable, this also applies to contracts for sales of books to foreign customers.

If no law has been chosen, the aforesaid Convention stipulates that the applicable law is the law of the country in which the vendor had his habitual residence when receiving the order or which contained the branch establishment accepting the order.

d) Contracts on rights in intellectual property³⁹

Contracts on rights in intellectual property (e.g. the distribution of software through the Internet) are governed by the law of the country in which the contracting party granting the intellectual property right or the right to use the software has his habitual residence or branch establishment (place of business).

³⁷ IPRG Art. 120(1)b

³⁸ IPRG Art. 118

³⁹ IPRG Art. 122