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Sylvia Mercado Kierkegaard

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E-CONTRACT FORMATION: U.S. AND EU PERSPECTIVES

Sylvia Mercado Kierkegaard ¹

Abstract

The United States ("U.S.") and the European Union ("EU") offer contrasting approaches to contract formation in Cyberspace. Two foci can be identified with EU law: (1) consumer protection and (2) market harmonisation. The American approach, however, is characterized by self-regulation and economic rationale. This Article examines and compares the EU and U.S. regulatory approaches to electronic contracting.

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INTRODUCTION

<1>The Internet has dramatically boosted the number of potential buyers for American goods. According to trade publication eMarketer, there are over 190 million Internet users in Europe.¹ The U.S. has built a substantial lead over Europe with the EU generally lagging behind the U.S. in e-commerce initiatives and Internet use in the late 1990s. But based on today's growth rate, Europe is quickly catching up. The U.S. share of the world Information Communication Technology ("ICT") market was 32.4% in 2004 with Europe (including Eastern Europe) accounting for 30.5%.² Forrester Research predicted that online sales in Western Europe, including business-to-business transactions, would have reached between USD \$2.1 and \$2.5 trillion in 2006.³

<2>Although the Internet is more or less an American affair, the EU is wielding incredible influence when it comes to regulating the Internet. With the addition of 10 new Member States, the EU aspires to shape global e-

commerce law and to remove obstacles to the functioning of the European internal market through a coherent legal and regulatory framework. This framework is based on the application of key internal market principles and human rights protections. In contrast, the U.S. approach is often associated with a purely economic rationale.

<3>It is critical for U.S. businesses seeking to increase revenue from European customers to be aware of the strict EU regulations governing Internet sales. For example, EU laws afford consumers significant protections and allow them to sue foreign businesses in a consumer's domicile or place of habitual residence.

<4>The purpose of this Article is to illustrate the regulatory approach taken by the EU on the formation of electronic contracts and to juxtapose it with U.S. regulations. This Article will focus on key themes of direct relevance to electronic contracting.

OVERVIEW OF U.S. AND EU APPROACHES TO E-COMMERCE REGULATION

<5>In the U.S., the National Conference of Commissioners on Uniform State Laws ("NCCUSL") has developed two uniform state acts designed to bring legal certainty to electronic transactions. The two uniform acts are the Uniform Computer Information Transaction Act ("UCITA")⁴ and the Uniform Electronic Transaction Act ("UETA").⁵ UCITA deals with contracts or transactions in "computer information".⁶ A contract involving computer information (for example a software license) may be concluded electronically or may be concluded in person or by other means. Thus, while UCITA deals with information technology it does not solely deal with electronic contracting. UETA, by contrast, is a statute with broader reach – focusing on all types of electronic transactions.

<6>These uniform acts are not binding law in a particular state until the state chooses to adopt the act through its respective legislative process; however, uniform acts authored by NCCUSL are often adopted by all or many states and are generally representative of current and future trends.⁷ For instance, 48 states have adopted UETA.⁸ On the other hand, only two states have adopted UCITA. This may be due to the uniform act being amended twice (in 2000 and 2002) since it was first introduced in 1999.⁹ Maryland and Virginia however have adopted UCITA – two states where software and Internet related businesses are located. Companies with establishments in those states may choose to have their software license contracts governed by UCITA. In this way, it may still have a significant effect on software licensing and electronic contracting.

<7>Congress has also entered the fray of electronic contracting when it passed the Electronic Signatures in Global and National Commerce Act ("E-Sign") in 2000.¹⁰ Fundamentally, E-Sign adopts the most significant UETA provisions. E-Sign as a federal statute, and only preempts state law if a jurisdiction has not adopted UETA in an unrevised form. If a State has enacted UETA, then UETA may serve as the governing law for a contract between parties (even if it involves parties from different states). To the extent that a state has not enacted UETA, E-Sign would apply.

<8>Both the E-sign Act and the UETA prevent a rule of law from denying

the legal effect of certain transactions in interstate or foreign commerce on the ground that the signature, contract, or record of such transaction is in electronic form or if an electronic signature or electronic record was used in the formation of a particular contract. Both provide that if a law requires a record to be in writing or retained in its original form, then an electronic record satisfies the law. Finally, both provide that if a law requires a signature, then an electronic signature satisfies that law. E-Sign does not, however, prevent states from altering or superceding this general rule of validity provided it is based on the enactment of UETA and so long as the state law does not contain an exception to the scope of UETA that would be inconsistent with E-Sign.

<9>The EU has created a coherent regulatory framework for electronic commerce. This framework includes the following Directives: Electronic Commerce Directive (hereinafter "E-Commerce Directive"),¹¹ the "Distance Contracts Directives,"¹² Unfair Terms in Consumer Contracts Directive (hereinafter "Unfair Contract Terms Directive"),¹³ and the Community Framework for Electronic Signatures (hereinafter "E-Signature Directive").¹⁴ In addition, a number of horizontal directives have been adopted, such as Privacy¹⁵ and Intellectual Property Rights in Cyberspace.¹⁶ A horizontal directive is EU legislation designed to cover all types of sectors. It is not designed to meet all the requirements of a particular sector. A horizontal directive complements specialized vertical sectoral legislation or a "vertical" directive.

<10>Finally, several sectoral directives have been adopted. These include the Directives on Consumer Credit,¹⁷ the Directive on Package Travel, Package Holidays and Package Tours (hereinafter "Travel Packages Directive"),¹⁸ and the Timeshare Directive.¹⁹

LEGALITY OF ONLINE CONTRACTS

<11>The E-Commerce Directive is designed to facilitate the provision of electronic commerce services.²⁰ Articles 9, 10 and 11 deal with electronic contracts in business-to-consumer ("B2C") transactions. The E-Commerce Directive adopts a minimalist approach, requiring a service provider to set out all the necessary steps so that consumers can have no doubt as to the point at which they are committed to an electronic contract.²¹ Article 2(b) of the Directive defines a service provider as "any natural or legal person providing an information service."

<12>Electronic contracts are just as legal and enforceable as traditional paper contracts that are signed in ink within the EU.²² Article 9 of the E-Commerce Directive requires Member States to ensure that electronic contracts are rendered valid and to remove any prohibition or restriction on the use of electronic contracts, with certain permitted exceptions. Permissible derogations from the E-Commerce Directive include the following:

- Contracts that create or transfer real estate property rights, except rental rights;

- Contracts requiring, in order to be valid, registration with public authority;
- Contracts of suretyship; and
- Contracts falling within the scope of the law of succession and family law.²³

<13> In the U.S., UETA plays a similar role to the E-Commerce Directive in that it seeks to “remove barriers to electronic commerce.” Unlike the E-Commerce Directive, however, UETA is “not a general contracting statute” and it does not require the recognition of electronic contracts.²⁴ Instead, it approaches its goal “by validating and effectuating electronic records and signatures” on which contracts may be based.²⁵ UETA provides:

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.²⁶

<14> As with the derogations in the E-Commerce Directive, UETA provides exemptions from these recognition requirements; however, the exemptions under UETA are broader than the E-Commerce Directive. For instance, UETA also exempts laws governing the execution of wills, codicils or testamentary trusts. Transactions also fall outside of UETA’s scope to the extent they are governed by the Uniform Commercial Code (“UCC”),²⁷ unless the electronic records or signatures relate to transactions governed by Sec.1-107, 1-206, Art. 2 (sale of goods) and Art. 2A (leases).²⁸ In addition, UETA also does not apply to transactions to the extent they are governed by UCITA²⁹ and other laws identified by a state.³⁰

<15> The E- Sign Act is similar to the UETA. The Act validates most types of electronic contracts and transactions by allowing the signatures, records, and notices associated with these contracts to be maintained in a digital form. However, the E-Sign Act differs from the UETA in the way it treats consumer transaction. UETA does not exempt any categories of consumer notices while the E-Sign Act provides strong consumer protections. E-Sign requires a specific and electronic consent process, before an electronic notice may replace a legally required written notice. The UETA merely requires that the parties agree to conduct transactions by electronic means (such as oral agreements and *lex mercatoria*) without providing any specific requirement of how consent can be proven. The E-Sign’s consent rule is provided in section 101 (c). Prior to consenting, the consumer must be provided with a clear and conspicuous statement of the following information:

- any right or option of the consumer to have the record provided or made available on paper or in non-electronic form
- right of the consumer to withdraw the consent and of any conditions, consequences, or fees in the event of such withdrawal;

procedures the consumer must use to withdraw consent and to update information needed to contact the consumer electronically;

- how the consumer may, upon request, obtain a paper copy of an electronic record, and whether any fee will be charged for such copy;
- a statement of the hardware and software requirements for access to and retention of the electronic records;

<16>As far as the consumer's consent is concerned, it must be obtained electronically and has to be expressed in a way that 'reasonably demonstrates' that the consumer is able to access the information in the electronic form, which will be used to provide the information that he/she is the subject of the consent. If there is any change in the hardware or software requirements needed to access or retain electronic records or if the change will create a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the consumer's consent must be re-obtained.

<17>Similar to the UETA and the E-Commerce Directive, the E-Sign contains several exceptions from the general rule that documents required to be in writing may also be recorded electronically. The exceptions include the following documents governed by statutes: wills, codicils, testamentary trust, divorce, matters of family law, Uniform Commercial Code, court orders and notices, recall of product, notice of cancellation or termination of utility services and any document required to accompany any transportation or handling of hazardous materials etc.

PRIOR INFORMATION REQUIREMENTS

<18>The E-Commerce Directive stipulates extensive *prior information requirements* to enter a contract.³¹ *Prior information requirements* refer to information that must be provided by a service provider "prior to an order being placed by the recipient of the service."³² This requirement is applicable to B2C and business-to-business ("B2B") transactions, but the rule allows derogation from this obligation for B2B transactions.³³ The Service Provider must provide information on (a) the different technical steps that a consumer must follow to conclude a contract, (b) whether the contract will be filed by the service provider and whether it will be accessible, (c) the technical means for identifying and correcting input errors prior to the placing of the order, and (d) the languages offered for the conclusion of the contract.³⁴ Contracts and general conditions must be made available in a way that would allow the consumer to store and reproduce them.³⁵ The contractual terms should appear on the screen before making any purchase.

<19>Under the E-Commerce Directive,³⁶ the Service Provider must also comply with prior information requirements established in the Community Law, such as those contained in the Distance Contracts Directives,³⁷ and sectoral Directives such as insurance,³⁸ travel packages,³⁹ etc. For instance, the Distance Contracts Directives⁴⁰ provide the rule on when

and what information should be provided to the consumer before a *distance contract* is concluded.⁴¹ These prior information requirements supplement those in the E-Commerce Directive⁴² and extends the provisions of the distance selling directive by placing the obligation on the service provider to provide the information even where no contract is to be formed.

<20> Under the E-Commerce Directive, contracts concluded exclusively by email or by equivalent individual communications are exempted from the prior information requirements of Art. 10.⁴³ The rationale is that necessary information can be asked easily in case of an individual consumer.

<21> Consumer protection requires that information be provided concerning the procedures in the formation of contract. Unlike the E-Commerce Directive, UETA does not provide a checklist of information that is required prior to the formation of contracts. This is because the purpose of UETA is to remove the barriers to contract formation using electronic records "without affecting the underlying legal rules and requirements."⁴⁴ It is not intended to alter the underlying substantive law of contract formation. Sections 3 and 8, for instance, leaves the determination of *what* information is required for contract formation to other laws.⁴⁵ Where notice must be given as part of contractual obligation, UETA simply sets forth the standards to be applied in determining whether electronic record is the equivalent of the provision of information in writing. It requires that electronic records be retainable by a person whenever the law requires information to be delivered in writing.⁴⁶

<22> The E-Commerce Directive not only requires that contract terms and general conditions be made available in a way that allows the consumer to store (retain) them, but the consumer must also be able to *reproduce* them.⁴⁷ Such a provision clearly calls into question the form of click-wrap agreement, where the agreement is displayed in a separate window from which it cannot be downloaded or printed.

<23> The central principle behind the prior information requirement is to establish the confidence of consumers and enterprise in e-commerce. Information varied across the different member states and customers had no clear view of the contractual terms, or the genuineness and reliability of the seller. By mandating a prior written requirement, the Directive aims to remove any disparities between the laws of the Member States and to enable the consumer to evaluate both the product and the offer before the contract is concluded. Consumers will only be willing to use electronic commerce if they are convinced that it is as safe and reliable as conducting transactions on the traditional market. Consumer confidence requires sufficiently harmonized levels of consumer protection throughout the Union so that consumers are effectively protected in their own country as in other Member States. Adopting regulatory approaches based on a coherent EU regulatory framework within the Single Market will result in legal certainty and market harmonization. The Directive would ensure that information society services benefit from the principles of free movement of services and freedom of establishment and could provide their services throughout the European Union (EU). The Directive establishes specific harmonized rules to ensure that businesses and citizens could supply and

receive information society services throughout the EU, irrespective of frontiers. A prerequisite for the development of electronic commerce in Europe is that businesses and consumers become fully aware of its capacity to empower consumers and the benefits it offers.

<24> In contrast, the U.S. promotes self-regulation and economic rationality, rather than imposing rules which should govern the development and use of electronic commerce. For example, the E-Sign Act does not endorse any specific technological protocol- it does not set up any mandatory scheme regarding e-signatures and certificates. Consumers are free to choose any form of e-signatures, while in the EU, only advanced electronic signatures based on a qualified certificate and created by a secure signature-creation device (a) satisfy the legal requirement in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data; and (b) are admissible as evidence in legal proceedings.

VALIDITY OF UNFAIR CONTRACT TERMS IN B2C CONTRACTS

<25> The EU's Unfair Contract Terms Directive⁴⁸ provides a comprehensive set of rules and an Annex containing an illustrative list of 17 contract terms that may be regarded as presumptively unfair. The terms have the effect of altering the position which would exist under the ordinary rules of contract as they would either protect the supplier from certain sorts of claims in law which the consumer might otherwise make, or give rights against the consumer that the supplier would not otherwise enjoy. The Unfair Contract Terms Directive applies to all consumer contracts – and thus extends to electronic or lone contracting terms as well.

<26> In the U.S., the issue of unfair contract terms is addressed in Section 111 of UCITA. UCITA only applies to transactions in computer information. Section 111 states that if a court finds a term of a contract to be unconscionable, it may choose not to enforce the term or the entire contract as appropriate. The provision does not provide a definition or an indicative list of what terms may be regarded as unconscionable. Section 111 allows the court to rule directly on the unconscionability of the contract or the particular term and adopts the unconscionability doctrine of Uniform Commercial Code § 2-302 (1998 Official Text). The basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so harsh, one-sided, or oppressive as to be unconscionable under the circumstances existing at the time of the making of the contract.⁴⁹ Since UCITA deals with only a limited set of contracts, other contracts would be governed by Section 2-302 of the UCC, to the extent an electronic contract involved a sale of goods or the general common law defense of unconscionability to the extent that a contract was for services. In essence, they all apply the same legal standard for determining whether a contract term is so one-sided as to be unenforceable.

<27> Article 20 of the E-Commerce Directive requires the Member States to determine the sanctions applicable to the infringements of national provisions adopted pursuant to the Directive, without clarifying the legal effects when the Information Service Provider failed to provide the required information. Similarly, UETA defers to other laws in determining

the consequences of the seller's failure to satisfy the information requirements.

FORMATION OF ELECTRONIC CONTRACTS

<28> Contract law requires an element of intent, but the E-Commerce Directive does not make any reference to "the intention to sign" in relation to an e-commerce transaction. Instead, it imposes an information obligation, in order to help consumers reach intent. By following the technical steps to conclude a contract, the consumer indicates his intent to enter into a contract.⁵⁰

<29> In contrast, UETA is more explicit and focuses on the party's intention to be bound and to sign. Section 7(d) states, "[i]f a law requires a signature, an electronic signature satisfies the law." Electronic signature is defined as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the *intent* to sign the record."⁵¹

<30> In most legal systems, a contract is formed through the exchange of offers and acceptance. However, the E-Commerce Directive introduces a third step in contract formation- *confirmation*. According to Article 11, "[i]n cases where the recipient of the service places his order through technological means, the service provider has to acknowledge the receipt of the recipients order without undue delay and by electronic means." Thus, a contract is concluded in B2C transactions only when the recipient of the service has received an electronic acknowledgement of the recipient's order from the service provider. Article 11 applies only in situations where the Service provider made the initial offer, not in situations where the customer is the one who makes the offer.⁵² Additionally, the "acknowledgment requirement" does not apply in contracts "concluded exclusively by exchange of electronic mail or by equivalent individual communications."⁵³

<31> The rationale for requiring an "acknowledgement of the receipt of the acceptance" is to provide protection from accidental contracts. The idea is to give the consumer a second chance to check whether he/she might have ordered a product that he/she did not want. It would also give a seller the opportunity to establish whether there were sufficient stocks available and whether the product has been offered at the right price.⁵⁴ However, the requirement of "confirmation" seems to duplicate the functions provided in Art. 10(1) of the Directive, which requires that a service provider make available to customers the identification and technical means to handle error. There are no mandatory requirements concerning the content of the acknowledgement of the receipt. In order to avoid mistakes, it might be more beneficial if the Directive ensures a consumer's right to reviewing the details of his or her contract before sending his or her confirmation. Thus, according to Article 11, if a service provider fails to send a confirmation to the consumer requesting acknowledgment, no contract is formed.

<32> Contract formation under UCITA requires an offer and acceptance: "A contract may be formed in any manner sufficient to show an agreement,

including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract."⁵⁵ "An offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances."⁵⁶ In addition,

(4) if an offer in an electronic message evokes an electronic message accepting the offer, a contract is formed

(a) when an electronic acceptance is received; or

(b) if the response consists of beginning performance, full performance, or giving access to information, when the performance is received or the access is enabled and necessary access materials are received.⁵⁷

A confirmation would merely be repeating what the parties are already bound to perform and would have no legal effects under the U.S. law.⁵⁸

OFFERS AND INVITATIONS TO DEAL

<33>The Internet makes it possible to address specific information to an unlimited number of persons. EU legislation does not address the issue of what constitutes an offer and an invitation to deal (referred to as an invitation to treat). The determination of this issue is left to the individual member states. A company that advertises its goods and services on the Internet could be making an offer, depending on the national law of the Member State. An offer of goods or services through the Internet would be considered an invitation to offer under English law,⁵⁹ but a "binding offer" under Danish or Spanish law. For example, Danish law recognizes the distinction between an offer and an invitation to treat but nonetheless holds that a statement of price attached to the goods constitutes a binding offer.⁶⁰ It is probable that a website announcement displaying goods with a statement of price would constitute a binding offer under Danish law. If a website includes an offer of goods or services with the material elements of a prospective contract, it is deemed a binding offer under Spanish law.⁶¹ English common law rules require that an offer be communicated containing sufficiently definite terms.⁶² Offers must specifically state the price or quantity of goods. Otherwise, it is subject to being construed as lacking sufficient definiteness to qualify as an offer.

<34>UCITA and UETA are silent on the issue of offers versus invitations to deal. Article 2 of the UCC, which governs contracts for the sale of goods, is applicable to Internet transactions involving the sale of consumer goods. Article 2 of the UCC liberalizes the common law rules pertaining to offers: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."⁶³ Though open terms do not defeat the existence of a binding contract, courts must have some "reasonably certain basis for granting a remedy."⁶⁴ "The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement."⁶⁵ The UCC does emphasize the presence of certain terms in particular circumstances,⁶⁶ but in general, this greater "freedom to contract"

exemplifies the self-regulatory approach.

RECEIPT

<35> Determining the time of contract formation is essential since it identifies the moment of transfer of ownership and risk, among others. The exact time of acceptance or confirmation of acceptance is important especially if there are competing acceptances. The E-Commerce Directive provides: "The order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them."⁶⁷ The E-Commerce Directive focuses on accessibility, but the meaning of "able to access" is ambiguous. Rules regarding online acceptance will be subject to the rules of the national law of each Member States. Receipt or the time of contract formation could be at the moment when

- a consumer drafts an electronic message of confirmation of acceptance;⁶⁸
- an electronic mail is sent by the acceptor;⁶⁹
- it is accepted in the Internet Access Provider's mailbox;⁷⁰
- a communication of acceptance has been *received* by—or brought to the mind of—the offeror.;⁷¹
- a recipient had the opportunity to review the confirmation of acceptance.⁷²

<36> UETA provides default rules regarding when and from where an electronic record is sent, and when and where an electronic record is received. Section 15 states that

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:

(1) is addressed properly or otherwise directed properly to an information processing system that has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) is in the form capable of being processed by that system; and

(3) enters an information processing system outside the control of the sender or of the person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when:

(1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving

electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) It is in a form capable of being processed by that system.

<37> Additionally, UCITA deals with the timing and effectiveness of electronic messages, as well as with the impact of an acknowledgment. An electronic message is effective when received, even if no individual is aware of its receipt.⁷³ This constitutes a rejection of the "Mailbox Rule" for electronic messages, thereby placing the risk on the sending party if receipt does not occur. The receipt of an electronic acknowledgment of an electronic message establishes that the message was received, but it *does not* establish the content of the message received.⁷⁴ As stated above, UCITA only relates to contracts in computer information. Thus, the mailbox rule is still in place for many electronic contracts in the U.S., meaning that an acceptance is effective when sent (dispatched).⁷⁵

TREATMENT OF MISTAKES AND ERROR

<38> The E-Commerce Directive deals with the question of mistake and error by obliging service providers to employ error-correction procedures. Art. 11 (2) of the Directive provides:

Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, *prior* to the placing of the order.

However, this provision would not help a consumer who has realized he or she has made a mistake after he or she has sent a confirmation. The E-Commerce Directive does not address the question of mistakes and errors in electronic commerce. It is not concerned with the substantive issues that arise in contract formation. The law on mistake and error of each Member State governs these situations.

<39> In contrast, both UCITA and UETA address the issue of mistake after the contract has been formed. In an automated transaction, a consumer is not bound if the mistakes were caused by an *electronic error*. An "electronic error" is defined as "an error in an electronic message created by a consumer using an information processing system if a reasonable method to detect and correct or avoid the error was not provided."⁷⁶ Both uniform laws allow the consumer to avoid the effect of mistake by notifying the other party promptly on learning of the error and by taking reasonable steps that conform to the other party's reasonable instructions, to return to the other person, or to destroy the consideration received, if any, as a result of the erroneous electronic record.⁷⁷ In a person-to-person transaction,

if the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the

nonconforming party would have detected the change or error had the other party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.⁷⁸ This provision deals with changes and errors occurring in transmission between parties to a transaction. It only applies to situations where it is possible to detect an error / change because of the security procedure and where a one party fails to use the procedure and thus is unable to detect the error. In such a case, consistent with the law of mistake, the record is made avoidable at the instance of the party who took all available steps to avoid the mistake. The rationale for voiding the record is based on the principle that the non-conforming party had a reason to know of the mistake, while the conforming party does not have the risk of mistake.

<40> In cases other than those dealt in Section 10 of UETA, the common law doctrine of mistake applies to resolve the dispute.⁷⁹

CONTRACT FORMATION THROUGH ELECTRONIC AGENTS

<41> The E-Commerce Directive does not address the issue of automated transaction made through electronic agents. Wooldridge and Jennings define an electronic agent as a hardware or software-based computer system that enjoys the following properties: autonomy (capacity to act without the direct intervention of humans or others), the capacity to interact with agents or humans, the capacity to perceive their external environment and to respond to changes that are coming from it, and the capacity to exhibit goal-directed behaviour by taking the initiative.⁸⁰

<42> The EU law lags behind technological developments, instead of anticipating them. The explanatory notes of the proposal of the E-commerce Directive mention that Member States should refrain from preventing the use of certain electronic systems such as intelligent electronic agents for making a contract. However, the final version makes no reference to electronic agents in the main text or in the recital.⁸¹ The deletion of the proposed text reflects EU's failure to respond to the tremendous growth of e-commerce. The preamble of the Directive states that the purpose of the Directive is to stimulate economic growth, competitiveness and investment by removing the many legal obstacles to the internal market in online provision of electronic commerce services.⁸² However, the exclusion of the provision giving legal recognition to electronic agents is a step backward and a failure to recognize the role of electronic agents in fostering the development of e-commerce such as, lower transaction costs, facilitate technology and adherence to international conventions.

<43> A number of other jurisdictions have either proposed or enacted legislation that deal with the use of autonomous electronic agents in electronic commerce. For example, the International Convention on the Use of Electronic Communications in International Contracts contains provisions dealing with such issues as determining a party's location in an electronic environment; the time and place of dispatch and receipt of

electronic communications and the use of automated message systems for contract formation. Article 12 states, "A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract."⁸³ The adoption of the uniform rules was aimed in removing obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, and to enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes.

<44> UETA expressly recognizes that an electronic agent may operate autonomously and contemplates contracts formed through the interaction of electronic agents and those formed by the interaction of electronic agents and individuals.⁸⁴ UCITA also contains provisions supporting the ability of electronic agents to make binding contracts.

ELECTRONIC SIGNATURE

<45> The E-Signature Directive recognizes the validity of two types of signatures: an electronic signature and an advanced electronic signature.⁸⁵ The former should not be denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form.⁸⁶ The advanced electronic signature satisfies the legal requirements of a signature in relation to data in electronic form in the same manner as a hand-written signature satisfies those requirements in relation to paper-based data and is admissible as evidence in legal proceedings.⁸⁷ The advanced signature qualifies only when it is based on a qualified certificate, which is defined in Annex I and Annex II of the Directive. The qualified certificate must also be based on a secure signature creation device, which should meet the requirements of Annex III. In order for an advanced electronic signature to meet the legal requirements, it has to satisfy the criteria of Annexes I, II and III.

<46> UETA takes a different approach to signature—one that is technology neutral. Unlike the E-Commerce Directive, UETA does not distinguish between the different types of electronic signatures. "If a law requires a signature, an electronic signature satisfies the law."⁸⁸ An electronic signature is defined as an "electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."⁸⁹ The purpose is to validate electronic signatures as equivalent to writing. The key emphasis is the intent of the party to sign the record. In contrast, the E-Commerce Directive focuses on satisfying the criteria of non-repudiation, integrity, security and confidentiality of the signature based on the identification of the signatory and the certificate issued by the Certificate Providers.

CONCLUSION

<47> The rationale behind the e-commerce legislations of the EU and the U.S. is similar in that they create legal certainty by validating electronic contracts. However, the U.S. laws are broader in scope. UETA covers all types of contracts, not just electronic contracts, and UCITA covers all types of computer information contracts. In contrast, the EU directives typically deal only with consumer contracts by exempting B2B transactions. The E-Commerce Directive contains extensive information requirements prior to the conclusion of the contract and the mandatory requirement of 3-steps procedures for the formation of contract. UETA defers to the other laws in providing the answer on what information must be provided and does not require "confirmation" as a requisite to contract formation. UETA and UCITA offer more extensive guidelines on the issue of mistakes, contracts through electronic agents, and they clarify the exact moment when a contract is concluded. American companies competing in Europe must make their offerings relevant and in compliance with EU regulations and national laws of the 25 Member States. They must comply with the requirements of the various EU legislations governing contracts and come to terms with the legal challenges posed by the divergence of national contract laws and inconsistencies from the way the EU laws are implemented in the Member States.

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Footnotes

1. Sylvia Kierkegaard is the president of the International Association of IT Lawyers.
2. European Information Technology Observatory, 2004 EITO (12th ed. 2004), available at <http://www.eito.com/previous-2004-sub.html> (last visited Sept. 30, 2006). Kiril Boyanov and Dimitar Todorov, *Key Trends in the Information and Communication Technologies 1* (2004) available at <http://ecet.ecs.ru.acad.bg/cst04/Docs/p/p1.pdf> (last visited Aug. 30, 2006).
3. Julie Meringer, *eCommerce Next Wave: Productivity and Innovation 12* (Forrester Research Ltd.) available at http://www.wto.org/english/tratop_e/devel_e/sem05_e/presentation_meringer.p (last visited Aug. 30, 2006).
4. Uniform Computer Information Transaction Act (2002) available at <http://www.law.upenn.edu/bll/ulc/ucita/2002final.pdf> (last visited Aug. 30, 2006).
5. Uniform Electronic Transaction Act (1999) available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.pdf> (last visited Aug. 30, 2006).
6. See Comment 2 to UCITA Section 103. The scope of this Act turns initially on the definition of *computer information transaction*. Section 102(11). *Computer information transactions* are agreements that deal with the creation, modification, access to, license, or distribution of computer information. Section 102(a)(11). *Computer information* is information in a form directly capable of being processed by,

or obtained from, a computer and any copy, associated documentation, or packaging. Section 102(a)(10). As stated in subsections (b) and (c), if a transaction is a computer information transaction but also involves other subject matter, this Act ordinarily applies only to the aspects of the transaction that involve *computer information*.

7. Founded in 1892, NCCUSL is a non-profit unincorporated association comprised of state commissions. Uniform law commissioners, appointed in a manner determined by each state or territory, review and evaluate the law of states to “determine which areas of law should be uniform.” Over 250 uniform acts have been proposed by NCCUSL. Many have been adopted by most states nationwide, the most notable of which is the Uniform Commercial Code. For more information on NCCUSL, see Introduction to the Organization, The National Conference of Commissioners on Uniform State Laws, available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited Sept. 30, 2006).
8. Legislative Fact Sheet on UETA, The National Conference of Commissioners on Uniform State Laws at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Sept. 30, 2006).
9. Legislative Fact Sheet on UCITA, The National Conference of Commissioners on Uniform State Laws at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucita.asp (last visited Sept. 30, 2006).
10. Pub. L. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. §§ 7001-7006, 7021, 7031).
11. Council Directive 2000/31, Directive on Electronic Commerce (hereinafter “E-Commerce Directive”), 2000 O.J. (L 178) (EC) available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML> (last visited Aug. 30, 2006).
12. “Distance Contracts Directives” refers to the following Directives: European Parliament and Council Directive 2005/29, Directive Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and the Council of Regulation (EC No. 2006/2004 of the European Parliament and the Council (“Unfair Commercial Practices Directive”) 2005 O.J. (L 149) (EC) available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32005L0029:EN:HTML> (last visited Aug. 30, 2006); Council Directive 2002/65, Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (hereinafter “Distance Marketing Contracts Directive”), 2002 O.J. (L 271) (EC) available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_271/l_27120021009en00160024.pdf

- (last visited Aug. 30, 2006); Council Directive 97/7, Directive on the Protection of Consumers in Respect of Distance Contracts (hereinafter "Distance Contracts Directive"), 97 O.J. (L 144) (EC) *available at* <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:EN:HTML> (last visited Aug. 30, 2006).
13. Council Directive 93/13, Unfair Terms in Consumer Contracts (hereinafter "Unfair Contract Terms Directive"), 93 O.J. (L 095) (EEC) *available at* <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML> (last visited Aug. 30, 2006).
 14. Council Directive 99/93, Directive on a Community Framework for Electronic Signatures (hereinafter "E-Signature Directive"), 99 O.J. (L 013) (EC) *available at* <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:EN:HTML> (last visited Aug. 30, 2006).
 15. European Parliament and Council Directive 2002/58, Directive Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (hereinafter "Privacy Directive"), 02 O.J. (L 201) (EC) *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf (last visited Aug. 30, 2006).
 16. European Parliament and Council Directive 2004/48, Directive on the Enforcement of Intellectual Property Rights (hereinafter "Intellectual Property Rights Directive") 04 O.J. (L 157) (EC).
 17. *See* Council Directive 87/102, Directive for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit, 87 O.J. (L 042) (EEC) *available at* <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31987L0102:EN:HTML> (last visited Aug. 30, 2006), *amended by* Council Directive 90/88, 90 O.J. (L 061) (EEC) *available at* <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31990L0088:EN:HTML> (last visited Oct. 2, 2005) and European Parliament and Council Directive 98/7, 98 O.J. (L 101) (EC) *available at* <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31998L0007:EN:HTML> (last visited Aug. 30, 2006).
 18. Council Directive 90/314, Directive on Package Travel, Package Holidays and Package Tours (hereinafter "Travel Packages Directive") 90 O.J. (L 158) (EEC) *available at* <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31990L0314:EN:HTML> (last visited Aug. 30, 2006).
 19. European Parliament and Council Directive 94/47, Directive on the Protection of Purchasers in Respect of Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Timeshare Basis (hereinafter

"Timeshare Directive"), 94 O.J. (L 280) (EC) *available at* <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31994L0047:EN:HTML> (last visited Aug. 30, 2006).

20. E-Commerce Directive, 2000/31, art. 1.
21. *Id.* art. 10 ("Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service: (a) the different technical steps to follow to conclude the contract.").
22. *Id.* art. 9 (" Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.").
23. *Id.* art. 9 sec. 2.
24. *Id.*
25. UETA Prefatory Note at *1.
26. UETA § 7(b).
27. U.C.C. (1977). Different sections of the U.C.C. have since been amended. These versions can be found at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=2&tabid=60> (last visited Aug. 30, 2006). Versions of the U.C.C. that have been adopted by each state are *available at* <http://www.law.cornell.edu/uniform/ucc.html> (last visited Aug. 30, 2006).
28. UETA § 3(b)(2). The Prefatory Note explains that the exclusion of specific Articles of the U.C.C. "reflects the recognition that, particularly in the case of Articles 5, 8 and revised Article 9, electronic transactions were addressed in the specific contexts of those revision processes." *See also* UETA § 3 cmt. 4-5. Excluding Articles 2 and 2A from the general U.C.C. exemption "provides the vehicle for assuring that such transactions may be accomplished and effected via an electronic medium." UETA is meant to apply to these Articles because "it is in the area of sales, licenses and leases that electronic commerce is occurring to its greatest extent today. To exclude these transactions would largely gut the purpose of this Act." *Id.* at § 3 cmt. 7.
29. *Id.* § 3(b)(3). The Prefatory Note explains that the exclusion of transactions to the extent they are governed by UCITA was included because electronic transactions were recently addressed in UCITA revision processes.
30. *Id.* § 3(b)(4).

31. Council Directive 2000/31 art. 10(1).
32. *Id.*
33. *Id.*
34. *Id.*
35. Council Directive 2000/31 art. 10(3).
36. Council Directive 2000/31 art. 10(1).
37. Directive 97/7/EC on the protection of consumers in respect of distance contracts
38. Article 36 of the Directive 2002/83/EC (Life Directive) and Article 31 of Directive 92/49/EEC
39. Council Directive 90/314.
40. Directive 97/7/EC on the protection of consumers in respect of distance contracts
41. Council Directive 97/7 art. 4. A *distance contract* is defined as "any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded." *Id.* § 2(1). Section 2(a) of Council Directive 2002/65 adds "any contract concerning financial services" to this definition.
42. The following compose the prior information requirements in the Distance Contracting Directives: (a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address; (b) the main characteristics of the goods or services; (c) the price of the goods or services including all taxes; (d) delivery costs, where appropriate; (e) the arrangements for payment, delivery or performance; (f) the existence of a right of withdrawal . . . (g) the cost of using the means of distance communication . . . (h) the period for which the offer or the price remains valid; (i) where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently. *See* Council Directive 97/7, art. 4. For further discussions on online ADR in the EU, *see* Sylvia Kierkegaard, *Online Alternative Dispute Resolution*, EU Electronic Commerce Law, DJØF Publishing, Denmark (2004).
43. *Id.* art. 10(4). The requirement that contract terms and general conditions be provided to the recipient in a manner that allows him to store and reproduce them still applies.
44. *See* UETA Prefatory Note at *1.
45. "A transaction subject to this [Act] is also subject to other applicable substantive law." UETA § 3(d). Section 8 also looks to other substantive laws to determine information required to

conclude a contract. This section merely provides that “[I]f parties have agreed to conduct a transaction by electronic means *and a law requires a person to provide, send, or deliver information in writing to another person*, the requirement is satisfied if information is provided, sent, or delivered, as the case may be, *in an electronic record capable of retention by the recipient at the time of receipt.*” UETA § 8(a) (emphasis added).

46. UETA section 8(a) “is satisfied if information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt.” UETA § 8(a) (emphasis added).
47. Council Directive 2000/31 Art. 10(3).
48. Council Directive 93/13/EEC.
49. UCITA § 111 cmt. 2. See also Restatement (Second) of Contracts § 208 (1981). Traditionally, a bargain was said to be unconscionable if it was “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.” *Hume v. United States*, 132 U.S. 406 (1889), quoting *Earl of Chesterfield v. Janssen*, 2 Ves.Sen. 125, 155, 28 Eng.Rep. 82, 100 (Ch. 1750). Today, courts generally look for both substantive and procedural unconscionability. The former generally involves oppressive terms of a contract resulting in a gross imbalance in consideration. Procedural unconscionability involves a lack of meaningful choice or an unfair process by which a contract was concluded.
50. See Council Directive 2000/31 art. 10(1)(a).
51. UETA § 2(8).
52. Council Directive 2000/31 art. 11(1).
53. *Id.* art. 11(3) clearly states, “Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.”
54. See also Michael Archer, Beale, and Company, *Kodak discount camera fiasco*, *The Register*, Jan. 9, 2002, available at <http://www.theregister.co.uk/content/archive/23608.html> (last visited Aug. 30, 2006).
55. UCITA § 202(a).
56. UCITA § 203(1).
57. UCITA § 203(4).
58. The Explanatory remarks (No. 93) in the UNCITRAL Model Law states, “It should be noted that the notion of “acknowledgement” is sometimes used to cover a variety of procedures, ranging from a mere acknowledgement of receipt of an unspecified message to an expression of agreement with

66. See, e.g. U.C.C. § 2-201(1).
67. Council Directive 2000/31 art. 11(1).
68. Expedition Theory [At the moment the acceptor drafts an electronic e-mail message of acceptance (which she does not succeed, perhaps, in sending via the Internet).]
69. Transmission theory or mailbox rule [At the moment when the electronic mail is sent by the acceptor.
70. Reception Theory - Upon reception of acceptance by the offeror, even if he has not yet read it. It is the receipt of the acceptance in the Internet access provider's mailbox, which is taken into consideration, and not the "check mail" function in the individual mailbox of the offeror's computer.
71. Information Theory [Upon the offeror's knowledge of the acceptance- that is- the offeror has checked the mailbox and has read the acceptance message.]
72. Review Theory. An example would be §69(3) of the General Part of the Civil Code Act of Estonia. See <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022>. For further discussions on the time of receipt under Estonian law, see Sylvia Kierkegaard, *Declaration of Intent: A legal Conundrum?*, Review of Central and East European Law, (2005).
73. UCITA § 214(a).
74. *Id.* § 214(b).
75. See, e.g., U.C.C. § 1-201(26), (38) (2000); Restatement (Second) of Contracts § 63, 66 (1981); 2 Williston on Contracts § 6:32 (4th ed.); Valerie Watnick, *The Electronic Formation of Contracts and the Common Law "Mailbox Rule"*, 56 Baylor L. Rev. 175 (2004); Paul Fasciano, *Internet Electronic Mail: A Last Bastion for the Mailbox Rule*, 25 Hofstra L. Rev. 971 (1997).
76. UCITA § 213(a).
77. UETA § 10(2)(A); UCITA § 213(b). The Commentary states that the defense does not apply if the electronic system with which the consumer is working provides a reasonable means to correct or avoid errors.
78. UETA § 10(1).
79. See Restatement (Second) of Contracts §§ 151-158 (1981).
80. Wooldridge & Jennings, 'Intelligent Agents: Theory and Practice', Knowledge Engineering Review Vol. 10 No. 2, June 1995, (Cambridge University Press: 1995)
81. COM (1998) 586 final.
www.europa.eu.int/scadplus/leg/en/lvb/124202.htm.

82. Harry Thurlow writes an interesting article which offers insight to the EU perspective and how it lags behind the technology developments in Electronic Contracts in the United States and the European Union: *Varying Approaches to the Elimination of Paper and Pen*, Vol. 5.3 Electronic Journal of Comparative Law, November 2001. Available at <http://www.ejcl.org/53/art53-1.txt>
83. United Nations Convention on the Use of Electronic Communications in International Contracts, *Draft resolution II*, 2005, at <http://www.uncitral.org/pdf/english/texts/electcom/2005Convention.pdf>
84. UETA § 14.
85. Council Directive 99/93 art. 5.
86. *Id.* art. 5(2).
87. *Id.* art. 5(1).
88. UETA § 7(d).
89. *Id.* § 2(8).

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