Questionnaire

for
E-commerce Legal Framework in Asia-Pacific Countries

28th September, 2001

Purpose of this survey:
Purpose of this survey is to clarify E-commerce legal framework in Asia Pacific countries, such as Singapore, Malaysia, Korea, Philippines, Thailand, Indonesia, Australia and Japan. Result of this survey will be introduced at round table “Asia-Pacific Professional meeting on B2C Legal framework for E-commerce”, 22nd January 2002, Cyberjaya, Malaysia. Participants of “Round table” are from Malaysia, Singapore, Thailand, Philippines, Korea and Japan. The goal of “Round table” is to share strategic view-points on legal framework among participants regarding Asian e-Commerce(mainly B2C) and recognize their differencies.

Deadline for your response: 22th October(Mon.), 2001
Language: in English

Thank you very much ahead for your cooperation!
Section 1 Questions on consumer protection

Q1-1 Please answer the legal framework regarding consumer protection in your jurisdiction. In particular, provide us their names, scopes (especially whether they cover e-commerce, and whether they cover cross-border transactions), and abstracts (including their articles) of the laws, acts, regulations, guidelines, and other legal concepts. If any legal concepts will be enforced or modified in the future in respect of consumer protection, give us the detail information of them. Please also provide us with a copy of the legal materials you referred.

Q1-2 If any government and/or private organizations aiming on the protection of consumer exists in your jurisdiction, please write down all of their names and URLs.

Q1-3 Please answer this question if your jurisdiction has comprehensive consumer protection law(s): evaluate the consistency between the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (December 1999, URL: http://www.oecd.org/dsti/sti/it/consumer/prod/CPGuidelines_final.pdf) and the consumer protection law(s) in your jurisdiction. Please choose one that is appropriate, and mention it’s reason.
   a. generally consistent.
   b. little consistent.
   c. generally inconsistent.
   d. others. (please explain: )

Q1-4 If an international dispute related to consumer protection is occurred in your jurisdiction, which of the following jurisdictional application will be adopted? Assume that any jurisdictional agreement between consumers and businesses has not yet being achieved. Please write the ground of the statute law, guideline, case law and/or any other legal aspects.
   a. the jurisdiction which the consumer belong to, follow the court of the laws.
   b. the jurisdiction which the business belong to, follow the court of the laws.
   c. others. (please explain: )

Q1-5 If there are any web sites and/or publications for consumers and businesses of foreign countries, which introduce consumer protection system in your jurisdiction, please write down their English URL or publication name. If possible, please purchase all available publications.
Section 2 Questions on personal information protection of private sector

Q2-1 Please answer the legal framework regarding personal information protection in private sector in your jurisdiction. In particular, provide us their names, scopes (especially whether they cover private sector and/or public sector, whether they cover e-commerce, and whether they cover cross-border transactions), and abstracts (including their articles) of the laws, acts, regulations, guidelines, and other legal concepts. If any legal concepts will be enforced or modified in the future in respect of personal information protection, give us the detail information of them. Please also provide us with a copy of the legal materials you referred.

Q2-2 If any government and/or private organizations aiming on the protection of personal information exists in your jurisdiction, please indicate all of their names and URLs.

Q2-3 Please answer this question if your jurisdiction has comprehensive personal information protection law(s): evaluate the consistency between the OECD Guidelines Governing The Protection of Privacy and Transborder Flows of Personal Data (September 1980, URL: http://www.oecd.org/dsti/sti/it/secur/prod/PRIV-EN.HTM) and the personal information protection law(s) in your jurisdiction. Please choose one that is appropriate from the following items, and mention it’s reason.
   a. generally consistent.
   b. little consistent.
   c. generally inconsistent.
   d. others. (please explain: )

Q2-4 If an international dispute related to personal information protection of private sector is occurred in your jurisdiction, which of the following jurisdictional application will be adopted? Assume that any jurisdictional agreement between parties has not yet being achieved. Please write the ground of the statute law, guideline, case law and/or any other legal aspects.
   a. the jurisdiction which the plaintiff belong to, follow the court of the laws.
   b. the jurisdiction which the defendant belong to, follow the court of the laws.
   c. others. (please explain: )

Q2-5 If there are any web sites and/or publications for foreign countries, which introduce personal information protection system in your jurisdiction, please write down their English URL or publication name. If possible, please purchase all available publications.
Section 3    Questions on Web Site Trust Mark System

Q3-1  Does Web Site Trust Mark System exist in your country?  If so, please write down its name and English URL.

Section 4    Question on Domain Name and Trademark

Q4-1  Please answer the name and URL of the organization(s) controlled domain names in your country.

Q4-2  How is Internet domain name considered in accordance with enforcement of trademark rights? Please mention the ground of statute law, guideline, case law or any other legal aspects.
Section 5 Questions on Electronic Authentication Business

Q5-1 Please answer the legal framework regarding electronic authentication, electronic signature, and electronic certification authority (CA) in your jurisdiction. In particular, provide us their names, scopes (especially whether they cover cross-border transactions), and abstracts (including their articles) of the laws, acts, regulations, guidelines, and other legal concepts. If any legal concepts will be enforced or modified in the future in respect of electronic authentication, electronic signature, and CA, give us the detail information of them. Please also provide us with a copy of the legal materials you referred.

Q5-2 If there is party(s) which grants a license, accreditation, or registration of CA in accordance with the legal framework you answered for Q5-1, please indicate the name and its English URL.

Q5-3 Which of the following system can a designated CA(*) receive in your jurisdiction?

(*) "a designated CA” is the CA regulated by the legal concepts(including the laws, acts, regulations, guidelines, etc.) concerning CA.

a. a license system.
b. a voluntary accreditation system.
c. a registration system.
d. Others. (please explain: )

Q5-4 How is an international (overseas) designated CA(*) considered in your jurisdiction?

(*) "a designated CA” is the CA regulated by the legal concepts(including the laws, acts, regulations, guidelines, etc.) concerning CA.

a. Mutual authentication.
b. Simplified examination.
c. Others. (please explain: )

Q5-5 Please list the names of businesses(domestic,overseas,international) that received a licence, accreditation or registration based on the legal concepts(including the laws, acts, regulations, guidelines, etc.) concerning CA in your jurisdiction.

Q5-6 If there are any legal concepts(including laws, acts, regulations, guidelines, etc.), which specify technical requirements(including facilities, computer hardwares) of CA, electronic authentication and electronic signature in your jurisdiction, please indicate their English URL and/or provide us with all related materials
B2B Legal Framework in Asia-Pacific Countries

This document is a commentary in the context of the legal framework on B2B (Business to Business E-commerce) including online contract law and electronic evidence in Asia-pacific countries, that is Singapore, Malaysia, Korea, Thailand, Philippines, Indonesia, Australia and Japan. The commentary mainly quotes from the APEC (Asia-Pacific Economic Cooperation) E-com Legal Guide, which written in January 2001.

I. Online contract law

1. Singapore

This section lays out the key legal issues surrounding Internet contracts and attempts to provide an overview and an examination of the state of law dealing with such issues. Where information on Web pages on the Internet simply refer to an alternative method of contracting, such as by telephone or fax, this situation would be adequately dealt with by the vast body of existing law and would not be discussed in this paper.

(i) Formation of contract

The formation of a binding contract is completed when there is an offer made, a clear and unequivocal acceptance, furnishing of consideration and an intention to be bound by the contract. In a contract made over the Internet, there are normally no problems concerning consideration and intention to be bound. However, there may be uncertainty as to when and whether there is an offer and acceptance.

The point at which offer and acceptance meet will dictate the time and place where the contract is formed. This has a number of significant ramifications, for example, it may determine which country’s laws would govern the terms of the contract and their enforceability, the tax liabilities of either party, and even the legality of the terms of the contract.

Offer
There may be uncertainty as to whether a statement made is intended to be an offer, the acceptance of which brings a contract into existence, or merely an invitation to treat, inviting offers from potential buyers. The question is ultimately one of intention, although it is generally accepted that advertisements made in newspapers and magazines and goods displayed in shop windows are mere invitations to treat.

A website containing advertisements is similar to advertisements published in newspapers or magazines. Also, the concept of virtual shopping purports to replicate the experience of walking through a mall, looking into shop windows and entering the shop and making an offer to buy. We may conclude that such websites do not constitute offers but mere invitations to treat and when a response has been made via electronic mail or message ("e-mail"), that response constitutes an offer.

However, this is not to say that it is never possible for a website to be an offer, since the test is ultimately one of intention. The merchant from a website ("Internet Merchant") may well have intended to be contractually bound once he receives an e-mail response from a site visitor (e.g. when the owner sells digital material which is unlimited). This is especially if the Internet Merchant wishes to ensure that a certain country’s tax or other relevant laws apply. To avoid uncertainty, the company advertising its products on the Internet should include a clear statement stating whether it is an offer or whether the buyer’s response constitutes the legal offer.

Acceptance
Once an offer is made, the recipient of the offer will have to accept it and communicate the acceptance to the offeror. On the Internet, this usually takes place by sending an e-mail.

The general rule is that communication is effected when the acceptance is received by the offeror. However, there are two alternative rules for this:

- The postal rule
  When acceptance is by sending of a letter, it is deemed communicated when the letter is posted. The basis of this postal rule is that when no form of communication of acceptance is stipulated by the offeror, he is deemed to have taken the risk of non-delivery or misdelivery by post. This rule does not apply in cases of instantaneous
communication like telex or fax.

- The telex rule
  For instantaneous communication like telex or fax, acceptance is deemed to take place at the time and in the place where it is received. Confirmation by answerback in telex communication is normally evidence of receipt by the recipient. In the case of communication by fax, it is submitted that confirmation of receipt by the transmission report should be sufficient evidence of such receipt by the recipient.

An acceptance sent by e-mail will be likely to take the following path before it reaches the offeror:

(i) message sent from home PC to a local Internet Service Provider (ISP);
(ii) routed by the ISP’s mail server via a larger ISP;
(iii) routed by that ISP over a high bandwidth link to a traffic exchange;
(iv) routed from there via another large ISP to a smaller ISP which hosts the offeror; and
(v) received by the offeror when he dials up his local ISP.

It can be seen that if the postal rule is applied, drawing a parallel between the ISP and the post box, difficulties arise since it begs the question: at which of the 4 ISPs is acceptance deemed communicated? An e-mail cannot be considered a form of instantaneous communication since it may take seconds or hours to reach its destination, depending on routing and other factors.

The inadequacy of common law rules is underscored by the above analysis and the artificiality of the entire exercise is evident. Many of the problems have been resolved by the enactment of the Electronic Transactions Act 1998.

**Electronic Transactions Act**
The Electronic Transactions Act 1998 ("ETA") was passed on 29 June 1998 and came into force on 10 July 1998. The aim of the ETA is to provide a legal foundation for electronic transactions and to give predictability and certainty to the electronic formation of contracts.

The general rule under the ETA is that a transaction is not invalid because it took place by means of one or more electronic communications. The ETA makes it clear that
transactions conducted using paper documents and transactions conducted using electronic communications should be treated equally by the law.

Section 6 of the ETA states that information shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record.

Section 7 of the ETA provides that an electronic record will satisfy the requirement for information to be in writing if the information is accessible so as to be useable for subsequent reference.

Section 8 of the ETA provides that a requirement for a signature is satisfied by an electronic signature.

Section 9 of the ETA states that a requirement to retain documents, records or information is satisfied by retaining them in the form of electronic records as long as certain prescribed conditions are satisfied.

Section 11 of the ETA states that in the context of contract formation, an offer and acceptance of an offer may be expressed by means of electronic records.

Section 12 of the ETA provides that a declaration of intent may be in the form of an electronic record.

Section 13 of the ETA deals with attribution of electronic records to the originator of the record.

Section 14 of the ETA is concerned with acknowledgment of receipt of an electronic record.

Section 15 of the ETA deals with the time and place of dispatch and receipt of an electronic record. Unless otherwise agreed between the parties, the dispatch of an electronic record occurs when it enters an information system outside the control of the originator or the person who sent the electronic record on behalf of the originator. Unless otherwise agreed between the parties, the time of receipt of an electronic record is the time when the electronic record enters an information system of the addressee (the addresses may designate a specific information system for this purpose). An electronic record is
deemed to be dispatched at the place where the originator has its place of business, and is
deemed to be received at the place where the addressee has its place of business.

**Which law governs the contract?**

In the absence of an international treaty which lays down a set of rules governing a
contract made over the Internet, the usual rules regarding international contracts apply.
The company selling goods on the Internet should state, as part of its terms, the choice of
law governing the contract. This will avoid the court having to apply the "proper law of
the contract" doctrine which considers intention of the parties or localisation of the
contract.

(ii) Incorporation of contractual terms

The general rule is that if the owner of the website wants the terms to be incorporated into
the contract, they must be sufficiently brought to the attention of the customer before the
contract is formed. The more onerous the terms are, the more effort must be taken to bring
them to the customer’s attention.

To incorporate effectively the terms into a contract of sale over the Internet, one may use
the "clickwrap" mechanism. The potential customer is taken from the advertisement to a
page setting out the terms of the contract. He then has to click on an icon which denotes
his acceptance of those terms before he can actually send that e-mail making his order.
This way, the seller can be sure that the terms are brought to the notice of the buyer before
the contract is formed.

A clickwrap licence may be considered a good method of incorporating contractual terms
as they avoid the problems of the more traditional shrink-wrap licences. This is because
the terms of the clickwrap licence have to be accepted by clicking on the icon before the
goods are sold or downloaded and the money is paid. The customer does not have the
excuse that he bought the goods before having a chance to read the terms as frequently
happens with store bought software or goods with terms on the shrink-wrap.

(iii) Enforceability of web-wrap agreements

In a recent case before the seventh circuit of the U.S. Court of Appeal, the court accepted
the enforceability of shrink-wrap licences as being in tune with trade custom - where the
"money now, terms later" arrangement is common in purchasing airline, insurance and concert tickets as well as consumer articles. The court also referred to the option given to purchasers to return the software and to be refunded the purchase price if they found the terms to be unacceptable. The Court further ruled that if the purchaser paid for the software and read the restrictions, but continued to use the software, he would be deemed to have accepted the terms offered in the shrink-wrap licence, through conduct.

In Singapore, it may be argued that the appropriate solution would be provided by section 35 of the Sale of Goods Act which states that a purchaser would have entered into a contract if he renders to purchased goods an "act inconsistent with the ownership of the seller", such as continued use of the software after reading the terms of the shrink-wrap licence. This analysis makes even more sense in the click-wrap situation where the purchaser would have to click some form of an "accept" icon agreeing to the terms of the licence before starting to use the software.

Contractual terms may alternatively be included in a hypertext link at the website such as "Click here to read the Terms and Conditions". Internet Merchants may also provide copies of the terms and conditions upon request. These two methods are obviously less satisfactory as it does not in any way attempt to compel or even encourage the purchaser to read the terms and conditions at any point before or after the transaction.

2. Malaysia

Contract law in Malaysia is governed by the Contracts Act 1950, which generally follows the common law. This chapter lays out the key legal issues surrounding Internet contracts and attempts to provide an overview and examination of the state of law dealing with such issues. Where information on Web pages on the Internet simply refer to an alternative method of contracting, such as by telephone or fax, this situation would be adequately dealt with by the vast body of existing laws and would not be discussed in this chapter.

(i) Formation of contract

The formation of a binding contract is completed when there is an offer made, a clear and
unequivocal acceptance, furnishing of consideration and an intention to be bound by the contract. In a contract made over the Internet, there are normally no problems concerning consideration and intention to be bound. However, there may be uncertainty as to when and whether there is an offer and acceptance.

The point at which offer and acceptance meet will dictate the time and place where the contract is formed. This has a number of significant ramifications, for example, it may determine which country’s laws would govern the terms of the contract and their enforceability, the tax liabilities of either party, and even the legality of the terms of the contract.

**Offer**

An offer in the context of the Contracts Act is known as a "proposal", which is defined in section 2(a).1 There may be uncertainty as to whether a statement made is intended to be an offer, the acceptance of which brings a contract into existence, or merely an invitation to treat, inviting offers from potential buyers. The question is ultimately one of intention, though it is generally accepted that advertisements made in newspapers and magazines and goods displayed in shop windows are mere invitations to treat.

A website containing advertisements is similar to advertisements published in newspapers or magazines. Also, the concept of virtual shopping purports to replicate the experience of walking through a mall, looking into shop windows and entering the shop and making an offer to buy. We may conclude that such websites do not constitute offers but mere invitations to treat and when a response has been made via electronic mail or message ("e-mail"), that response constitutes an offer.

However, this is not to say that it is never possible for a website to be an offer, since the test is ultimately one of intention. The merchant from a website may well have intended to be contractually bound once he receives an e-mail response from a site visitor (e.g. when the owner sells digital material which is unlimited). This is especially if the merchant from the website wishes to ensure that a certain country’s tax or other relevant laws apply. To avoid uncertainty, the company advertising its products on the Internet should include a clear statement stating whether it is an offer or whether the buyer’s response constitutes the legal offer.

**Acceptance**
Once an offer is made, the recipient of the offer will have to accept it and communicate the acceptance to the offeror. Acceptance is provided for in section 7 in the Contracts Act. On the Internet, this usually takes place by sending an e-mail.

The general rule is that communication is effected when the acceptance is received by the offeror. In the Contracts Act, this is provided for in section 4(2). There are two alternative rules for this:

- **The postal rule**
  When acceptance is by sending of a letter, it is deemed communicated when the letter is posted. The basis of this postal rule is that when no form of communication of acceptance is stipulated by the offeror, he is deemed to have taken the risk of non-delivery or misdelivery by post. This rule does not apply in cases of instantaneous communication like telex or fax.

- **The telex rule**
  For instantaneous communication like fax or telex, acceptance is deemed to take place at the time and in the place where it is received. Confirmation by answerback in telex communication is normally evidence of receipt by the recipient. In the case of communication by fax, it is submitted that confirmation of receipt by the transmission report should be sufficient evidence of such receipt by the recipient.

An acceptance sent by e-mail will be likely to take the following path before it reaches the offeror:

(i) message sent from home PC to a local Internet Service Provider (ISP);
(ii) routed by the ISP’s mail server via a larger ISP;
(iii) routed by that ISP over a high bandwidth link to a traffic exchange;
(iv) routed from there via another large ISP to a smaller ISP which hosts the offeror; and
(v) received by the offeror when he dials up his local ISP.

It can be seen that if the postal rule is applied, drawing a parallel between the ISP and the post box, difficulties arise since it begs the question: at which of the 4 ISPs is acceptance deemed communicated? An e-mail cannot be considered a form of instantaneous communication since it may take seconds or hours to reach its destination, depending on routing and other factors.
The inadequacy of current rules under modern contract law and the Contracts Act is underscored by the above analysis and the artificiality of the entire exercise is evident. One solution is for a company selling its products via the Internet to state clearly on its website the precise time and means by which acceptance will take place. This may be when the company acknowledges the receipt of the e-mail acceptance, or when the product is delivered, or, if it is in digital form, when it is downloaded.

**Which law governs the contract?**

In the absence of an international treaty which lays down a set of rules governing a contract made over the Internet, the usual rules regarding international contracts apply. The company selling goods on the Internet should state, as part of its terms, the choice of law governing the contract. This will avoid the court having to apply the "proper law of the contract" doctrine which considers intention of the parties or localization of the contract.

(ii) Incorporation of contractual terms

The general rule is that if the owner of the website wants the terms to be incorporated into the contract, they must be sufficiently brought to the attention of the customer before the contract is formed. The more onerous the terms are, the more effort must be taken to bring them to the customer’s attention.

To incorporate effectively the terms into a contract of sale over the Internet, one may use the "clickwrap" mechanism. The potential customer is taken from the advertisement to a page setting out the terms of the contract. He then has to click on an icon which denotes his acceptance of those terms before he can actually send that e-mail making his order. This way, the seller can be sure that the terms are brought to the notice of the buyer before the contract is formed.

A clickwrap licence may be considered a good method of incorporating contractual terms as they avoid the problems of the more traditional shrink-wrap licences. This is because the terms of the clickwrap licence have to be accepted by clicking on the icon before the goods are sold or downloaded and the money is paid. The customer does not have the excuse that he bought the goods before having a chance to read the terms as frequently happens with store bought software or goods with terms on the shrink-wrap.
In Malaysia, it is submitted that the appropriate solution regarding the incorporation of shrink wrap licenses, would be provided by Section 42 of the Sale of Goods Act 1957 (which applies in Peninsular Malaysia) which states that a purchaser would have entered into a contract if he renders to the purchased goods an "act inconsistent with the ownership of the seller", such as continued use of the software after reading the terms of the shrink-wrap licence. This analysis makes even more sense in the click-wrap situation where the purchaser would have to click some form of an "accept" icon agreeing to the terms of the licence before starting to use the software.

Contractual terms may alternatively be included in a hypertext link at the web site such as "Click here to read the Terms and Conditions". Merchants may also provide copies of the terms and conditions upon request. These two methods are obviously less satisfactory as it does not in any way attempt to compel or even encourage the purchaser to read the terms and conditions at any point before or after the transaction.

(iii) Agency

The increasing availability of access to the Internet in the working office means that employees may enter into contracts over the Internet and the issue of whether they bind their employers to the contract made arises. Under the principles in agency law, the principal (employer) is bound when the agent (employee) has actual authority, apparent authority, or when he ratifies the contract. Where there is actual authority or ratification, the issue does not arise. The issue arises when the employee has no actual authority, and the other party is relying on apparent authority to bind the employer.

In order for the employer to be bound, he must have represented to the other party, either expressly or by conduct, that his employee has authority to enter into that contract. It is unlikely that the mere granting of Internet access to the employee in the office amounts to such a representation. The representation must come from the employer and reliance on an assurance made by the employee is misguided reliance. The only way the employer would be bound would be when he gives an express representation that the employee has authority, or when he has acquiesced to the employee’s act because he has entered into similar contracts in the past and the employer, having knowledge of such, has kept silent.

It is suggested that parties dealing with employees purporting to bind their principals act
prudently and check with the employers whether such authority has been conferred. On the part of the employers, stricter and more careful guidelines should be developed which specify who is permitted Internet access and for what purposes.

3. The Republic of Korea

(i) Contract formation

The legal system in Korea is based on the European civil law. Thus, Korea has the Civil Code which contains several sections on the formation of contracts, as well as one chapter on the expression of intent. The Korean Commercial Code also contains special provisions concerning contracts that only apply to commercial activities.

A contract is formed in one of three ways: (i) an offer and an acceptance; (ii) realization of an intent; and (iii) cross-offers. Realization of an intent means an action of the offeree by which acceptance can be inferred when an acceptance is not necessary from the offer itself or in light of the customary course of dealing or usage in the trade. Cross-offers occur where two same counter-offers are made by coincidence. These two later forms are, however, basically a modification of the offer and acceptance principle of contract formation.

An offer is an expression of intent to enter a contract. Although it does not have to be made to a specific person, it must be sufficiently definite and concrete to form a contract upon an acceptance. Thus, it is different from the mere solicitation of an offer. Although the definitiveness of the expression can be one factor in distinguishing between an offer and solicitation of an offer, it will ultimately be determined in light of the relevant parties’ intent and customary trade practices.

An acceptance is an expression of intent to enter a contract in accordance with an offer. An acceptance must normally be made in the manner specifically required by the offer. If no specification of the method of acceptance is made in the offer, it may be made in any manner, either expressly or implicitly.

An acceptance must be received by the offeror within a reasonable time period after the offer is made. This is in line with the general principle that an expression of intent is valid at the time of arrival. If, however, an offeror and an offeree are distant from each other, a contract is formed when the acceptance leaves the offeree. Thus, only in a face-to-face negotiation, is the acceptance effective when received.

If the contract constitutes a commercial activity of the relevant party, the special provisions of the Commercial Code will govern the transaction. For example, in a face-to-face negotiation, an acceptance must be immediately made. If no specific time period for an acceptance is specified, the offer must be accepted by the offeree within a reasonable time period. Furthermore, if a merchant has received an offer from a party which it has a steady trade relationship with, a failure to promptly express an intention of refusal will be deemed to be an acceptance.

If the general rules on commercial contracts between an offeror and an offeree who are distant from each other are applicable to online transactions, a contract is formed when the offeree sends out an acceptance, provided it is made within a reasonable time. However, such rules presuppose substantial time differences between the time an acceptance is sent out and the time the acceptance is received. As this presumption is not applicable to online transactions, many believe that the arrival principal of contract formation should apply to online transactions. Certain legislation on electronic data transfer, such as the Customs Law and the Law for Promotion of Trading Administration Automation, provides that an application or report is deemed to be accepted when it is duly recorded on the service provider's computers and a reasonable time for transfer has lapsed. The Law on Network Expansion and Utilization Promotion also provides that an electronic document is deemed to reach the recipient when it is recorded as a file within the recipient’s computer system.

(ii) Electronic Transaction Basic Act

The Electronic Transaction Basic Act 1999 ("ETBL") was passed on February 1999 and came into force on 1 July 1999. The ETBL operates in conjunction with existing legislation, providing a basic legal framework for e-commerce in Korea. The ETBL does not expressly specify the requirements for the making of online contracts, however its provisions do provide a guideline to the formation of electronic contracts.

4 JETRO’s NOTE: This Act is formally named the Framework Act on Electronic Commerce.
The general rule under the ETBL is that information prepared, transmitted, received or stored in an electronic form through the use of equipment having information processing abilities, such as a computer, shall be deemed a document which can be used in a court as evidence.

Provisions under the Act include:

Article 5 of the ETBL states that the effect of an electronic document cannot be disregarded merely because it is electronically created.

Article 7 of the ETBL stipulates that electronic documents may be admissible in Korean courts as general evidence.

Article 9 of the ETBL states that an online contract is deemed to have been executed when the transmission of such contractual consent is received on the computer of the receiving party.

Article 12 of the ETBL provides that where an offeror sends an online transmission attaching a stipulation that the receiver of the transmission must confirm the receipt thereof, the transmission will not be deemed validly delivered until the receiver confirms receipt.

Article 13 of the ETBL states that any and all e-commerce entities are required to take proper measures in order to protect information that is processed, transmitted or kept by such entities from unauthorized use, access or disclosure.

Article 18 of the ETBL provides that ecommerce entities may use encryption to secure the safety and reliability of electronic commerce.

(iii) Contract terms

The terms of a specific contract are to be governed by the agreement between the parties and certain mandatory or gap-filling laws. If there exists a prior, umbrella agreement (such as the basic agreement on access and use of the trade administration network under the Law for Promotion of Trading Administration Automation), it may be incorporated as part
of a specific contract unless specifically excluded.

Provided Korean law applies, the relevant sections of the Civil Code and the Commercial Code on sales will fill in the missing terms of a contract where the parties have failed to provide for such terms. For example, if the product is designated by in-kind, it must be of mid-range quality. In the absence of a specified place for delivery, the place for delivery is the place of the buyer. If the product has any defects, the buyer has the right to request compensation for damages. If, however, the defect is so serious as to prevent the satisfaction of the purpose of the contract, the contract may be terminated. Such remedies are available within six months after the defects become known to the buyer and are not available if the buyer was aware of such defects or should have known of them at the time the sales contract was made. In the case of sales between merchants, the buyer has the obligation to inspect the product immediately after delivery. If the buyer fails to notify the seller of any defects in quality or quantity, the buyer cannot claim the warranty liabilities under the Commercial Code unless the seller knew of such defects or lack in quality.

Agreements between parties may be overruled by mandatory norms. For example, warranty liabilities can be excluded by agreement between the parties. However, it will not be valid if the defects in the product are known by the seller. Courts will also refuse to enforce unconscionable contract clauses. One of the most important mandatory norms is the Law on Standard Terms. The Law on Standard Terms defines "standard terms" very broadly as to include all contracts that have been prepared for use by multiple parties. This law contains a general clause which invalidates unfair terms that violate the good faith principle. Under this general clause, contract provisions concerning the limitations of liability, liquidated damages, terminations, changes of the contents of the obligation, deemed expressions of intent, liability of an agent, and dispute resolutions are not valid to the extent that they are found to be unfair. The Korea Fair Trade Commission, which is vested with the authority to decide the validity of standard terms in contracts, has interpreted the scope of unfair standard terms rather broadly without any guiding principles or reasoning. Recently, the Courts also appear to be expanding the scope of the Law on Standard Terms regardless of the economic reality of the contracting parties. Thus, the Law on Standard Terms is now applicable to almost every contract in writing regardless of whether the contracting party is a consumer or not.

(iv) Shrink-wrap, Web-wrap, Click-on agreements
Currently, there are no judicial decisions or rulings in Korea concerning the enforceability of shrink-wrap or web-wrap agreements. Although the enforceability of shrink-wrap agreements can be subject to questions, depending on one’s analysis, web-wrap agreements will be enforceable when its contents are offered to the buyer before he/she clicks on the Agree button. However, because web-wrap agreements are made for multiple customers, the Law on Standard Terms will apply to such agreements to the effect that any unfair terms will be invalidated.

(v) Formality

Korea does not have a Statute of Frauds. Accordingly, a contract does not have to be in writing to be valid. For written documents, signatures and impression of seals are necessary for the authentication thereof. Digital signatures in electronic documents have the same effect as that of regular signatures in written documents. Several laws, such as the Law on Network Expansion and Utilization Promotion and the Law on Trade Administration Automation, provide that in cases where the electronic documents are disputed, the file in the computer system of network managers are presumed to be accurate.

(vi) Application of foreign law

The Private International Law regulates the choice of laws on international matters. In principle, the formation and effect of a contract is determined by the law chosen by the parties. However, if such agreement has not been clearly made, the agreement is to be governed by the law of the place where the acts occur. As to the formation and effect of a contract, the place where an offer is made is treated as the place where the acts occur.

Korean courts, however, tend to limit the application of the Private International Law. For example, if a claim based on a contract or tort is made between two Korean residents, courts have applied Korean laws on the ground that such dispute is not international or that the parties have implicitly chosen to be governed by Korean law.

(vii) Foreign courts’ jurisdiction

The Korean Code of Civil Procedure has several sections concerning the basis for venue, such as residence, place of performance, etc. Korean courts apply these venue rules to
international jurisdiction to the extent they are reasonable. Thus, if the place of performance, location of assets, place of torts or a place of business is in Korea, Korean courts will exercise jurisdiction over foreign entities.

(viii) Enforcement of foreign law

If the rights and obligations of the parties in a dispute are supposed to be resolved by foreign law, it is theoretically the court’s responsibility to apply such law. Under art 203 of the Korean Code of Civil Procedure ("CCC"), foreign judgments will be given effect if certain requirements are satisfied. The conditions which must be satisfied under art 203 include:

- The foreign judgment must be a final judgment;
- The foreign court must have valid jurisdiction over the Korean defendant;
- The Korean defendant must have received proper service process;
- The foreign judgment must conform with Korean public morals and policy;
- There is a requirement to prove reciprocity between the foreign court with Korean courts

However, it is possible that a Korean court will be unable to find or discern the applicable foreign law. While the Korean court has the power to dismiss the case if the applicable foreign law is not proved to the satisfaction of the court, it tends to render decisions on such cases by applying domestic law or general principles of law.

(ix) Enforcement of foreign judgments

To enforce foreign judgments, the Korean Code of Civil Procedure requires that a separate enforcement judgment be obtained from a Korean court. To obtain such judgment, the following requirements must be met: (i) the foreign judgment is final; (ii) the foreign court has proper jurisdiction; (iii) the defeated defendant who is a Korean resident must receive service by means other than public notice; (iv) the foreign judgment is not in violation of public order; (v) a mutual guarantee on enforcement exists. A mutual guarantee is deemed to exist if the country which has rendered the foreign judgment enforces Korean judgments with the same or less rigorous requirements. Korean courts have recognized the existence of mutual guarantees with New York, Minnesota, Japan and Germany. Most recently, however, a Korean court has refused to enforce a Florida judgment against a
Korean manufacturer relating to product liability on the ground of enforceability.

4. Thailand

The Thai legal system is mostly influenced by Continental European civil law traditions although some specific statute law of common law origin has been adopted and blended in Thai jurisprudence. The main statutory basis for governing private transactions is the Civil & Commercial Code (CCC) which is amended from time to time to cope with social and economic changes. The CCC retains the principle of freedom of contract. This means parties have autonomy in concluding an agreement, so long as the purpose of the agreement is not prohibited by law or contrary to good morals, or against public policy.

(i) Offer and acceptance

A contract is deemed to be concluded and binding where the formal requirements for forming a contract are met i.e. offer, acceptance, intention to create legal relation, capacity, formality etc. Like other jurisdictions, the general rule of contract under the CCC is that a contract is concluded and binding where the offer is accepted and the acceptance is communicated from the offeree to the offeror. The postal rule under the common law tradition is not imported into Thai legal system.

Presently there remains no concrete legislation in Thailand which address online contractual situations. Thai courts are forced to apply traditional laws to the e-commerce transactions. However a series of proposed e-commerce laws are being drafted to ensure an adequate legal framework for online transactions.

S. 354 of the CCC provides "(a)n offer to make a contract in which a period for acceptance is specified cannot be withdrawn within such a period." S. 356 further provides "(a)n offer made to a person who is present without specifying a period of acceptance may be accepted only there and then. This applies also to an offer made by one person to another on the telephone."

It might theoretically be argued that S. 356 cannot directly apply to international

electronic commerce i.e. on-line commercial transactions made over EDI, e-mail, Internet, etc. Telephone communications are two-way communications through which the parties concerned interactively and simultaneously communicate whereas the messages communicated over the EDI, e-mail and the Internet can be stored in the computer. The receiving party may not immediately retrieve the information transmitted although he can if he wishes receive it in real-time. In this situation, S. 356 shall not apply.

In the Supreme Court Decision No. 3046/1994 (B.E. 2537) concerning a contract for the purchase of rice made over telex, the Supreme Court held that the contract is complete where the offer and acceptance is made over the telex. The contract was however unenforceable on the ground that the contract formation for purchasing of material with a price over Baht 500 was not met.

This Thai court decision is consistent with English case law. In Entores Ltd. V. Miles Far East Corporation, it was held that telex communications are instantaneous, and thus a contract made by telex is made where the telex is received.

Under Thai law, an agreement to sell or to buy any property, or a promise of sale of such property is not enforceable by action unless there is some written evidence signed by the liable party or unless a deposit is given, or part performance is undertaken. For this discussion, it is assumed that the other formalities necessary to form an on-line contract (i.e. intention of the parties, contractual capacity and purpose of entering into a contract) are complete and legal.

(ii) Which law governs the contract?

Where a contract involves a party located outside of the Thai jurisdiction, under Section 13 of The Act on Conflict Laws B.E. 2481 (A.D. 1938), the parties to the contract may determine which law they intend to be bound by. However in circumstances where there is no agreement as to the applicable jurisdiction of law, then the provisions of Section 13 may provide guidelines. These include:

"If the parties are of the same nationality, the laws of that country will apply"
"If the parties are not of the same nationality, the law of the country where the contract has been made will apply"
"In instances where a contract has been made between parties at a distance, the country
where the contract is deemed to have been made is the country where notice of the acceptance reaches the seller. if such a place cannot be ascertained, the law of the country where the contract is to be performed shall govern"

(iii) Contract terms/liability

Where there is no express provision under the CCC to directly apply to a contract made via modern technological facilities, Thai courts, under the civil law approach, may employ the general principles of law which are recognized under S. 4 of the CCC to regulate that commercial transaction.

Similar to the common law approach on the issue of contract terms/liability, Thai law also recognizes the principle of freedom of contract. The parties are free to set the terms they wish, so long as they are not inconsistent with S. 149-151. With respect to a contract of sale, the title of the goods pass from the seller to the purchaser when the contract is entered into provided that the contract does not stipulate any condition or time clause. If it does, the title is not transferred until the condition is fulfilled or the time requirement is met. Under general terms/liability as prescribed in the CCC, the seller is under the duty of good faith to provide ordinary quality of goods suitable for the purchaser's purpose and to deliver the goods within a reasonable period of time, except where the seller is entitled to retain the goods until the payment is made.

Section 503 of the CCC, sale by description, is explicitly applicable to sale by an on-line transaction e.g. Internet sale. Section 503 states that (i)n a sale by description, the seller is bound to deliver property corresponding to the description. Section 504 expressly states that legal action in relation to non-correspondence in a sale by description must be filed within one year after delivery.

The Unfair Contract Terms Act (1997) play an important role in consumer protection against suppliers who normally have high bargaining power and set standard contract terms. This Act may be relevant to the sales of goods on the Internet, allowing Thai Courts great discretion in the determination of whether online contract terms are unfair or unreasonable. Any term which places an excessive burden on one party may likely violate the Act, in which case the Court may limit the enforceability of such unfair contractual agreement to what the Court deems to be fair and reasonable between the parties on a case by case basis.
As a practical matter, legislation is applicable only within a state jurisdiction. It has no extra-territorial enforcement beyond a state territory. It is controversial as to whether a national Thai statutory law sufficiently governs Internet sales. International e-com raises a large number of legal questions, including the applicability of formal requirements such as writing or signature and where the agreement is made. These issues could well lead to issues as to applicable law and legal jurisdiction in any litigation for the settlement of e-com disputes.

(iv) Electronic Transaction Bill

The purpose of this Act is basically to supplement the law that required formalized transactions to be in writing. According to this Act, where any transaction is required by law to be in writing, that requirement is met by electronically-transmitted information (or data message, as used in the Model Law) if the information contained therein is accessible so as to be usable for subsequent reference.

Where the law requires any document or information to be presented or retained in its original form, that requirement is met by a data message if:

(a) there exists a reliable assurance as to the integrity of the information from the time it was first generated to its final form, as a data message or otherwise; and
(b) that information presented, is capable of being displayed to the person to whom it is being transmitted.

In any legal proceedings, no laws on evidence shall be applied to deny the admissibility of a data message as evidence, simply because it was made electronically.

Information in the form of a data message shall be given due evidentiary weight. In assessing the evidentiary weight of a data message, regard shall be given to the reliability of the manner in which (i) the data message was generated or communicated, (ii) the integrity of the information was maintained, (iii) its originator was identified and (iv) any other relevant factors.

6 JETRO’s NOTE: As of January, 2002, Electronic Transaction Law and Electronic Signatures Law are combined into one called Electronic Transaction Act which will be enforced 3rd April, 2002.
The Act will also set up a regulatory body called the "Electronic Transactions Board". The Board will have the authority to designate certain businesses, including the certification authority business, to be under its control.

The Act also sets up the principles and reliable methods for promoting public confidence in the integrity and reliability of electronic commerce, and for fostering the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium.

Where the person is required to sign with an electronic signature in an electronic record, that requirement is met, if:

(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and
(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in light of all circumstances, including any relevant agreement.

The electronic signature shall not be limited or denied by law simply because it was made electronically. The Act also establishes the principles upon which the certification authorities will rely when issuing a Certification of Authenticity for electronic signatures.

The introduction of the Act will hopefully resolve many of the inadequacies which affect the traditional laws presently used to deal with the contractual questions concerning the online and Internet environment.

(v) Enforceability of web wrap / click-wrap agreements

Web-wrap/click-wrap agreements follow the footsteps of shrink wrap licence agreements. Thailand has no specific legislation or body of law that directly applies to "shrink-wrap licences" beyond the general law of contract. Thai law of contract does not provide a clear and specific answer as to whether a shrink-wrap would bind the parties, particularly the end-users.

There has been no dispute brought before a Thai Court on the issue of shrink-wrap licence
agreements. However, if a shrink-wrap licence agreement is globally recognised, there is no reason why web-wrap/click-wrap agreement should not be regarded as binding on the parties. The enforceability is generated by the industry's practice and end-users' acceptance. This notion can also be applied to the on-line contract in accordance with the principle of freedom of contract and the general principles of law as prescribed in the CCC. Reading S. 150 in conjunction with S. 361 para. 2 of the CCC, one would interpret that a web-wrap/click-wrap agreement could be enforceable since a contract is entered into when an offer is accepted. An acceptance can be implicit or explicit.

Another ground to support the enforceability of web-wrap/click-wrap agreement is that on-line agreements are naturally embodied in the on-line system. The distinct example is well illustrated in an Internet sale. At least, a contractual relationship comes to exist between the on-line system provider and the on-line user. Before being permitted access to an on-line system or some areas of service, the on-line user is led through a set of screens containing implied contract terms shown as "O.K." or "Cancel" or more specifically the on-line user must type his/her name indicating that he/she accepts the contract terms. It is beyond reasonable doubt that the on-line user is given the choice to freely accept or reject the terms. This is far more enforceable than the "shrink-wrap" licence agreement found in almost all commercial software packages.

The critical question on the issue of web-wrap/click-wrap licenses is as to which national law should be applied to the contract between the on-line system providers and on-line users and as to which national court should be the competent jurisdiction.

5. **Philippines**

Under the Civil Code, the elements of a contract are: consent of the contracting parties; an object, certain which is the subject matter of the contract; and cause of the obligation which is established.

(i) **Consent**

Consent means that there has been an offer and an acceptance of the cause and object of

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the contract. The acceptance must be conveyed to the party making the offer.

(ii) Object

All things within the commerce of men and services not contrary to law, morals, good customs, public order and public policy may be the object of a valid contract.

(iii) Cause

Cause is understood as "consideration" in common law jurisdictions. Cause has been defined by the Philippine Supreme Court as "the essential reason which moves the contracting parties to enter into the contract." Contracts without cause, or with an unlawful or illegal cause produce no effect whatsoever.

Persons who may not enter into contracts:

Under Philippine law, minors (below the age of 18) cannot enter into valid contracts, and contracts entered into by them are not binding upon them. Insane persons and deaf-mutes who do not know how to write likewise cannot enter into contracts.

(iv) Particular forms of contracts

In certain cases, the law requires that a contract must appear in a public document – i.e. that the document must be notarized. The most common of these contracts are those which deal in the sale of real estate, or those which create, transmit, modify real rights over immovable property. However, section 16 of the ECA states that "an offer, the acceptance of an offer and such other elements required under existing laws for the formation of contracts may be expressed in, demonstrated and proved by means of electronic data message or electronic documents and no contract shall be denied validity or enforceability on the sole ground that it is in the form of an electronic data message or electronic document, or that any or all of the elements required under existing laws for the formation of the contracts is expressed, demonstrated and proved by means of electronic documents",

(v) Enforceability of "Web Wrap" licenses
A "web wrap" agreement is when a consumer reads a copy of a license agreement on his or her screen and is advised that by clicking on an "Accept" button, he or she is deemed to have read and agreed with the terms of the license.

In "web wrap" agreements, by clicking on an "Accept" icon, the consumer may be considered as expressly manifesting his or her consent to be bound by the terms of the license agreement. As a practical matter, the position of the "Accept" icon should be after the entire license is scrolled down, to enable the licensee to read through the entire agreement. It would also be advisable to place a statement in the license agreement that reads:

"I hereby manifest that I am at least 18 years of age or older, and that I am authorized to give consent to, enter into, or otherwise be bound by the terms and conditions of, this license agreement."

Though the Philippine Supreme Court has not ruled on the enforceability of "web wrap" agreements, we believe that all the requisites to a valid contract are present in such agreements.

(vi) Digital signatures

Digital signatures are legally recognised in the Philippines. Section 8 of the ECL makes it clear that an electronic signature on an electronic document will be equivalent to the signature of a person on a written document. The functional and legal equivalence exists only if it is proved that a prescribed procedure, not alterable by the parties interested in the electronic document, existed under which-

a) A method is used to identify the party sought to be bound and to indicate said party's access to the electronic document necessary for his consent or approval through the electronic signature;

b) Said method is reliable and appropriate for the purpose for which the electronic document was generated or communicated, in the light of all the circumstances, including any relevant agreement;

(c) It is necessary for the party sought to be bound, in order to proceed further with the
transaction, to have executed or provided the electronic signature; and

d) The other party is authorized and enabled to verify the electronic signature and to make the decision to proceed with the transaction authenticated by the same.

Section 9 provides a statutory presumption that in any proceedings involving an electronic signature, it shall be presumed that the electronic signature is the signature of the person to whom it correlates, and that the electronic signature was affixed by that person with the intention of signing or approving the electronic document unless the person relying on the electronically signed electronic document knows or has notice of defects in or unreliability of the signature or reliance on the electronic signature is not reasonable under the circumstances.

(vii) Encryption policy

The Philippines has no encryption policy or any law dealing with encryption.

6. Indonesia

According to the Indonesian Civil Code, to be valid, a contract has to fulfill four basic requirements, i.e.:

- it must be concluded by competent parties;
- these parties have consented to be bound by the contract;
- the contract has a definite object;
- the cause of the contract is permissible.

Clearly all of these requirements must be fulfilled by contracts that are concluded by electronic means, as well as those concluded by traditional means (e.g. by the parties meeting each others in person). In this section our focus will be on the requirement for consent and competence. We will assume that the electronically concluded contracts that we are talking about have definite objects. The issue of permissible cause will be dealt with below in the section on the protection of the public, below.

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(i) Issues on competence

According to the Indonesian law, contracts that are signed by incompetent parties are voidable. Incompetent parties are minors, persons who represent other parties without authority and legal entities that are barred by their Articles of Association from concluding the contract concerned. A minor (i.e. those who are under the age of 17) who has signed a contact may submit a claim (presumably through his guardian) to an Indonesian Court to void this contract. Likewise companies may ask the Court to void contracts signed on their behalf by other parties who actually have no authority to represent them.

Competence, presumably, would not be a problem in electronically concluded contracts between parties who knew each other well such as contracts signed via facsimile between companies that have extensively negotiated them beforehand. There is also little chance that competence would matter between parties who are conducting electronic commerce within a restricted environment where only certain parties may join and conclude contracts with each other, such as in a stock exchange. Competence, may, however, becomes a potential problem in situations, such as selling goods through the Internet, where the parties have no prior knowledge of each other and there is no guarantee on each party’s competence. This problem is particularly crucial for the electronic commerce through the Internet where parties could find ways to hide their true identity.

Currently, the law does not provide us with any comforting solution in this matter. The defense of good faith would not work very well in cases of incompetent minors because the law is strongly protective of this group. Likewise, in other cases of incompetence, unless the contracting party is able to proof fraud or other unlawful acts on the part of his wrongly-represented counterpart, he cannot sought remedy from this counterpart, rather he must sue the party who wrongly represented the counterpart for fraud. There are no general standards on how far a party should go in checking his counterpart’s competence in concluding an electronic transaction. Everything is approached on a case-by-case basis.

On the other hand, we must consider that the burden of claiming and proving incompetence lays on the minor’s guardian and the wrongfully represented parties. Realistically, these parties’ decision to submit claims of incompetence to Court would depend on many practical issues, like the cost and benefit of going to Court and the possibility for proving incompetence. This means claims for incompetence are unlikely to be raised in cases where the amount concerned are too small to warrant the cost of
Nevertheless, it is always advisable to take all practical precautionary measures to prevent claims of incompetence. In situations where the transaction is routine and involves the public in general, such as soliciting merchandise through the Internet, it would be advisable to set up procedures for identification of prospective clients.

(ii) Issues on consent

The Indonesian Civil Code does not define when parties to a contract consented to be bound. Well established doctrines, however, provides that the parties are considered bound when they have reached agreement, i.e. when one party offer is accepted by the other party. It is generally held that contract is formed the exact moment when this acceptance is received by the offeror. For instance, the moment a mail containing a message confirming acceptance of the terms of a contract arrived in the address of the party offering these terms is the moment the sender and the receiver of this mail became bound by a contract containing these terms.

Connected to this matter is the question of the correctness of the content of an acceptance or an offer received by parties to a contract. The principle of good faith provides that messages that are clearly mistaken or unintentional should not be regarded. This means a party may not rely on messages that are clearly unreasonable. Furthermore, due to the technical unreliability of some means of telecommunication, doctrine held that the party who requires use of a particular means of telecommunication should bear the risk of mistaken transmission. For instance, once a party requests that a message confirming an order be delivered via facsimile, the consequence of any mistake by the facsimile machine in transmitting this message is borne by this requesting party.

Applied to electronic commerce, the above rules and principles may cause problems. Some electronic commerce means would make it hard to decide when a message accepting an offer is received. For instance, technically, e-mail messages have to pass through so many stages each of which is operated by different parties that it becomes hard to decide at which stage an acceptance delivered this way can be regarded as received by the offeror. The principle of good faith would be hard to apply to situations whereby both offer and acceptance is given automatically by electronic means. If applied consistently, the rule that the party requiring use of a particular means of telecommunication should
bear the risk of this request would be disadvantageous to vendors in the Internet who request buyers to send their orders via e-mail, a media which reliability is often questioned.

Counterbalancing this situation are the principle of freedom of contract and the role of custom in contracts. Parties engaging in electronic commerce are free to provide among themselves how they would become bound by their contract. The doctrines described above are only applicable to the extent the parties do not provide otherwise themselves. Therefore it is possible to provide in a commercial website that anyone who clicked a particular icon shall be regarded as bound by the certain terms and conditions. Furthermore, since contracts should be interpreted within the context of customary laws (as far as these contracts do not provide otherwise), it is possible to held that certain rules to conclude a contract is customary among those who regularly engage in electronic commerce so that they should reasonably regarded to be bound by these rules. For instance, people who have bought goods through the Internet should be aware that clicking certain icons is a customary way of indicating acceptance so they should not be able to held that they are mistakenly bound when they click these icons.

The advisable course to take in this situation is to clearly indicate in the terms of a contract provisions on how acceptance can be expressed and would be regarded as given and received, e.g. by sending certain messages and later confirming them by some other means. To avoid risk due to unreliable transmission, it would be advisable to give the other party the choice of means of communicating their offer or acceptance. To guard against mistake and for clarity, it might be advisable to provide for confirmation in form of hard copy of the electronically communicated contracts. This approach would make especially good sense with regard to certain contracts that has substantial value.

(iii) Jurisdictional Issues

The focus of this section is the problem of determining whether or not Indonesian law would be applicable to transactions carried out electronically. Our particular concern is determining whether or not civil and criminal law rules would be applicable to these contracts.

Civil law
With regard to civil law, the basic rule is that unless the parties have specifically provided
which legal regime should govern their relationship, this question would be decided on the basis of traditional doctrines of private international law. Generally, these doctrines are developed before electronic commerce came into being and therefore, their application to electronic commerce can be problematic and may produce unsatisfactory results. For instance, doctrine which held that the law of the jurisdiction where the contract is concluded is the governing law. It would be impossible to apply this doctrine to the virtual world of electronic commerce where it is very difficult to determine where a contract is concluded. Another example is the doctrine which held that the law of the jurisdiction where the transaction is carried should be the governing law. This doctrine would be impossible to apply to certain transactions that are carried out entirely through electronic means, e.g. when a party purchases software via the Internet, and pays for it and downloads it directly to his computer by e-mail.

In view of the above difficulties, it would be advisable to provide clearly in electronic contracts which law would be applicable to these transactions. This approach is not without its risk. Although, generally, choice of law is acceptable on the basis of the principle of freedom of contract, this choice is limited by public policy which may prohibit choice of law in certain transaction and prescribe that domestic law shall be applicable to them. The limit of public policy is not very clear. Although doctrine held that they only consist of fundamental principles of the Indonesian legal system, sometimes the Courts classify mandatory rules of Indonesian law (that are not fundamental in nature) as public policy rules which preclude choice of law in contracts whose object are regulated by these rules. For instance, import of rice is regarded as a matter of public policy because it is regulated under a special mandatory import regime. In this situation, it would be advisable to seek advice on whether or not any rules which would prevent choice of law exist.

**Criminal law**

The same problems arise with regard to the applicability of Indonesian criminal law to electronic transactions. Basically, the Criminal Code is applicable to:

- crimes committed within Indonesia;
- crimes committed by Indonesian overseas, provided that these crimes are also considered as crimes in the overseas jurisdiction concerned;
- certain crimes committed overseas by foreigners.
The law does not specifically provides how a crime can be regarded as committed in Indonesia. Obviously, the place where the actual physical criminal act is carried out should determine whether or not Indonesian criminal law is applicable. The application of this principle is problematic considering the virtual nature of certain electronic media, such as the Internet which makes it hard to decide where the parties actually carry out their transactions. Doctrine, however, has expanded this principle to enable crimes that are carried out outside Indonesia to be regarded as committed inside Indonesia on the reason that:

- the effect of the crime is felt within Indonesia, such as in the case where a person is given a slow-acting poison overseas which only becomes lethal when he has arrived in Indonesia;
- Indonesia is only one of the locations where the crime is committed, such as the case where a person holds another person hostage and transports this hostage through several countries, including Indonesia;
- the instrument by which the crime is committed has effect within Indonesia, such as in the case where a person defames another person through foreign media which is also accessible within Indonesia.

On the basis of these doctrines, it would be possible to classify actions that are carried out by electronic means as being carried out in Indonesia. The example in point C above is applicable to cases of commercial websites containing defamng or fraudulent materials. Another example: It is possible to regard a fraudulent contract that is concluded electronically as being concluded in Indonesia on the basis that its effect is felt inside Indonesia. So far, however, this hypotheses has not yet been tested in an actual case.

7. Australia

(i) Contracting

**Introduction**

Under Australian Law, the basic elements required for the formation of a contract are an intention to create contractual relations; an agreement which is usually constituted by an

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offer and an acceptance; and consideration. Consideration is required because a mere promise is not legally enforceable unless it constitutes part of a reciprocal exchange.

**Offer**

Australian courts have distinguished an offer from an "invitation to treat". An invitation to treat is a statement or conduct which invites each recipient to make an offer or enter into further negotiations. Such invitations cannot be "accepted" to form a contract.

The distinction between an offer and an invitation to treat is the willingness to be bound without any further negotiations. During the currency of an invitation to treat, the parties are still at a negotiating stage.

Whether a web site can be regarded as an invitation to treat or an offer remains to be tested. Similarities can be drawn from advertisements and display of goods in a shop. An Australian court has ruled that "the display of goods in the shop window or shelf, complete with price markings is usually interpreted as an invitation to treat. Whether it is ….. an offer depends on the intention of the trader to be gathered from all the circumstances" (Reardon v Morley Ford Pty Limited (1980) 49FLR401). In recent years web sites have been predominantly used to sell products and services online. The interactive nature of present web sites suggest that these sites are less likely to be viewed as merely being promotional. Promotional statements made in advertisements have generally been held to be no more than an invitation to treat, or to be outside the realm of contract altogether as being "mere puffery" not intended to be legally binding. In general, if a web site has been set up with a standing offer which is capable of acceptance, it will be construed accordingly.

**Acceptance and the postal rule**

Under Australian law the general rule is that a contract is formed where and when the acceptance to the offer is received. However, where the acceptance of the offer is communicated by post, the contract is deemed to be formed at the time and place that the acceptance is posted. This is known as the postal rule. It does not apply to instantaneous communications (facsimiles, telephone and telex). Electronic mail would most likely be classified as an instantaneous communication, despite any possible time lag in delivery of the message. No cases in Australia have been decided on this issue, but Australian courts have been generally reluctant to extend the application of the postal rule.
Electronic Transaction Act


The Commonwealth legislation only applies to those pieces of federal legislation listed in the regulations to the Act. From 1 July 2001, however, the Act will apply to all federal legislation except those listed in the regulations. Each of the States and Territories has agreed to use the Act as a model for e-commerce legislation and will be enacting mirror legislation extended the provisions of the Act to the laws in each State and Territory. At the time of writing, legislation has been enacted in Victoria, given Royal Assent in NSW, Tasmania and Northern territory (Proclamation date to be announced) and passed in South Australia (awaiting assent).

The intention of the ETA is to provide Australian businesses and the community the option of using electronic communications in everyday transactions. The legislation is intended to "enable" electronic transactions without prescribing a particular kind of technology to be used.

The general rule under the Act is that a transaction is not invalid because it took place by means of one or more electronic communications. The ETA makes it clear that transactions conducted using paper documents and transactions conducted using electronic communications should be treated equally by the law.

1. Section 8 of the ETA states that a transaction is not invalid because it took place wholly or partly by means of one of more electronic communications.

2. Section 11 of the ETA allows a person to produce a document in the form of an electronic communication where the law requires the production of a paper document.

3. Section 12 provides that if a person is required to record or retain information or documentation in writing, that requirement can be met by retaining or recording the information in electronic form.

The Act has a two step implementation process. Prior to July 2001 the Act will only apply to laws of the Commonwealth specified in the regulations. After that date, it will apply to
all laws of the Commonwealth unless they have been specifically excluded by the regulations.

(ii) Digital Signatures

**General Contracting Principles**

Under general contract law, digital signatures have been recognized as a way of evidencing the requirement of proof of intent for an electronic contract. Even with the arrival of the Electronic Transactions Act, there remains general acceptance under common law to the force and validity of digital signatures.

**Electronic Transaction Act (Cth)**

The Electronic Transactions Act 1999 (Cth), discussed above, also contains provisions relating to the use of digital signatures Section 10 of the ETA provides that if the signature of a person is required, that requirement may be met by use of another method as long as certain requirements are met. If under a law of the Commonwealth, the signature of a person is required, those requirements may be satisfied electronically if:

- the method is used to identify the person and to indicate the person's approval of the information communicated;
- the method was as reliable as was appropriate for the purposes of the communication; and
- there was consent (s.10).

The aim of this Act is not to endorse a particular digital signature technology but rather to provide flexibility for people and businesses to determine the kind of technology that is appropriate for their particular needs.

**Gatekeeper**

"Gatekeeper" refers to the Federal government initiative by the government agency Government Online that was established to provide for the use of public key technology in government. Under the Gatekeeper strategy, public and private organisations can apply to become accredited service providers supplying government agencies with identification and authentication technology (ie digital signatures) or encryption technology. Presently only two bodies have received full accreditation, the Australian Taxation Office and Baltimore Technologies.
ABN DSC Scheme
The ABN-DSC is a government proposal which will entitle every Australian business with a current ABN to apply for a digital signature certificate based on their ABN.

The main elements of the proposed scheme are as follows:

1. Every Australian business with a current ABN can apply for an ABN-DSC. Each applicant will be entitled to one "primary" ABN-DSC and also a number of "secondary" ABN-DSCs. These secondary ABN-DSCs will also be linked to the applicant's ABN but may be used by particular departments or individuals within the organisation.

2. The ABN-DSC will be linked to the business' name and contact details. This will allow any recipient of digitally signed material will to verify, upon decryption, the identity of the sender.

3. Only one ABN-DSC will be required for a business to communicate with all government authorities. At this stage the focus will be on federal agencies but it is hoped that the scheme will eventually allow electronic transactions with state government agencies as well.

4. ABN-DSCs will initially be issued by the Australian Tax Office. It is proposed, however, that ABN-DSCs will soon be available from private sector certification authorities which have received accreditation from the government.

Any person or body that receives accreditation under Gatekeeper or the ABN-DSC scheme to provide digital signature technology will be called a Certification Authority (CA).

8. Japan

(i) Offer

As in the Common Law, there is a distinction made in Japanese law between an offer for

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sale and an invitation to offer. However, unlike in shops in the real world, goods displayed in a virtual shop may be offered for sale. If Mr. X does something and Ms. Y merely says OK, and if in the context of these acts it is appropriate to consider that Mr. X intended for a contract to be concluded, Mr. X’s behavior would constitute an offer. Factors that should be taken into consideration are (a) whether an important portion of the terms and conditions was manifested, and (b) whether the identity of the person matters. Since in a virtual mall consumers usually have no choice other than whether or not to click the Accept-to-Buy icon, there can be no room for negotiation. In cyberspace, the identity of the customer usually would not matter as long as the payment is secured. In most cases, when the seller’s computer receives an electronic instruction from a customer's financial institution indicating approval, software in the seller’s computer will automatically send shipping instructions without further contemplating whether to sell. Given the typical nature of online shopping, the display of products in a virtual mall would probably constitute an offer for sale in most cases.

(ii) Acceptance

The general rule under Japanese law is that a contract becomes effective when the acceptance is dispatched unconditionally by the offeree to the offeror. This means that the contract would be formed when the consumer clicks on the Accept-to-Buy icon even if some communication error may have prevented the seller from acknowledging the consumer's acceptance.

(iii) Formalities

Japanese law generally does not require any formalities for offers or acceptances to be valid as such. There is no Statute of Frauds, and parties may make most types of contracts orally. If there is enough evidence establishing that the offeree agreed to the terms offered, an offeror may rely on it. In most simple sales contracts for consumer goods, for example, it would be easy to prove that the customer agreed to pay x yen for product Y. The Seller's electronic records showing that the customer clicked on the icon to buy product Y should be enough in this context.

In more complicated contracts, such as computer software license agreements, the structure of the seller's Web pages should be carefully designed. Having no court decisions, there is no definite answer to the question of enforceability of shrink-wrap license
agreements in Japan. However, the legal implications of Web-wrap, the online version of shrink-wrap, may be somewhat different from shrink-wrap licenses for software sold over the counter. Under a typical shrink-wrap license in the real world, the customer cannot break the wrapper until after the customer purchases the product. However, in a virtual mall, a customer has a choice to click on an Accept-to-Buy icon before the customer purchases the product. Further, with a carefully compiled sequence of screens or pages which would in effect be able to let the customer read the terms and conditions before rushing to click on the icon, it would be easier to prove that the customer read the terms and conditions than in a typical shrink-wrap license situation. Unlike shrink-wrap in the real world, the seller may obtain an electronic record showing that the customer clicked on the icon. Given these differences, the result possibly may be more favorable to sellers online than to those using shrink-wrap licenses.

(iv) Custom Prevails

If a custom exists which differs from any provisions of law or ordinances not concerned with public policy, and it is considered that the parties to a contract intended to conform to such custom, that custom will prevail.

General or standard contract terms are utilized throughout certain industries in Japan, such as insurance, banking and carriage. Under Japanese contract law, the enforceability of such general contract terms is based on the principle of custom prevails. Such customs, on the other hand, may be disregarded if a court finds that the particular general contract terms are, for example, in violation of public order and good morals under the Civil Code, or anti-competitive under the Japanese Antimonopoly Law.

This principle brings us to an interesting hypothetical situation:

Country X, where most major computer industries and technologies originated, enacted the Uniform Commercial Code in Cyberspace (UCCC). Byte-o-Soft, the biggest software company in Country X, sets up the largest all-in-one virtual mall in the world. In order to open a shop in the mall, tenants must agree to use the UCCC as the governing law in their contracts with customers. Six months later, almost all virtual malls, including Japanese malls, have come to use the UCCC as their governing law.

In the above situation, it would be possible for a Japanese court to find that the UCCC is
the governing law even if the virtual mall/shop concerned did not expressly state that the UCCC would govern.

(v) Declaration of Intent

In cases where no notice of acceptance is necessary, either by reason of a declaration of intent by the offeror to that effect or by business usage, the contract will come into existence at the time when any event takes place which can be taken as a declaration of intent to accept. If a bookseller sends a book to a person with an offer, and the person did not respond but nevertheless read and took notes in the book, this would constitute a declaration of intent to accept and a contract would be formed.

Digital goods such as computer software may be sent online without being ordered by consumers. Whether the same thing could happen with the online distribution of a digital book is unclear. Query whether the customer could deface such a product unless he actually uses a binary editor.

(vi) Mere Silence

Mere silence of the offeree does not in principle constitute an acceptance under Japanese law. Thus, an offer with a note stating that silence shall be deemed as an acceptance ordinarily does not obligate the offeree to respond to the contrary. For example, if a bookseller sends a book to a person without it having been ordered, with a note to the effect, "If you do not want to buy this book, send it back to us within x days, otherwise you will be deemed to have accepted," this does not oblige the person to send the book to the bookseller. The person is liable only if his willful or grossly negligent conduct resulted in damage to the book.

Mere silence may constitute an acceptance in exceptional cases, taking into consideration the surrounding circumstances. For example, a debtor asked a creditor for a five-year extension of the loan's term stating, "If you do not agree, please negotiate with Mr. X who is in charge of settlement of my debts". The creditor did not contact Mr. X at all, and the debtor relied on this. A court held that this constituted an implied acceptance of the term's extension by the creditor.

The result may not be the same in cyberspace. For example, assume that a Web page tells
visitors, "We are offering you the following products at xx yen each. If you do not agree, please leave this site within yy minutes". A visitor’s silence i.e., just being in the site without clicking an icon, probably would not constitute a declaration of intent to be bound.

(vii) Merchant’s Deemed Acceptance

The Commercial Code provides an important exception to the above general principle:

If a merchant has received an offer to enter into a contract which falls within the scope of the business carried on by him, from a person with whom he has regular business relations, he shall without delay dispatch notice of acceptance or rejection. If he has neglected to dispatch such notice, he shall be deemed to have accepted the offer [emphasis added].

The definition of merchant is complicated. In sum, (i) all corporations established under the Commercial Code i.e., joint stock companies, partnership companies, limited partnership companies and limited liability companies, and (ii) individuals or corporations dealing in certain areas of business, are merchants.

Regular business relations refer to continuous relationships which have existed and are expected to exist in the future. Several court cases have held that the existence of one or two prior transactions was not enough to constitute regular business relations.

The content of the offer must be within the scope of the offeree's business. In other words, the subject matter of the offer must comprise a major part of the offeree's business. For example, if a grocery store receives an offer to sell soft drinks, buying the soft drinks is within the scope of the grocery store’s business. However, if the grocery store receives an offer of terms and conditions for the termination of its office lease, that would not be. By the same token, if the grocery store receives an offer to update the spreadsheet software which the grocery store uses for tax return purposes, it would not be within the Commercial Code exception, because updating the software i.e., conclusion of a software license, is not within the scope of the offeree’s business in this context.

(viii) Cross-Border and Jurisdictional Issues

Under Japanese conflict of laws rules, whether displaying products in a virtual mall or
clicking on an Accept-to-Buy icon constitutes an offer or acceptance, whether a contract is formed by such acts, and the law applicable to these issues, are all determined by the parties’ choice of governing law. In the absence of a choice by the parties, the applicable law would be the laws of the place of the conduct.

It may be possible for a seller in Japan to ensure that Japanese law is applicable in determining there is an acceptance. This could create unreasonable results for a buyer who resides in a foreign country. For example, as stated above, if a merchant located in New York has received an offer to enter into a contract which falls within the scope of his business from a Japanese corporation with whom he has regular business relations, he will be deemed to have accepted the offer should he neglect to dispatch notice of acceptance. If there are no such laws in New York, this could be a trap for the unwary. A Japanese scholar, noting this unreasonable result, opines that the governing law to determine the existence of an offer and acceptance should be the law of the habitual residence or principal place of business of the party performing the act.

Thus, determination of the place of the conduct is an important issue in Japanese conflict of laws rules. Electronic commerce is carried out between persons who are physically located in different places in the real world. Article 9 of the Law Concerning the Application of Laws provides that:

(1) If an intention is declared to a person in a place having a different law, the place from which the declaration of intent is dispatched is deemed to be the place of conduct.

(2) The creation and effect of a contract are governed by the law of the place from which the offer is made. If the offeree, at the time of acceptance, does not know from where the offer was made, the place of the offeror’s domicile is deemed to be the place of conduct [emphasis added].

In commerce in cyberspace without an agreed governing law, the place of the country where the offer was made is the place of conduct, and therefore the laws of the country where the offeror is located would be the governing law. If, as stated in the above, displaying products in a virtual mall is an offer, the laws of the country where the shop owner (or its Web server) is located would be the governing law under Japanese rules.
II. Electronic Evidence

1. Singapore

Before it is printed out as a hard copy, computer evidence is ephemeral or transitory: it is usually easily alterable, often without leaving any sign of such alteration. It is therefore no surprise that the source or authenticity of evidence received from a computer used in electronic commerce is often open to question because the tests that can be used to ascertain the authenticity of say, paper evidence, simply cannot be repeated with computer evidence. Added to that, electronic data evidence are usually produced from complex systems and such evidence are usually not easily understood.

Evidence in Singapore law is categorized as falling into two main classes, direct and hearsay. The basic common law principle is that direct evidence is admissible, that is to say, receivable by the Court, whilst indirect or hearsay evidence is not. Direct evidence is that given orally during court proceedings (or in writing by way of sworn affidavits provided that the deponent of the affidavit appears in court to confirm the contents of the affidavit and to be available for cross-examination) by a witness of things he or she had actually seen, heard or perceived. Hearsay or indirect evidence is that which is reported by a witness from some other source. When hearsay evidence is tendered to show the truth of the statement being made, then the hearsay evidence is inadmissible.

The main argument against why a computer record should not be admissible as evidence is because it is hearsay. Set against that, there are certain provisions under Singapore’s Evidence Act that seek to deal with the admissibility of computer records, which might otherwise be inadmissible for being hearsay.

(i) New provisions relating to computer evidence under Singapore’s Evidence Act

The legislature in Singapore has made recent amendments to the provisions in the Evidence Act (the "Act") relating to the admissibility of computer evidence. The

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amendments came into force in March 1996, and are quite a departure from the former regime which had existed prior to the amendments. It is worth noting that the former provisions relating to the admissibility of statements produced by computers was loosely based on certain provisions of the English Civil Evidence Act 1968 and the Police and Criminal Evidence Act 1984.

Under section 35(1) of the Act, as amended, where computer output is tendered in evidence, the output will be admissible if it is relevant or otherwise admissible, and it is:

- expressly agreed between the parties that neither the authenticity, nor the accuracy of its contents, are disputed;
- produced in an "approved process"; or
- shown by the party tendering the output that (i) no reasonable ground exists for believing that the output is inaccurate because of improper use of the computer and that no reason exists to doubt or suspect the truth or reliability of the output, and (ii) there is reasonable ground to believe that at all material times, the computer was operating properly or, if not, that in any respect in which it was not operating properly, the accuracy of the output was not affected by such circumstances.

It is worth noting that relevance, which has always been key to the issue of the admissibility of any evidence, has been emphasized in the amended provision; and that the reference to whether the computer had been operating properly at the material time, which was a requirement under the old provisions, has been retained.

The Act proceeds to define an "approved process" to mean a process that has been approved in accordance with the provisions of any regulations made by:

- the Minister, or
- by a person or an organization appointed by the Minister to be a certifying authority under such regulations.

Additionally, it is provided that where the computer output is obtained from an "approved process" and duly certified as such by a person holding a responsible position in relation to the operation and management of the approved process, it shall be presumed that it accurately reproduces the contents of the original document unless the contrary can be proven.
Turning to the two-limb test in the new section 35(1)(c) mentioned above, an exception to the hearsay rule is provided in that where a certificate is signed by a person holding a responsible position in relation to the operation or management of the relevant computer system which:

- purports to identify such output and describes the manner in which it was produced;
- gives particulars of any device involved in the processing and storage of such output; and
- deals with the matters mentioned in section 35(1)(c),

then the certificate shall be sufficient evidence of the matters stated in the certificate.

In the above instances where a certificate is produced, provision has been made such that it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it. However, safeguards are provided in that where a person making a statement in a certificate knowing the statement to be false or does not reasonably believe that the statement is true, such a person shall be guilty of an offence which is punishable upon conviction by a fine or an imprisonment term of not exceeding 2 years, or both.

A certain degree of protection has been afforded in relation to the admissibility of computer output where express agreement had been made to the effect that neither the authenticity, nor the accuracy of the contents of the computer output, are disputed. Section 35(2), as amended, provides that notwithstanding such agreement, the computer output shall not be admissible in evidence if:

- tendered on behalf of the prosecution in criminal proceedings, if at the time the agreement was made, the accused did not have legal representation; or
- in any proceedings, the agreement was obtained by means of fraud, duress, mistake or misrepresentation.

Additionally, it is provided that any computer output tendered in evidence, and duly authenticated, shall not be inadmissible as evidence of proof of the contents of the original document merely because:

- certain parts or features of the original document, such as boxes, lines and colors, do
not appear in the output if such parts and features do not affect the accuracy of the relevant contents; or

- it is secondary evidence.

The new provisions reserve for the Court a discretion to call for further evidence if it is unsatisfied that the computer output sought to be admitted under section 35 accurately reproduces the relevant contents of the original document. In such instances where further evidence is called by the Court, such further evidence may be produced by way of affidavit made:

- by a person occupying a responsible position in relation to the operation or management of the certifying authority (of which, see above);
- by any other person occupying a responsible position in relation to the operation of the computer at the relevant time;
- by the person who had control or access over any relevant records and facts in relation to the production of the computer output;
- by the person who had obtained or been given control or access over any relevant records and facts in relation to the production of the computer output; or
- by an expert appointed or accepted by the Court.

Provisions have been made to allow the Court to retain its discretion, in spite of the provisions relating to the call of further evidence outlined above, to call for oral evidence to be given of any matters concerning the accuracy of the computer output.

Guidelines have been given under the new provisions as to the weight to be attached to any computer output tendered as evidence under section 35, as amended. The Court is to have regard to all the circumstances from which inference can be reasonably drawn as to the accuracy, or otherwise, of the computer output, and in particular:

- whether or not the information which the output reproduces or is derived from was supplied to the computer, or recorded for the purpose of being supplied to it, contemporaneously with the occurrence or existence of the facts dealt with in that information, where such contemporaneity is relevant; and
- whether the supplier of the information or any person involved in the processing of such information had any incentive or motive to conceal or misrepresent the information so supplied.
(ii) Practical considerations

The principal issue that is likely to arise from the operation of section 35, as amended, is where there is a challenge to the computer output being inaccurate because of improper use of the computer, or where there is reasonable ground to believe that the computer was not operating properly.

In this regard, it is vital for parties engaged in electronic commerce to keep the system specification document, if one had been provided. Unfortunately, there appears to be no industry agreement as to how such documents should be prepared, and even with off-the-shelf packages, there may be no more than a user manual with additional "help" files on the disks containing the program.

If there is no system specification, the next best alternative would be to find the exchange of correspondence or meeting notes which were used in substitution for it. Only in the last resort should recourse be made to mere recollection.

Having established the system specification and a proper description of the hardware and software, the next step would be to determine with these and other surrounding documents what the parties thought the system was supposed to do. In this regard, it is again crucial for users engaging in electronic commerce to keep all documents relating to the operation of the computer filed away securely and in an orderly manner.

(iii) Electronic Transactions Act

As discussed above, the ETA establishes the legal admissibility of electronic and digital signatures, as well as electronic records.

2. Malaysia

Amendments to the Malaysian Evidence Act made in 1993 have now made it possible for a party wishing to adduce evidence in the form of, inter alia, electronic data stored in a

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computer, CD-ROM, magnetic diskette or documents produced by a computer, to do so with fewer obstacles.

The Evidence Act now provides that in any criminal or civil proceeding, a computer generated "document" (a word widely defined in the Act) or any statement contained in such document, is admissible as evidence of any fact stated therein. Computer generated records in the form of printed documents or even discs, tapes etc. containing electronic data are thus no longer hearsay and are admissible provided that the document was produced by the computer in the course of its ordinary use and this may be proven by a certificate to that effect signed by a person normally responsible for the management or operation of the computer.

Furthermore, the Malaysian Rules of the High Court (the "Rules") provide for, amongst others, the process of discovery of documents in civil litigation in the Malaysian High Court. While the Rules do not define the word "document", assistance may be gained from the Malaysian Interpretation Act which defines "document" as "any matter expressed or described upon substance by means, intended to be used or which may be used for the purpose of recording that matter". Thus the Rules could conceivably be used to effect the discovery of any evidence in electronic form which is relevant in a civil litigation.

A relevant development in the area of electronic commerce is the introduction of the Digital Signature Act 1997 ("DSA") by the Malaysian Government. The Act came into force on 1 October 1998. This piece of legislation is one of the several "cyberlaws" enacted in conjunction with the Malaysian Government’s Multimedia Super Corridor project.

The DSA provides that a document signed with a digital signature shall be as legally binding as a handwritten signature, an affixed thumbprint or any other mark and that a digital signature created in accordance with the Act shall be deemed to be a legally binding signature. The DSA also provides that a message shall be as valid, enforceable and effective as if it had been written on paper if it bears in its entirety a digital signature and the signature is verified in accordance with the procedure laid out in the Act.

Under the DSA, when a court is adjudicating a dispute relating to a document in which a digital signature appears and the signature is verified in accordance with the procedures set out in the Act, it shall presume: (i) the digital signature is the digital signature of the
person who is a subscriber under the procedures; (ii) the signature was affixed by the subscriber with the intention of signing the message; and (iii) the recipient of the signature has no knowledge or notice that the signer has breached a duty as a subscriber or that the signer does not rightfully hold the private key used to affix the signature.

3. The Republic of Korea

The Korean Code of Civil Procedure provides that a private document is presumed to be authentic if the person that made the document or his/her agent signed his/her name or impressed his/her seal thereon. Official documents are automatically presumed to be authentic. Electronic documents with digital signatures will have the same presumptive effect of authenticity. In case of disputes, electronic documents will have to be examined as documents as opposed to examination as evidentiary materials.

With the advent of the Electronic Transactions Basic Act, there is clear recognition of the admissibility of electronic evidence in courts. The ETBL provides that information prepared, transmitted, received or stored in an electronic form through the use of equipment having information processing abilities, such as a computer, shall be deemed a document which can be used in a court as evidence.

Article 7 of the ETBL stipulates that electronic documents may be admissible in Korean courts as general evidence.

4. Thailand

Authentication is a major factor of legal enforceability both substantively and procedurally. On the substantive law notion, authentication is an element of formation of a contract whereas in the procedural law respect it concerns the law of evidence and the issue of admissibility in the court. Under the Thai legal system, formalities are required in some special types of contracts. Pursuant to S. 152 of the CCC, an act (including a contract) which is not made in the formalities required by law, shall be void. The formalities of a

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contract can be indicated as in writing and with signature.

(i) Writing

Some types of juristic acts or contracts are required to be made in writing otherwise they are invalid. As a general principle of Thai law, whenever a writing is required by law, it is not necessary to be written by a person from whom it is required but it must bear his signature. This provision generally means that such document must be signed by both parties. However for the unilateral act or granting any right or benefit to a grantee or transferee, the Thai court is fairly liberal in interpreting that agreement in writing of these types simply signed by the transferor would be sufficient and valid.

In addition, the law requires that the transfer of this kind can be set up against the debtor or third persons only if notice thereof has been given to the debtor, or if the debtor has consented to the transfer; such notice or consent must be in writing. If the debtor has only received a notice of the transfer, he may set up against the transferee any defense which he had against the transferor before he received such notice. If the debtor had against the transferor a claim not yet due at the time of the notice, he can set off such claim provided that the same would become due not later than the claim transferred.

Therefore, it is necessary to notify the debtor in writing of such transfer. The question arises as to whether the debtor being notified electronically is equivalent to the notifying in writing as prescribed by law. It is arguable that the notification in writing under Thai law must be in the form of documents signed by the transferor. There is no Supreme Court precedent concerning validity of the electronic notification of the transfer.

However, the degree of such exposure will be reduced if the parties concerned, i.e. the transferor and the debtor agreed in writing in advance that for any possible transfer in the future, only an electronic notification to the debtor is sufficient which shall satisfy the requirement of the law.

The proposed Guidelines for Litigation Process in the Intellectual Property & International Trade Cases recognize messages stored and processed by computer. In fact, Clauses 34-37 of the Guidelines spell out the principles of admissibility of evidence under the Civil Procedural Code. The print-out of information stored and processed by computer is admitted as genuine evidence provided that such information is automatically recorded
by computer and it has been proven that the computer did not malfunction. The invoice of
the record of international telephone calls represents an good example to witness that the
print-out of computer data is admissible. The extent to which this Guidelines will apply to
on-line contract depends on how much the Thai Court trusts the reliability of the
electronic commerce system.

(ii) Signature

Where a writing is required by law, it automatically means that a signature is essential.
Under S. 9 para. 2 of the CCC, a finger print or cross seal will be equally treated as a
signature provided that it is certified by two witnesses. This provision seems unlikely to
be applicable in a practical way to electronic commerce. To facilitate international trade
via on-line contract, the reliability and security of signatures for electronic commerce have
been developed. As digital signatures come into widespread use in on-line transactions
they may come to be accepted in Thailand. Public key encryption is also practically
accepted in on-line transactions in Thailand.
5. Philippines\textsuperscript{15}

The integrity of electronic documents (in Section 9\textsuperscript{16}) provides for prima facie presumptions relating to electronic signatures: that the electronic signature is that of the person to whom it correlates, and that the signature was affixed with the intention of signing or approving the electronic document. This means that when A's signature is attached to a document, one may presume that it is A's signature and that he was the one who signed it with the intention of signing or approving the same. The presumption is, of course merely prima facie, it may be rebutted with better evidence to the contrary.

What constitutes Original Documents is also discussed in the law. This is important as it impacts on rules of evidence or court procedures where the concept of original is most vital to whether one's piece of evidence is admitted or not. Presently, where the law requires information to be presented or retained in its original form, that requirement would be deemed met by an electronic data message or document if the integrity of the information is shown by evidence or otherwise and that it is capable of being displayed to the person to whom it is to be presented. This provision of law will be of great help to those who go to court presenting electronic evidence. While the old paradigms could only conceive of original document as just being generally singular, this paves the way for the existence of many "originals" as long as the provision's criteria of integrity and reliability are met.

The authentication of electronic data messages and electronic documents, covered in section 11, amends the rules on evidence. Given the different nature of electronic data messages vis-à-vis paper or other objects, authentication procedures necessarily will have to be different too. This law calls for electronic data messages to be authenticated by demonstrating, substantiating, and validating a claimed identity of a user, device, or another entity in an information system. Electronic signatures are to be authenticated by proof that a symbol or character representing the person named therein or attached thereto or that an appropriate technology or security was used with the intention of authenticating or approving the electronic document. The electronic data message shall be authenticated by proof that an appropriate security procedure, when applicable, was used for the purpose of verifying the originator, or detecting errors.


\textsuperscript{16} JETRO's NOTE: The Electronic Commerce Act.
The law also provide a guide as to when a data message is to be admitted in evidence and to how much weight is to be given them (Section 12). The provision states that no rule shall render the data message inadmissible on the sole ground that it is in electronic form or on the ground that it is not in the standard written form. Evidential weight is to be given such electronic document after assessing the reliability of the manner in which the originator was identified, and other relevant factors have been given due regard.

6. Indonesia

Related to the issues of contract law in general is the issue of evidence. The legal system on evidence is based on the principle that certain kinds of documents fulfilling certain criteria should be regarded as sufficient evidence by the Court whereas the value of other acceptable evidence depends on the Court’s conviction. Current Indonesian law on evidence for civil cases value written evidence, especially those that are signed and notarized over other kinds of evidence. These rules are drafted with traditionally printed documents (i.e. hard copy on paper) that are signed by hand in mind.

The value of entirely electronic contracts and messages that are electronically signed within the current system on evidence is unclear. Concern has been raised that such electronic messages are easy to manipulate and falsify and therefore unreliable as evidence. In this context it appears more likely that their value would depend on the conviction of the Court. In this light it would be advisable to keep hard copies of contracts and messages that are important in interpreting their content. For particularly important contracts, it might even be advisable to confirm them by having them signed by hand in hard copy form after agreement has been reached electronically.

That said, there are signs that the law is moving toward recognition of electronic evidence. Recently, a new law is passed which allows companies to store their documents in electronic forms. Also recently, the entire custom payment system is changed from one based on paper to an EDI system and implementation of paperless trading in Indonesia’s stock exchanges has been started. These developments are not yet completed (for instance, custom’s EDI system is not fully implemented due to technical problems) but they do

point to increasing acceptance of electronic documents as evidence of transactions and increasing confidence in their reliability.

Law No. 30/1999 on Arbitration and Alternative Dispute Settlement for the first time introduces e-mail as one of the media and therefore is considered as an evident in arbitration procedures. Even though this Law has not regarded e-mail as a material evident, but the consideration of having e-mail as an evident in arbitration procedures is one step forward under Indonesian law to recognize the significance of electronic document.

7. Australia\textsuperscript{18}

Under the Australian Law, certain kinds of contracts (for example agreements creating interests in land and copyright assignments) are subject to statutory requirements as to form, most usually that they be in writing and/or signed. In most State jurisdictions the most significant types of contract which require writing are those for the disposition of an interest in land and contracts of guarantee. However, the position is not uniform. Western Australia, the Northern Territory and Tasmania still require contracts for the sale of goods over a certain amount to be evidenced in writing. There is also consumer protection legislation enacted in all jurisdictions requiring various types of contracts such as credit transactions, commercial sale of second hand motor vehicles and others to be made in writing.

(i) Electronic Transaction Act

The introduction of The Electronic Transaction Act has been central to the issue of whether the expressions 'writing' or 'written note of memorandum' include electronic data. The ETA attempts to achieve "technology neutrality" on this issue by deeming such requirements to be satisfied by electronic transactions and signatures. However this does not yet cover all Australian jurisdictions, and, in any event, it is subject to certain requirements relating to security and authenticity.

As discussed above, the general rule under the ETA is that a transaction is not invalid because it took place by means of one or more electronic communications. The ETA

makes it clear that transaction is not invalid merely before it took place wholly or partly by means of an electronic communication rather than via paper documents. In particular, Section 11 of the ETA allows a person to produce an electronic form of document where the law requires production of a paper document.

The approach of the ETA is consistent with existing laws of evidence in Australia. In addition to the provisions of the ETA, the general law recognizes the validity of electronic records. The Acts Interpretation Act 1901 (Cth) provides that wherever the word "document" is used in legislation, then unless the contrary intention appears, "document" includes items from which sounds, images or writings can be reproduced. The Act also provides that wherever the word "record" is used then, unless the contrary intention appears, "record" includes information stored or recorded by means of a computer.

8. Japan

Article 3 of the Act Concerning Electronic Signatures and Certification Services is a provision in the context of the presumption of the authenticity of an electro-magnetic record.

Article 3 of the Act is as follows:

“An electro-magnetic record which is made in order to express information (with the exception of one drawn by a public official in the exercise of his official functions) shall be presumed to be authentic if an electronic signature (limited to those that, if based on the proper control of the codes and objects necessary to perform the signature, only that person can substantially perform) is performed by the principal in relation to information recorded in the electro-magnetic record.”
URL List of Statutes

9. Singapore

9.1 Consumer Protection Law

Sale of Goods Act
http://www.lawnet.com.sg/freeaccess/SGA.htm

9.2 Personal Information Protection Law

Computer Misuse Act
http://www.lawnet.com.sg/freeaccess/CMA.htm

Info-communications Development Authority of Singapore Act
http://www.ida.gov.sg/Website/IDAContent.nsf/1dd32a5437a7ceb4c825682f0045a341/d857b7280551c160c825683a003f250c/$FILE/1999-ACT-41-N.doc

Telecommunications Act
http://www.ida.gov.sg/Website/IDAContent.nsf/1dd32a5437a7ceb4c825682f0045a341/d857b7280551c160c825683a003f250c/$FILE/1999-ACT-43-N.doc

9.3 Regulations on Domain Name

No statutes.

9.4 Electronic Authentication Business

Electronic Transactions Act
http://www.ida.gov.sg/Website/IDAcontent.nsf/dd1521f1e79ecf3bc825682f0045a340/a9c478f4cef4076ac82568390001f97f?OpenDocument

Electronic Transactions (Certification Authority) Regulations
http://www.ida.gov.sg/Website/IDAcontent.nsf/dd1521f1e79ecf3bc825682f0045a340/bb33718e2ca38e90e82568390001fb16?OpenDocument
10. Malaysia

10.1 Consumer Protection Law

Communications and Multimedia Act

10.2 Personal Information Protection Law

Computer Crimes Act
http://ktkm.netmyne.com.my/contentorg.asp?Content_ID=80&Cat_ID=1&CatType_ID=17&SubCat ID=40&SubSubCat_ID=15

Digital Signature Act
http://ktkm.netmyne.com.my/contentorg.asp?Content_ID=92&Cat_ID=1&CatType_ID=17&SubCat_ID=43&SubSubCat_ID=115

Communications and Multimedia Act

10.3 Regulations on Domain Name

No statutes.

10.4 Electronic Authentication Business

Digital Signature Act
http://ktkm.netmyne.com.my/contentorg.asp?Content_ID=92&Cat_ID=1&CatType_ID=17&SubCat_ID=43&SubSubCat_ID=115
11. Korea

11.1 Consumer Protection Law

Consumer Protection Act
http://www.cpb.or.kr/english/cpact.html

Monopoly Regulations and Fair Trade Act

Fair Labeling and Advertising Act
http://ftc.go.kr/data/hwp/G00014.doc

Door-to-Door Sales Act
http://ftc.go.kr/data/hwp/dtd-law.doc

Installment Transaction Act
http://ftc.go.kr/data/hwp/it-law.doc

11.2 Personal Information Protection Law

Constitution

Telecommunications Business Act
http://www7.itu.int/treg/Legislation/Korea/BusinessAct.htm

11.3 Regulations on Domain Name

No statutes.

11.4 Electronic Authentication Business

Digital Signature Act
12. Thailand

12.1 Consumer Protection Law

Constitution
http://www.krisdika.go.th/law/text/lawpub/e11102540/text.htm

12.2 Personal Information Protection Law

Constitution
http://www.krisdika.go.th/law/text/lawpub/e11102540/text.htm

12.3 Regulations on Domain Name

No statutes.

12.4 Electronic Authentication Business

No URLs.

13. Philippines

13.1 Consumer Protection Law

Consumer Act
http://www.doh.gov.ph/BFAD/ra7394titlepage.htm

Constitution

Electronic Commerce Act
http://www.dti.gov.ph/gteb/elaw.htm
13.2 Personal Information Protection Law

Constitution


Implementing Rules and Regulations of the Electronic Commerce Act

http://www.disini.ph/EcomIRR%20Annotations.zip

Implementing Rules and Regulations on Electronic Authentication and Signatures

http://216.185.141.192/content.asp?FileName=VlegalVe-authentication.ini

13.3 Regulations on Domain Name

No statutes.

13.4 Electronic Authentication Business

Electronic Commerce Act

http://www.dti.gov.ph/gteb/elaw.htm

Implementing Rules and Regulations on Electronic Authentication and Signatures

http://216.185.141.192/content.asp?FileName=VlegalVe-authentication.ini

Rules on Electronic Evidence

http://www.supremecourt.gov.ph/ecommerce.htm

14. Indonesia

14.1 Consumer Protection Law

No URLs.
14.2 Personal Information Protection Law

Law on Telecommunication

http://www.internews.or.id/content/medialaw/lawnreg/UU361999/index_eng.html

14.3 Regulations on Domain Name

No URLs.

14.4 Electronic Authentication Business

No statutes.

15. Australia

15.1 Consumer Protection Law

Commonwealth:

Trade Practices Act 1974 (Cth)


New South Wales:

Sale of Goods Act 1923 (NSW)


Fair Trading Act 1987 (NSW)


Contracts Review Act 1980 (NSW)

Industrial Relations Act 1996 (NSW)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/nsw/consol%5fact/ira1996242/?query=title+%28+%22contract+review+act%22+%29

Victoria:

Sale of Goods Act 1958 (Vic)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/vic/consol%5fact/ga195876/?query=title+%28+%22good+act%22+%29

Fair Trading Act 1999 (Vic)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/vic/consol%5fact/fta1999117/?query=title+%28+%22fair+trading+act%22+%29

Consumer Affairs Act 1972 (Vic)

15.2 Personal Information Protection Law

Commonwealth:

Privacy Act 1988 (Cth)  (As amended by Privacy Amendment (Private Sector) Act 2000)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/cth/num%5fact/pa1988108/?query=title+%28+%22privacy+act%22+%29

Telecommunications Act 1997 (Cth)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/cth/num%5fact/ta1997214/?query=title+%28+%22telecommunication+act%22+%29

Telecommunication (Interception) Act 1979 (Cth)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/cth/num%5fact/ta1979350/?query=title+%28+%22telecommunication+interception+act%22+%29
New South Wales:

Privacy and Personal Information Protection Act 1998 (NSW)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/nsw/consol%5fact/papipa1998464/?query=title+%22privacy+and+personal+information%22+%29

Listening Devices Act 1984 (NSW)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/nsw/consol%5fact/lda1984181/?query=title+%22listening+device+act%22+%29

Victoria:

Information Privacy Act 2000 (Vic)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/vic/consol%5fact/ipa2000231/?query=title+%22information+privacy+act%22+%29

Surveillance Devices Act 1999 (Vic)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/vic/consol%5fact/sda1999210/?query=title+%22surveillance+device+act%22+%29

15.3 Regulations on Domain Name

No statutes.

15.4 Electronic Authentication Business

Commonwealth:

Electronic Transactions Act 1999 (Cth)

New South Wales:

Electronic Transactions Act 2000 (NSW)
Victoria:

Electronic Transactions Act 2000 (Vic)
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/vic/consol%5fact/eta2000345/?query=title+%28+%22electronic+transaction%22+%29

16. Japan

16.1 Consumer Protection Law

Consumer Protection Fundamental Act
http://www.consumer.go.jp/e/cpfa/index.html (in English)

Act Concerning Specified Commerce

Consumer Contract Act
http://www.consumer.go.jp/e/cca/index.html (in English)

Guideline Concerning Unlawful Contract Enforcement without Consumer’s Consent in Internet Commerce

Installment Sales Act
http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=1&H_NAME=%8a%84%95%8a%94%ce%94%84&H_NAME_YOMI=%82%a0&H_NO_GENGO=H&H_NO_YEAR=&H_NO_TYPE=2&H_NO_NO=&H_FILE_RECNO=4537 (in Japanese language only)

Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade
http://www.jftc.go.jp/e-page/acts/amact.txt (in English)
Act against Unjustifiable Premiums and Misleading Representations
http://www.jftc.go.jp/e-page/acts/pr.htm (in English)

16.2 Personal Information Protection Law

Requirements for Compliance Program on Personal Information Protection
(JIS Q 15001:1999)
http://privacymark.org/ref/jisq15001.en.html (in English)

Act Concerning Wiretapping for Investigating of Crimes
http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=1&H_NAME=%96%54%8e %f3&H_NAME_YOMI=%82%a0&H_NO_GENGO=H&H_NO_YEAR=&H_NO _TYPE=2&H_NO_NO=&H_FILE_RECNO=853 (in Japanese language only)

Telecommunications Business Act
http://www.soumu.go.jp/joho_tsusin/eng/Resources/laws/TBL/TBL-index.html (in English)

Wire Telecommunications Act
http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=1&H_NAME=%93%64%8b %43%92%ca%90%4d&H_NAME_YOMI=%82%a0&H_NO_GENGO=H&H_N O_YEAR=&H_NO_TYPE=2&H_NO_NO=&H_FILE_RECNO=5371 (in Japanese language only)

16.3 Regulations on Domain Name

Unfair Competition Prevention Act
http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=1&H_NAME=%95%73%90 %b3%8b%a3%91%88&H_NAME_YOMI=%82%a0&H_NO_GENGO=H&H_N O_YEAR=&H_NO_TYPE=2&H_NO_NO=&H_FILE_RECNO=1842 (in Japanese language only)

16.4 Electronic Authentication Business

Act Concerning Electronic Signatures and Certification Services
http://www.meti.go.jp/english/report/data/gesignconte.html (in English)