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ELDOC

LEGAL STUDY ON LEGAL AND ADMINISTRATIVE PRACTICES REGARDING THE VALIDITY AND MUTUAL RECOGNITION OF ELECTRONIC DOCUMENTS

D3.4 – First Interim report
(country reports)

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ENTERPRISE DIRECTORATE-GENERAL

The opinions expressed in this study are those of the authors and do not necessarily reflect the views of the European Commission.

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A. Introduction – The ELDOC Study

The ELDOC Study Team, consisting of K.U.Leuven-ICRI and Lawfort, have been contracted by the European Commission – DG Enterprise to perform the Legal Study N° ENTR/04/67 on the national legal and administrative practices regarding the validity and mutual recognition of electronic documents, with a view to identifying the existing legal barriers for enterprises ("the ELDOC Study").

The purpose of this Study would thus be twofold:

- To create an overview of the existing legal and administrative practices in the Members States, EEA countries and Candidate Countries, with regard to the treatment of electronic documents in eCommerce transactions.
- To examine and assess these practices, thus identifying any remaining legal barriers to the use of such electronic documents in eCommerce transactions, and to identify potential solutions to any such barriers, particularly on a cross-border level, where the validity and acceptability of electronic documents generally poses the greatest difficulties.

To realise the first step in this Study, the Terms of Reference require that the ELDOC Study Team identifies "*the different national legal and administrative practices in the various Member States, Candidate Countries and EEA EFTA States. with regards to the validity and mutual recognition of electronic documents, as specified in the chapter below, on a predefined set of business processes.*" The resulting input would constitute the main working base for the second phase of the study, the examination and assessment of these legal and administrative practices.

The Study Team has proposed a Standardised Questionnaire and a Standardised National Report to the Commission, based on the findings of a brief preliminary study of three European countries, which were subsequently accepted. The questionnaire and report were then submitted to a European network of national legal experts in the field of eCommerce, who have assisted the Study Team in drafting a national profile for their State.

B. The First Interim Report

The current document contains two major sections:

- An overview of the considerations taken into account by the Study Team when conducting the preliminary study and when drafting the Standardised Questionnaire and National Report template (Section C of this Report). This will provide the reader of the present report with an insight to the reasons why certain questions were asked, and why certain other topics were given less attention.

- The national reports as received from the national correspondents, which have subsequently been reviewed and approved by the Study Team, and through the Steering Group meeting of 3 July 2006 in Brussels.

While small changes to these profiles are still possible pending further review by the Study Team, they are considered to be of a high quality and suitable as a working basis for the completion of the ELDOC Study.

It is important to note that the main purpose of the present report is not to draw any significant conclusions regarding the practices reported by the correspondents, but rather to provide the reader with the necessary background information on the choice and delineation of the subject matter included in the national reports. This will undoubtedly be of instrumental importance to correctly interpret the scope and purpose of the information included in the national reports.

C. Content of the national reports

C.1. Goals and ambitions of the national reports

C.1.1. Scope of the national reports

As indicated above, the main purpose of the national reports was to obtain a complete, accurate and up-to-date overview of the legal and administrative practices regarding the use of electronic documents in a select number of eBusiness processes in the Member States.

The basic consideration underpinning the usefulness of the ELDOC Study as a whole was the simple fact that documents constitute the basis for a great number of legal and administrative processes in the vast majority of European countries. While the national reports below will show that there is a large variety in the European countries surveyed (both with regard to the general principles of (e-)contract law and with regard to the resulting legal value accorded to documents), it is an inescapable fact that many business processes still rely on the use of documents.

While this may not be the case for each business process in each examined country, the cross-border nature of modern day business life means that legal and administrative barriers have a clear tendency to escalate, as the most restrictive framework will generally dictate the possibilities available to legal partners from a different country in regulating their commercial undertakings.

It is clear that there have been a large number of initiatives, both on a national, European and international scale, to alleviate such barriers by modernising the existing administrative and legal frameworks through the introduction and/or encouragement of modern technologies to facilitate cross-border transactions. Among the multitude of examples to be further detailed below we can refer to the various European initiatives (including but not limited to the eSignatures directive, the eCommerce directive and the eInvoicing directive), as well as to several soft law initiatives with a general international scope (such as the International Chamber of Commerce's eUCP rules, the CMI Rules on Electronic Bills of Lading, and the UNCITRAL Model Law for eCommerce).

However, what is much less clear is how these initiatives have interacted on a national scale, and to what extent that they have resulted in a legal and administrative framework that is open to the use of electronic processes, in particular processes relying on the use of electronic documents, as is the focus of the present Study, keeping into account the acute business need to be able to exchange these documents across national borders in a manner which is valid and legally binding to all parties concerned.

To this end, the national profiles will contain an overview of the manner in which each surveyed country deals with electronic documents, both in a more general sense (eCommerce regulation as a whole, and generic business processes such as electronic notifications and electronic archiving), and with regard to a number of specific document types in the different phases involved in commercialising a product on the European market (credit arrangements, transportation and storage, customs, fiscal management, …).

The exact scope of the contents as requested from the national correspondents will be further detailed below in section C.2. of this Report.

As the ELDOC Study is a legal study, the national correspondents were required to include references to the sources that they consulted. This includes references to laws, other regulations, and doctrine, in such a manner that a legal expert with knowledge of the national legal system would be able to retrieve the sources. Whenever possible and suitable, references to relevant case law along with summaries were provided.

Since the Study examines the legal framework but also its actual impact in day to day eBusiness practice, the national correspondents were asked to keep into account the administrative practices in eBusiness transactions, and assess whether or not any given legal solution is actually used in practice (and if not, to identify the reason why). The purpose of this was to avoid obtaining an overview of the legal framework surrounding electronic documents, without having any real indications of whether or not a given solution model had any impact in commercial reality. The consultation of national Chambers of Commerce, other representative professional organisations or any other eBusiness service providers was therefore recommended, and is mentioned in the reports below whenever applicable. Additionally, if any trusted third parties (TTPs) were commonly involved in the practical realisation, execution or management of an electronic contract, this is also explicitly mentioned in the reports.

It is important to note that, in compliance with the call to tender requirements, the Study focuses on the general eBusiness framework as applicable to common product types, thus excluding sector-specific regulations which have a limited to no practical bearing on eBusiness transactions in general (e.g. pharmaceutics, fire-arms, motor industry,…).

Whenever referring to national legislation or institutions, the correspondents were required to provide the local name as well as an English language translation of the regulation's title.

If available, links to on-line resources (legislation, judicial decisions, governmental websites, and professional organisations) were also included.

C.1.2. Preliminary study: approach and impact

In the first material stage of the ELDOC Study, the Study Team and the Commission agreed that a Preliminary Study should be conducted before circulating a questionnaire and draft report to the network of national correspondents, in order to identify the issues to be studied in the course of the Study, and to determine the questions to be asked of the National Correspondents.

The reason for this was the generally broad scope of the Study as defined in the specifications of the call to tender, which required the Study Team to examine the legal and administrative framework of the countries to be surveyed, based on (but not limited to) a number of predefined document types. Some of these document types were pre-determined by the tender specifications (such as certificates of origin, warehouse warrants, documentary credit, etc.), but the tender specifications also required the Study Team to suggest additional document types, and to agree with the Commission on a final list of document types to be assessed at the beginning of the Study.

As the Study Team wanted to ensure valuable and usable results from the Questionnaire, a Preliminary Study phase was organised in agreement with the Commission, in which Three European states were selected to draft a national report, based on a draft Questionnaire:

- An older Member State, Belgium;
- A new Member State, Poland;
- And an Acceding Country, Bulgaria.

The resulting profiles were subsequently analysed by the Study Team, and the Standardised Questionnaire and National Profile were updated in accordance with these findings, as will be explained in detail below (see Section C.2.). In this manner, the Study Team wanted to avoid being confronted at a later stage with answers that would be too general or insufficiently relevant to be able to draw specific conclusions.

The amended Questionnaire and Draft National Profile were then presented to the Commission, approved for use, and disseminated to the national correspondent network.

C.1.3. The national correspondent network

The national correspondents whose services were called upon to complete the national profiles contained below come from a variety of legal fields: lawyers, professors, public sector representatives, magistrates, etc. In all cases, the correspondents have the required legal expertise and specialise in ICT Law.

The following correspondents have contributed to the national profiles below:

EU Member States		
Austria	Erich SCHWEIGHOFER	erich.schweighofer@univie.ac.at
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Bulgaria	George DIMITROV	george.dimitrov@dpc.bg
Croatia	Zvonimir SLAKOPER	zslakope@inet.hr
Romania	Peter BUZESCU	pacsinte@buzescu.com
Turkey	Leyla KESER	lkeser@bilgi.edu.tr

EEA Countries		
Iceland	Rán TRYGGVADOTTIR	ran@ru.is
Norway	Thomas MYHR	Thomas.Myhr@NHD.dep.no
Liechtenstein	Michael GRABHER	Michael.Grabher@marxerpartner.com

More complete contact information along with an indication of the correspondent's affiliation (if any) can be found below, at the end of each country report.

It is important to stress that the information in the national reports was provided by the correspondents. While the Study Team has taken great care in ensuring the completeness, accuracy and neutrality of the Reports, the opinions expressed therein with regards to the interpretation and suitability of a given country's legal framework and administrative practices were provided solely by the correspondents. Such opinions and assessments do not necessarily coincide with the Study Team's perspective.

In the sections below, we will take a closer look at the subject matter examined by the Study Team through the national reports, the questions presented to the national correspondents in the Standardised Questionnaire and the Study Team's reasons to stress certain topics over others.

C.2. General sections – legal background and eCommerce regulations

The main purpose of the initial sections of the national reports (Sections A and B of each report) is to provide a general overview of the country's legal structure, general legal traditions, court system, and the regulation of eCommerce transactions in general, without examining the requirements of specific document types in detail.

C.2.1. General legal profile

Each national profile initially (in Section A of the report) provides a brief general overview of that nation's legal traditions, structure and institutes, by way of providing a certain background to the interested reader who may be unfamiliar with the country.

This section describes the distinct levels of autonomy in the country, common types of legal norms, main legal documents (i.e. civil codes, contract laws etc.) and their predominant influences (if any), and courts that would most typically be competent in disputes regarding the examined document types.

C.2.2. eCommerce regulations

In this section of the profile, correspondents are requested to describe the general provisions of their national eCommerce contract law, both from a general perspective (Section B.1.1 of the national profiles – contract law, eBusiness and eCommerce contracts in general), and more specifically with regard to the transposition of a number of important provisions of the eCommerce directive (Section B.1.2 of the national profiles).

Specifically, the national correspondents were requested to elaborate on the following issues from the perspective their national legal systems:

C.2.2.1. Autonomy of will

It was generally expected that contract law in all European legal systems would be predominantly based on the principle of autonomy of will (i.e. the emphasis on stressing the expressed will of contractual partners rather than the formalities related thereto). This is an important consideration, as this theory proposes as a basic principle that the vehicle used for expressing this will (e.g. a paper or electronic document) is of secondary importance, at least for the purposes of assessing the validity of any given contract.

The correspondents were requested to explain how this theory was generally applied in their legal system, and what the consequences of this theory were with regard to electronic documents. Additionally, correspondents were requested to identify to what extent their eCommerce laws imposed formal requirements for the validity of any given contract.

Many legal systems allow more flexibility in the formation and proof of commercial contracts than for civil contracts.

C.2.2.2. Legal recognition of electronic documents in general

Correspondents were requested to clarify whether or not their national legal framework explicitly (i.e. in specific and unambiguous terms) recognised the validity of electronic documents for the purposes of contract law, or whether such validity would be more strongly dependent on the interpretation of general principles of contract law as outlined through legislation, doctrine and jurisprudence.

If such explicit legislation existed, the correspondents were requested to describe the conditions for validity, and whether there were any restrictions in place with regard to the form(at) of the document, the scope in which such electronic documents would be deemed acceptable or the specific subject matter for which such documents could be excluded.

C.2.2.3. Definition of the notion of electronic documents

Along the same lines, correspondents were requested to indicate whether there existed a generally accepted legal definition of an electronic document in their national legal system. If so, they were asked to provide this definition, and to clarify how it was formed: through doctrine, jurisprudence, or through legislative intervention? The general expectation was that doctrine would be responsible for defining electronic documents if any definition was available, and that legislation would only play a limited role.

C.2.2.4. Contractual freedom

Many legal systems allow contractual parties to conclude binding agreements on which form their contracts or other exchanged documents need to take to be legally valid and binding. Correspondents were asked whether such agreements were also possible under their national law (the expected response was a universal confirmation across all countries), and to indicate for which type of business relations (civil contracts, commercial contracts,…) this would be possible.

Additionally, in order to assess the extent to which parties have the right to refuse the use of electronic documents, correspondents were requested to indicated whether a consensus to use electronic documents between all parties involved constituted a precondition to the legal acceptability of an electronic document (i.e., can an electronic document become legally invalid if one party refuses to accept it)?

C.2.2.5. Jurisprudence

In order to obtain a complete picture of the national legal practice, correspondents were requested to indicate whether there was there any jurisprudence explicitly acknowledging the acceptability of electronic documents as equivalent to traditional written documents.

C.2.2.6. Transposition status of the eCommerce directive

The correspondents were also asked to provide some specific information regarding the transposition of the eCommerce directive, to the extent that these issues had not come up sufficiently in the sections above. The correspondents were requested to provide the following information:

- Scope of the transposition and exclusions (art. 1 of the Directive):
  - To which electronic contract types does the national transposition apply? Only to services of the information society, or are any other contract types covered?
  - Are any contract types excluded from its scope?
  - If so, which contract types (e.g. the aforementioned "qualified documents", real estate agreements, gambling,…)?

- Formal requirements in an electronic context (art. 9 of the Directive)
  - How does the national legal system determine how formal requirements can be fulfilled in an electronic context?

- Signature requirements (consideration 35 of the Directive)
  - Has the national transposition indicated specific requirements with regard to the use of electronic signatures?

C.2.3. Administrative documents and eReadiness

Although eGovernment is expressly not part of the scope of the ELDOC Study, the Study Team was none the less acutely aware that administrative requirements (requesting permits, filing reports, obtaining official stamps,…) can sometimes constitute the largest hurdle to the development of eCommerce. Even in cases where the law expressly or implicitly permits the use of electronic documents, such regulations can be foiled by a requirement to submit these documents to a registration office on paper, to present them to a court clerk for rubber stamping, or to affix fiscal seals to the document before tax administrations are allowed to process them.

While a thorough examination of the national eGovernment situation for electronic documents in general would have been infeasible within the context of the ELDOC Study,

the Study Team none the less inquired with its correspondent network whether their government had implemented any specific regulations or had taken any specific initiatives to facilitate or encourage the use of electronic documents in B2A and C2A relations. If so, the correspondents were requested to describe the scope and ambitions of the regulation or initiatives.

C.2.4. Findings of the preliminary study

The preliminary study was of significant importance for the preparation of the finalised questionnaire and the national profile template, as it revealed several issues which needed to be added or expanded upon. As a result of the preliminary study, the following topics were added to the questionnaire and national profile:

C.2.4.1. Electronic notifications

As one of the most generally used legally relevant documents, the Study Team decided that notifications in the most general sense had to be a part of the questionnaire. For the purposes of the ELDOC Study the notification was defined as "an expression of will or a statement from the sender upon which he wishes to rely against the receiving party of the message, such as the acceptance of an offer to conclude a contract, the termination of a contract or the communication of product information to a consumer".

The national correspondents were required to examine whether or not their legal system allows the parties in a commercial relationship to send electronic notifications instead of traditional paper documents. If so, the correspondents were asked to describe the context in which this was allowed, and the criteria that electronic notifications should meet.

Since the aspect of clear communication of a given intention is the central purpose of a notification, correspondents were also requested to indicate if the consensus of the party receiving the notification is a precondition to the legal acceptability of an electronic notice (i.e. can an electronic document become legally invalid if one party refuses to accept it)? And if so, does that party need to reject the electronic notification explicitly, or is tacit acceptance possible?

C.2.4.2. Electronic registered mail

Registered paper mail is a staple element of most European legal systems, being the preferred method of sending cease and desist notices or notices of default, given the relative ease with which jurisprudence accepts such messages as proof of notification. Given the importance of the paper registered mail (which in essence is a notification mechanism involving the intervention of a trusted third party), the Study Team requested the national correspondents to indicate whether their legal system has implemented a framework for sending electronic registered mail. As with notifications in general, if the reply was in the affirmative, correspondents were also requested to indicate the context in which this is allowed, the procedure to be followed (e.g. the fulfilment of the role of

Trusted Third Parties), and an assessment of the importance of the receiving party's consent to accepting such electronic registered mail.

C.2.4.3. Electronic archiving

It goes without saying that the legal (and economic) value of electronic documents is also dependent on storing such documents in the long term, and being able to reproduce them after a significant amount of time, with the necessary guarantees concerning its validity at the time of creation, integrity of its contents, authenticity, and accessibility of the digital file. In the absence of sufficient assurance mechanisms in this regard, electronic documents are legally all but worthless. While it was expected that regulations regarding electronic archiving of documents would be fairly common in certain specific contexts (specifically for electronic invoices and electronic accountancy), the Study Team also considered it important to examine which European countries, if any, had implemented a generic (i.e. not limited to a specific sector) framework for the electronic archiving of electronic or paper documents. The correspondents were asked to examine this issue, and if any framework was available, to describe the context and criteria with regard to the archiving process, particularly concerning the preservation of integrity and authenticity, and non-repudiation?

C.2.4.4. Restrictions to the acceptability of electronic documents – Qualified documents

Finally, the country profiles received in the course of the preliminary study indicated the existence of general provision in their legal system indicating which contract types still need to be concluded on a written (paper) document, either for validity or for evidence purposes. Both the Polish and Bulgarian profile coined the phrase "qualified documents" for this type of document, which typically included e.g. family contracts (wills, marriage, guardianship, etc.), contracts of suretyship, and transfer of real property rights (excluding rent). For qualified documents, the formal requirements render electronic documents impossible. Common examples of such formal requirements include: the signature of or in the presence of a notary public, copying of the document in an official paper-based register, presence and/or co-signing of witnesses, stamping with fiscal seals, authentication by court decisions, etc.

Therefore, the correspondents were requested to describe the categories of such qualified documents in their national legal system.

C.3. Specific business processes

C.3.1. Approach and findings of the preliminary study

One of the principles put forth by the tender specifications was that the Study Team would be required to present a series of documents to be surveyed to the Commission, ensuring that a representative sample of eBusiness processes would be covered by the Study. This proposal was to be submitted for approval to the Commission before the network of national correspondents could be contacted.

As indicated above, the Study Team felt that the exact identification of business processes and document types was of such importance that it merited a preliminary study, in which a group or three national correspondents were requested to provide information on specific document types used in five different eBusiness phases:

(i) Introduction of goods on the market (e.g. certificates of origin and conformity);

(ii) Credit arrangements (e.g. bills of exchange and documentary credit);

(iii) Transportation and storage (e.g. bills of lading and storage agreements/certificates);

(iv) Cross border trade formalities (i.e. customs);

(v) Financial and fiscal management (e.g. invoices, accounting and periodic deposits of annual accounts).

Most notably, the Study Team had a concern that for some of these business processes the resulting information would be too similar between the different states. The risk existed that for certain document types, no specific national regulation would be in place regarding the use of electronic documents, and that all national reports would simply refer to applicable international norms (e.g. European directives), and indicate that electronic documents would be theoretically possible within the national legal framework, but that they remain almost entirely unused in commercial practice.

This risk was felt to be most pressing for the first business process, related to the introduction of goods on the European market, and the necessity of including certificates of origin and/or conformity. The legal framework for this specific business process tends to be fairly fragmented even within any given country, but the central pattern was expected to be the same.

Following the example set by the European New Approach policy, European directives (see e.g. the Low Voltage Directive, i.e. Council Directive 72/23/EEC for the safety of low voltage electrical equipment[1], as modified by Directive 93/68/EEC[2]) typically require enterprises engaged in the production of goods requiring administrative certification to self-certify their products or to obtain certification from an expertise centre, and to

1 Council Directive 73/23/EEC on the harmonisation of the laws of the Member States relating to electrical equipment designed for use within certain voltage limits, as amended by Council Directive 93/68/EEC.

2 Council Directive 93/68/EEC of 22 July 1993 amending Directive [...] 73/23/EEC (electrical equipment designed for use within certain voltage limits)

indicate their compliance with European standards by appending the well known CE-marking to/on their product and/or to include a formal declaration of conformity.

The directives do not typically indicate if the marking or the certificate can be included in electronic form, and it was generally expected that national transpositions wouldn't clarify this matter either. As a result, prior to the preliminary study, the Study Team expected that examination would only reveal that national regulations would be no more clear on this issue than the European framework itself; that it would therefore mostly be considered allowable to include markings or certificates in an electronic form; but that commercial practice in this sense would be limited to non-existent.

The outcome of the preliminary study confirmed the suspicion: in all three surveyed states (Belgium, Bulgaria and Poland), specific regulation was scarce. When available, it offered no clear answer to the question of the possibility of using electronic documents, although the correspondents generally considered it a possibility. In all cases, they confirmed that the actual use of electronic certificates in practice was virtually non-existent, mostly due to practical reasons.

Following this result, the Study Team concluded that a further in-depth examination of the use of electronic documents for the introduction of goods on the European market would constitute a considerable additional workload for the correspondents, which was unlikely to yield any further results apart from those already known to the Study Team on the basis of the preliminary study. For this reason, the Study Team recommended to focus more on the other four business process phases, as described in detail below, so as to ensure that the information collected would be relevant and useful for further analysis.

Thus, the Study Team suggested to the Commission to focus the Questionnaire on the four latter business phases, a proposal which was subsequently accepted.

Furthermore, the Study Team felt a concern that focusing too much on a fixed list of document types for each of these phases could prove to be counterproductive, since the risk existed that for any specific document type no regulation would be available (which is not uncommon), or worse yet, that no significant legal practice existed (which would later prove to be a valid concern for some countries, e.g. the quasi non-existence of bills of lading (a mostly maritime document) in fully landlocked countries (e.g. Hungary). In such cases, an excessive focus on specific and mandatory document types could result in reports that would yield too little results for a given business phase.

The Study Team resolved this issue by making information on the regulation and administrative practices surrounding electronic documents in each business phase mandatory, but by instructing the correspondents that the list of specific document types mentioned above for each business phase was indicative. In other words, the correspondents were thus allowed to omit certain document types if no specific relevant legislation or legal practice existed for this document, and to add other document types if these were regulated in a more interesting manner than the document types suggested by the Study Team. In this way, information could be collected regarding the most prevalent or significant electronic documents for each business phase of the Study.

As the national profiles below will show, several correspondents used this option to good effect, by providing information on alternative document types which proved in many cases to be quite useful and informative.

Thus, for the examination of electronic documents in specific business processes, the correspondents were asked to focus on the following phases, and were recommended to focus on the indicated document types:

(i) Credit arrangements (e.g. bills of exchange and documentary credit);

(ii) Transportation and storage (e.g. bills of lading and storage agreements/certificates);

(iii) Cross border trade formalities (i.e. customs);

(iv) Financial and fiscal management (e.g. invoices, accounting and periodic deposits of annual accounts).

For each of these phases (and for each document type commented therein), the following questions were required to be addressed by the correspondents:

- Is there explicit regulation regarding the use of electronic documents in this business process?

  E.g.: does the national legal system explicitly regulate the use of electronic bills of lading, electronic storage agreements, electronic accounting documents, etc.

- Are electronic documents legally allowed for this business process?

  I.e., even if the law does not expressly regulate electronic documents as indicated above, is the law interpreted in a manner that none the less allows electronic documents to be considered valid? E.g. electronic bills of lading are often not expressly authorised by the law, but they are none the less often considered valid, either through doctrine or by application of general contractual principles.

- Are the criteria for the use of electronic documents clear?

  I.e. does the law permit contracting parties to conclude electronic contracts in a manner that is sufficiently certain, or is there room for interpretation (and thus legal uncertainty)?

- Are electronic documents used in practice in this business process?

  Has the legal framework resulted in the actual use of electronic documents in this business process? If no, are there barriers of another nature?

- Are there any remaining legal issues which impede the use of electronic documents?

  Sometimes electronic documents are allowed, but they can none the less not be used because of a different legal requirement (e.g. public administrations need to stamp the original document), and no procedure has been put in place to do this electronically. In this case correspondents are requested to describe these remaining formal legal barriers.

In addition, the specific business processes may require a number of other questions to be answered, depending on the situation in the national legal framework. This will be indicated below.

As a general comment, it should also be pointed out that in several instances the correspondents were asked about the transposition of European directives in their national framework. Since the Study also spans the EEA and Candidate Countries, these questions could sometimes not be answered literally. In these cases, the correspondents indicated the corresponding regulation in their own countries, in some cases even spontaneously referring to European regulations and their compliance therewith.

C.3.2. Credit arrangements

The status of electronic documents when concluding credit arrangements, particularly between the buyer and seller of goods in an international context, is an extremely important issue. Document types such as bills of exchange, promissory notes and documentary credit tend to be extremely formalistic in nature, requiring a great deal of care of contractual partner both when creating such documents and when assessing their validity and probative value.

Credit arrangements form a good test case of overall acceptability of electronic documents in eBusiness transactions, as they comprise a volatile cocktail of characteristics include that collectively could prove to be a significant obstacle to their acceptability in electronic form. These characteristics include:

- The fact that legislation is occasionally unavailable, so that legal practice relies fully on doctrine, jurisprudence and commercial tradition;
- When legislation does exist, it tends to be decades old, so that references to electronic documents are extremely rare;
- The typically high value of these contracts, which means that contractual partners will be even less likely to assume any kind of risk in using electronic documents;
- The highly formalistic nature of such agreements, as states about, which e.g. implies that the documents often embody a right, rather than merely serving as evidence to it. Thus, the integrity (and sometimes uniqueness) of the documents becomes an even larger factor.
- The fact that credit arrangements are most often used in cross-border commercial relations where the contractual parties are not familiar with one another, so that cross-border validity and acceptability of electronic documents constitutes an even larger problem.

Thus, correspondents will not only be required to examine the available legal framework, but also (and more importantly) to assess whether commercial practice has embraced electronic business processes in any form.

C.3.3. Transportation and storage of goods

While the document types commented in this section are among the most common – indeed, it is scarcely conceivable to monetise a good without transportation and storage agreements – the use of electronic documents in such processes is certainly not evident.

In fact, a broad distinction can be made between two common types of regulatory frameworks in this category, which do not necessarily exist in all European countries:

- on the one hand relatively generic and form-free storage and transportation regulations, where the applicable law specifies little to no formal requirements for the validity and proof of a contract, so that the acceptability of electronic documents is generally speaking an application of the general principles of eCommerce legislation, as outlined in the sections above. This will e.g. commonly be the case for storage contracts in countries where no formal requirements (such as fiscal seals, the physical delivery of the goods to be stored, etc.) are imposed. In this case, the legal framework will generally be fairly flexible towards the use of electronic documents.
- On the other hand, certain contract types will be more tightly regulated in certain countries, requiring e.g. the registration of a storage contract in a storage register, the issuing of a storage receipt, or the physical hand-over of the goods before a contract can be considered concluded. Furthermore, countries with a more extensive mercantile (and especially maritime) background are generally expected to distinguish more clearly between contracts regarding transport over land, air or sea, possibly imposing different formal conditions depending on the type of transport. The bill of lading is a common example of this, as a transportation document issued to the receiver of a sea cargo, to indicate his right to claim the cargo at its place of destination. Considering the extreme importance of being able to prove that the bearer of such a document is the sole holder of the original authentic bill of lading, the law can be expected to be significantly less flexible with regard to this second group of contracts.

Thus, the national correspondents will be required to examine in detail to what extent their legal framework distinguishes between such different storage and transportation documents, and what the consequences of this distinction are with regard to the formal requirements imposed to such documents, as well as to the possibility of substituting the traditional paper documents by an electronic equivalent.

C.3.4. Cross border trade formalities

One of the main problems in the introduction of electronic documents in business transactions is that customs often do not accept them as legally valid. Therefore, even when trade partners agree that electronic documents are acceptable, they will often decide against using them to avoid legal arguments with customs services or other public authorities.

On a European level, customs regulation has been incorporated in Council Regulation (EEC) No 2913/92 establishing the Community Customs Code[3], supplemented by

[3] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L 302 , 19 October 1992

Commission Regulation (EC) No 2787/2000 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (Text with EEA relevance). In particular, Regulation (EC) No 648/2005 of the European Parliament and of the Council of 13 April 2005 amended Council Regulation (EEC) No 2913/92, allowing the use of data processing techniques and consequently of electronic customs declarations[4].

The objective was to harmonise customs regulations in all Member States and the EEA countries, in a fashion that would permit the electronic transmission of harmonised data using common interfaces. The use of electronic documents should therefore be permitted based on a universally accepted standard, keeping into account existing international initiatives[5]. In this manner, electronic customs declarations and electronic data exchange should become the norm[6], rather than the exception.

The Community Customs Code repeatedly emphasises that certain declarations may be made "using a data-processing technique where provided for by provisions laid down in accordance with the committee procedure or where authorized by the customs authorities". These data processing techniques have been specified in greater detail by Commission Regulation (EC) No 3665/93[7], containing definitions of such terms as "data processing technique", "EDI" and "standard message". The regulation stipulates that the handwritten signature may be replaced by another technique, to be chosen by customs authorities.

The text does not contain an emphatic preference for the digital signature, although the text does require the technique to permit "checking the source of data and [...] protecting data against the risk of unauthorized access, loss, alteration or destruction". Considering these requirements, the advanced digital signature seems an obvious choice.

For the management of transit procedures, there is a New Computerised Transit System (NCTS[8]), and an electronic network to which national Customs offices/authorised traders are connected.

Since the introduction of these rules, all Member States customs offices have gradually joined the NCTS-network, which permits the exchange of electronic data with connected offices.

The customs declarations are lodged on standardised SAD (Single Administrative Document) form, with the electronic messages codified and transferred via secured network ((CCN/CSI). As for the pre-arrival and pre-departure declarations, which will have to be lodged electronically under Regulation (EC) 648/2005, the data

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[4] http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_117/l_11720050504en00130019.pdf

[5] Such as the customs harmonisation initiatives of the WTO and the WCO Customs Data Model.

[6] For more detailed information, we refer to the "Report on the proposal for a European Parliament and Council regulation amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (COM(2003) 452 C5-0345/2003 2003/0167(COD))"

[7] Commission Regulation (EC) No 3665/93 of 21 December 1993 (Official Journal L 335 of 31 December 1993)

[8] For detailed information regarding the NCTS, see http://ec.europa.eu/taxation_customs/customs/procedural_aspects/transit/common_community/index_en.htm

elements will be fully harmonised in the EU and be again transferred via a secured network.

Furthermore, the transit procedure between the EU Member States, Iceland, Norway and Switzerland is done on the basis of the Convention between the European Economic Community, the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, on a common transit procedure[9].

The customs procedures within the Member States themselves are conducted on the basis of the Community Customs Code and the Code's implementing provisions.

On the other hand, a number of documents are still required to be lodged with the customs declaration (certificates, confirmations, loading lists, etc.). These documents usually fall within the competence of different agencies in the member states and/or third countries and are not harmonised.

Given that the European regulatory situation is thus fairly well defined, and that it is a known fact that the European Member States have all acceded to the NCTS-network, the national correspondents are mainly required to indicate how the implementation of the European regulatory framework has been implemented in their Member States, and for the non-Member States to indicate how (if at all) their customs accept electronic documents and/or interact with the NCTS.

C.3.5. Fiscal / Financial management

Finally, in order to complete the set of eBusiness process phases, it is also important that European enterprises are allowed to keep their financial and fiscal documents in an electronic form. After all, if every other step of an eCommerce activity can be handled electronically, an enormous unnecessary and inefficient overhead is created if the enterprise engaged in the eCommerce activity is still required to print out its invoices, cost statements, or any other document that might be required for taxation purposes.

Principally, the correspondents were asked to clarify three separate issues regarding the status of electronic documents in fiscal and financial business processes according to their national legal framework:

- First of all, can invoices be issued electronically? If so, what conditions need to be met? How and where should electronic invoices be stored, and for what period of time? For EU Member States, this will mostly result in an explanation of the transposition of the relevant provisions of the eInvoicing directive; however, for the EEA and Candidate Country states, the directive need not have had an equally decisive influence. None the less, the existence, validity and international exchangeability of eInvoices between all surveyed states is of key importance in order to assess the pervasiveness of eCommerce practices.
- Secondly, enterprises are also required to maintain a more or less extensive set of documents for accounting and tax auditing purposes. While accounting

[9] See http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=21987A0813(01)&model=guicheti

software is relatively commonplace on the European market, this need not necessarily be an indication of the openness of European regulations to electronic accounting documents as evidence. It is equally plausible that national tax administrations allow accounting software for assisting in the preparation of fiscal documents, but that they still only consider the printed paper versions as authentic and acceptable.

- Finally, a number of European countries require all or some of the enterprises incorporated within their national borders to annually deposit certain fiscal documents with the competent authorities. It is thus also important to determine if this deposit can be done electronically, or whether companies would be required to provide printed paper versions of these fiscal documents only.

The importance of this particular section of the national reports lies not only in the assessment of the completeness of the national eCommerce frameworks by verifying to what extent companies can meet their administrative obligations in an electronic manner, but also and perhaps more importantly in determining the eReadiness of each given country's public administrations. After all, more than any other process examined in the national reports, the fiscal/financial management aspects of eBusiness are also focused on fulfilling requirements imposed by public administrations, rather than purely on achieving a company's internal economical goals.

Thus, the flexibility of this particular aspect of a country's legal and administrative framework is a clear indication of the importance which that country has placed on modernising their own internal processes in an effort to increase efficiency and reduce costs, to the mutual benefit of the public sector and the enterprises with which it interacts.

For this reason too, the acceptability of electronic documents in fiscal and financial business processes is a key element for the assessment of a country's legal and administrative eBusiness framework.

C.4. Assessment of the eCommerce framework

Finally, in the last section of the national reports, the correspondents were asked to assess their own national framework.

Particularly, the correspondents were requested to describe:

- The main characteristics of their legal framework, i.e. to provide a general assessment, identifying the most significant policy choices made by the national legislator and in preparing public administrations and the eBusiness sector;
- The main legal barriers to eBusiness, i.e. to summarise any remaining legal obstacles to the development of eBusiness, either of a regulatory nature, from a policy perspective, or out of purely practical considerations;
- The main legal enablers to eBusiness, i.e. to summarise of the main encouraging factors in the legal framework to the development of eBusiness, specifically paying attention to the flexibility, clarity, comprehensiveness and consistency of the national eBusiness regulations.

The main purpose of this last section was to learn the correspondent's appreciation of his own country's legal eCommerce framework, including its strengths and weaknesses. Therefore, correspondents were given considerable leeway in this section: no specific questions were required to be answered here, and the correspondents were given complete freedom to emphasise any points that they felt to be of significance for their report. As the national reports below will show, this has resulted in some very interesting insights for a large part of the profiles.

In the section below, the resulting National Profiles will be presented.

Austria National Profile

A. General legal profile

Austria is a federal republic, consisting of 9 states[10]. At a lower administrative level, Austria comprises 84 districts[11] and 2359 communities[12].

Commerce and contract law is a federal matter, which is generally incorporated into the Civil Code[13] and the Code of Commerce[14]. As a result, eCommerce is also regulated at the federal level, through a number of laws and regulations *(Verordnungen)*[15].

Disputes regarding commercial relations are typically dealt with by District Courts[16] for matters with a financial value of € 10.000 or less, or by Courts of Commerce[17] for matters of higher value. Appeals against the decisions of District Courts can be lodged with the Commercial Courts, and with the Courts of Appeal[18] for decisions of the Courts of Commerce. Decisions of Courts of Appeal are subject to appeal for error to the Supreme Court.

Austrian courts are bound by statute (§ 12 Civil Code). Former judicial decisions are not binding precedents. In practice, however, standing case law is not overruled without good reason. The Supreme Court thus maintains uniformity and continuity in its decision making and its decisions are highly authoritative. Enlarged panels have to deal with legal questions of fundamental importance that may result in a departure from an established line of decisions. This practice grants legitimacy to "judicial adaptation of the law" *(richterliche Rechtsfortbildung)*.[19]

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[10] Bundeslaender

[11] Bezirk

[12] Gemeinde

[13] Civil Code *(Allgemeines Bürgerliches Gesetzbuch - ABGB)*, Official Gazette (*Justizgesetzsammlung*) 946/1811, as amended.

[14] Code of Commerce (*Handesgesetzbuch - HGB*), Official Gazette (*deutsches Reichsgesetzblatt*) 219/1897, as amended. The Code of Commerce will be replaced by a new Business Code (*Unternehmensgesetzbuch - UGB*), Official Gazett (*Bundesgesetzblatt*) I 120/2005, as by 1 January 2007.

[15] Austrian regulations can be accessed through the *Rechtsinformationssystem der Republik Österreich* - http://www.ris.bka.gv.at/

[16] Bezirksgerichte

[17] Handelsgerichte

[18] Oberlandesgerichte

[19] An introduction to the Austrian legal System provides H. Hausmaninger, *The Austrian Legal System*, 3rd Edition, Manz, Wien 2003.

B. eCommerce regulations

Legislation is the basis for most questions regarding the validity and recognition of electronic documents.

B.1 eCommerce contract law[20]

B.1.1. General principles

Regarding the validity of electronic contracts, Austrian law is – as a general rule – very flexible. Barring certain more formal types of contracts[21], Austrian contract law typically only demands that a consensus exists between parties regarding the essential elements of a contract; a written document is not typically required (§ 883 Civil Code)[22]. The validity of the contract must be proven by the presentation of sufficient evidence, e.g. witnesses or creditable documentation. Therefore, documents are normally not required for the validity of the contract as such, but rather for proof that the contract was concluded.

In civil and commercial affairs, parties are free to conclude arrangements between themselves in which they can specify explicitly which forms of evidence can be deemed acceptable in a court of law, and such agreements are binding. This has been a great facilitating factor, given the specific nature of many types of modern trade and transportation contracts or banking.

Both in civil and in commercial cases, proof is mostly dependant on the existence of a written document. Austrian law distinguishes between private documents *(Privaturkunden)* (§ 294 Civil Procedure Code) and other instruments. A private document must be written and signed by the issuer of the document. For the declarations contained in a private document, full evidence is given that these declarations are those of the issuer. Other instruments can be invoked as evidence but are subject to free appraisal of the actual evidential value of the document by the judge.

Austrian courts are quite open to accept other than written documents as proof. Recently, the validity of documents without signature based on a private contract was recognised (e.g. credit card transactions over the internet)[23]. Due to this flexibility, no need has arisen to develop a theory of equivalence of an electronic document to a written document.

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[20] See H. Koziol, R. Welser, *Grundriss des bürgerlichen Rechts 1*, 13th Edition, Manz, Wien 2006, p. 12 et seq. and 138 et seq.; W. Zankl, *E-Commerce-Gesetz, Kommentar und Handbuch*, Verlag Österreich, Wien 2002; I. Mottl, *Vertragsrechtliche Rahmenbedingungen für den Electronic Commerce*, in: D. Jahnel, A. Schramm und E. Staudegger (Eds.), *Informatikrecht*, 2nd Edition, Springer, Wien 2003, p. 56 et seq.

21 Such as e.g. the sale of real estate.

[22] W. Zankl, *Bürgerliches Recht, Kurzlehrbuch*, 3rd Edition, WUV, Wien 2006, p. 119. As we shall see below, the consequences of this position are far reaching. Even more specialised types of contracts do not typically require extensive written documents to be legally valid, which can often result in practical difficulties.

[23] Supreme Court *(Oberster Gerichtshof),* judgment of 13.6.2005, case 10Ob54/04w.

A facsimile signature is allowed if it is usual commercial practice (§ 886 para. 3 Civil Code). This does not, however, apply to electronic documents.

Therefore, the primary requirement for a document submitted as proof of a contract is the presence of an autographic signature.

The Electronic Signature Act, enacted in 2000 in transposition of the e-Signature Directive, explicitly recognises secure electronic signatures as valid for the proof of contracts. Electronic documents signed with an electronic signature[24] are therefore expressly recognised as proof. Full legal value is given to an electronic document as evidence before courts (§ 4 para. 3 Electronic Signature Act).

Only a secure electronic signature fulfils the legal requirement of an autographic signature (§ 4 Electronic Signature Act). The legal presumption of evidence of private documents (§ 294 Civil Procedure Code) is slightly modified for electronic documents as it extends only to the declaration of the content and not to the issuer of the document.[25]

Other electronic signatures cannot be discarded as evidence for the reason that the signature exists only in electronic form (§ 3 Electronic Signature Act).

A secure electronic signature has to fulfil certain requirements, inter alia be based on a qualified certificate issued by a notified and supervised certification service provider and be created using technical components and procedures which comply with the security standards set forth in the Electronic Signature Act.[26] The cryptographic signature procedure is governed by the Signature Regulation[27].

However, § 4 of the Electronic Signature Act excludes a number of contract types from its scope: contracts regarding family and inheritance law; other declarations of intent or legal transactions which require official certification, contracts which require certification by a court or a notary or a notarial deed in order to be valid; declarations of intent, legal transactions or petitions which require official certification, judicial or notarial authentication or a notarial deed in order to be entered in the land register, companies register or other official register or declarations of guarantee.

From 1 January 2007 on, these exemptions apply only for few contract types, e.g. marriage or testaments[28]. Otherwise, these transactions can be done electronically, however, depending on the type of contract, involving the certification by a court, a notary or a solicitor. For transactions requiring a notarial authentication, parties have to sign electronically with a secure electronic signature before the notary. Then, the notary signs with a special electronic certification signature of the notary

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[24] Federal Electronic Signature Law *(Bundesgesetz über elektronische Signaturen (Signaturgesetz - SigG))*, Official Gazette *(Bundesgesetzblatt)* I 137/2000, as amended; in force since 1 January 2000.

[25] If the rules on a public key infrastructure are kept, sufficient evidence exists on the link between the electronic signature and its user.

[26] For further information on the Electronic Signature Act see T. Menzel, *Elektronische Signaturen*, Verlag Österreich, Wien 2000.

[27] Regulation of the Federal Chancellor on Electronic Signatures *(Verordnung des Bundeskanzlers über elektronische Signaturen (Signaturverordnung - SigV)*), Official Gazette *(Bundesgesetzblatt)* II 2000/30, as amended.

[28] Amendment to the Electronic Signature Act, Official Gazette (*Bundesgesetzblatt*) I 164/2005.

(elektronische Beurkundungssignatur des Notars)[29]. Such documents have to be stored electronically in a special archive called "*Urkundenarchiv des österreichischen Notariats*". Therefore, a personal presence before a notary, a court or a solicitor is always required in order to establish such documents. These electronic documents have the same value as paper documents and can be submitted as such before courts and public authorities. Courts (and also public authorities) will establish archives of electronic documents. In this respect, the electronic archives of the business register and the land register are to be mentioned.

Austrian law imposes additional requirements on certain categories of documents. Several examples of such requirements will be discussed in the remainder of this study.

Within the confines of commercial law (which is the area this study is predominantly concerned with), Austrian legislation contains no special rules on the conclusion of contracts.

The freedom of form of a contract (§ 883 Civil Code), the autonomy in private law to accept electronic or other documents without a signature and the positive appraisal of judges of other than written documents as evidence establishes a facilitation environment for commerce but also more specific types of modern trade and transportation contracts. Parties are therefore free to conclude arrangements between themselves in which they can specify explicitly which forms of evidence can be deemed acceptable in a court of law, and such agreements are binding.

The conclusion of contracts is dependent on communications between the parties that must be proven in case of disagreement (e.g. offer, acceptance etc.). These practical problems exist without distinction in the paper and electronic environment. Whereas registered letters provide evidence in the paper environment, no comparable solutions exist so far in the electronic environment for the commercial sector. In the future, registered e-mail or time stamps based on transactions with a particular provider as a form of third party intervention may be available.

In the public sector, the e-government law provides for third party intervention for the proof of delivery of documents.

As for electronic archiving, Austria has not implemented a generic framework that could be useful across sectors or for multiple document types. The only explicit regulation regarding electronic archiving is in relation to electronic accountancy and invoicing, where the law provides that both electronic and paper documents and invoices may be stored in an electronic form. The law also describes the specific conditions imposed on the storage process. However, as electronic documents are recognised as proof, no real obstacle exists for electronic archiving besides for special documents.

[29] Notaries Act (*Notariatsordnung*), Official Gazette (*Reichsgesetzblatt*) 75/1871, as amended. The relevant amendment is part of a wider change of relevant laws called Profession Amendment Act (*Berufsrechts-Änderungsgesetz 2006*), Official Gazette (*Bundesgesetzblatt*) I 164/2005.

B.1.2. Transposition of the e-Commerce Directive

This existing legal framework has been amended and clarified through the transposition of the e-Commerce Directive.

The Electronic Commerce Act[30], which transposed the e-Commerce Directive, adds only a few rules for the conclusion of contracts in the information society. Otherwise, the general regime for validity of a contract and the form of a contract as well as the rules on proof of documents apply.

Services of the information society (further referred to as online contracts) require detailed information by the service provider on the conclusion of the contract and on terms and conditions of business (§ 9 and 11 Electronic Commerce Act). Technical means for correction of input errors have to be provided and a conformation of receipt must be immediately sent to the user (§ 10 Electronic Commerce Act). Electronic declarations are considered as received if those could be accessed by the recipient under normal conditions (§ 12 Electronic Commerce Act). Besides these special rules, the difference between online and offline contracts (contracts concluded in other contexts than the Electronic Commerce Act) is not significant in Austria.

B.2 Administrative documents

Austrian public law follows the general line of other states concerning administrative documents. Whereas private autonomy allows great flexibility in contract law, administrative law provides strict rules for notification and notices.

The use of electronic documents in Austrian administrative procedures and the requirements for use differs, depending inter alia on the respective authority, the type of procedure and infrastructure available. Permissibility of electronic communications with public authorities is determined by the General Administrative Procedure Act[31], the Federal E-Government Act[32], the Electronic Signature Act, as well as by the Federal Delivery Act[33]. More specific administrative regulations may provide for differing procedural requirements.[34]

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[30] Electronic Commerce Act (Bundesgesetz, mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt werden (E-Commerce-Gesetz - ECG)), Official Gazette (Bundesgesetzblatt) I 152/2001.

[31] General Administrative Procedure Act 1991 (*Allgemeines Verwaltungsverfahrensgesetz 1991 - AVG*), Official Gazette (*Bundesgesetzblatt*) 51/1991, as amended. An English version is available at http://ris.bka.gv.at/erv/erv_1991_51.pdf.

[32] E-Government Act (Bundesgesetz über Regelungen zur Erleichterung des elektronischen Verkehrs mit öffentlichen Stellen (E-Government-Gesetz - E-GovG)), Official Gazette (Bundesgesetzblatt) I 10/2004; in force since 1 March 2004. An English version is available at http://www.ris.bka.gv.at/erv/erv_2004_1_10.pdf.

[33] Federal Delivery Act (Bundesgesetz über die Zustellung behördlicher Dokumente (Zustellgesetz - ZustG)), Official Gazette (Bundesgesetzblatt) 200/1982, as amended.

[34] For a general overview on the Austrian E-Government strategy see the report of the Austrian Federal Chancellery, *Administration on the Net: An ABC Guide to E-Government in Austria*, OCG books, Wien 2006.

According to the General Administrative Procedure Act, a written submission may be presented in any technically feasible way. Within the scope of the General Administrative Procedure Act a handwritten or secure electronic signature is not a precondition for communication between citizens and public authorities. Electronic communication is permissible, where the communication takes place in written form, an administrative procedural rule does not stipulate otherwise, and as far as appropriate technical means are available for both communication partners. In most legally relevant cases, however, a written submission or the electronic equivalent is obligatory.

The General Administrative Procedure Act furthermore provides that authorities have to inform citizens on how they can electronically communicate with the authority. Certain information on addresses, technical conditions required, formats recommended or required, whether an electronic signature is needed, etc. has to be published in the bulletin and on the Web.[35]

By enacting the Federal Act on Provisions Facilitating Electronic Communications with Public Bodies in 2004 a basic legal framework was established. The intention of the Austrian E-Government Act is to promote legally relevant electronic communication. It enables the implementation of basic elements such as the citizen card, electronic forms, electronic signature, electronic payment and electronic service delivery, but also establishes the principle of freedom to choose between different means of communication when making submissions to such bodies.[36] Quite often, however, the law requires the submission of a written document that could be substituted by an electronic submission with secure electronic signature and proof of unique identity by the citizen card.

The citizen card serves to validate the unique identity of a person making an electronic submission and the authenticity of this submission in procedures for which a controller in the public sector has set up a technical environment in which the citizen card can be used. Identity is ensured by a unique identity link between the citizen card and its rightful owner. The identity link has to be entered in the citizen card. A secure electronic signature contained in the citizen card ensures authenticity. Upon consent of the card holder the citizen card may also be used for electronic validation of data, in particular data on personal status, nationality and information on economic activity. However, the citizen card environment is established for several procedures but not widely used yet. Citizen cards issued in the other EU Member States can be used in Austrian e-government, provided that they contain an identity link or are capable of being so equipped.

To establish a unique identity link, all natural persons registered as resident in Austria are allocated a sourcePIN, which is derived from the respective number of the Central register of Residents in encrypted form. For all the other natural persons, the registration number in the Supplementary Register is used. The source PIN for

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[35] For further information on the electronic administrative procedure under the General Administrative Procedure Act see W. Steiner, *Die elektronische Verfahrensführung nach dem AVG*, in: O. Plöckinger et al. (Eds.), *Internet-Recht*, Neuer wissenschaftlicher Verlag, Wien-Graz 2004, p. 279-298.

[36] For further information on the E-Government Act see W. Dohr et al. (Eds.), *E-Government-Gesetz*, Manz, Wien 2004.

legal persons is derived from the Register of Company Names, the Central Register of Associations, or the Supplementary Register.[37]

The sourcePIN of a natural person may be stored only on their citizen card and in the sourcePIN Register of the source PIN Register Authority. The Data Protection Commission is assigned the function of the Register Authority.[38] Other authorities may identify natural persons only by their sector-specific PIN (ssPIN), which is derived from their source PIN in an irreversible process. As a basis for the generation of the ssPIN, the e-Government Sectors Delimitation Regulation[39] identifies 26 different sectors. Each application needs to be assigned to exactly one of these sectors. An ssPIN is valid only for the sector of activity of the authority within which the initiated procedure falls.

The ssPIN is generated by using the citizen card and therefore needs approval by the person concerned. However, the Register Authority may in certain circumstances generate the ssPIN without a citizen card, in particular as regards administrative cooperation, data acquisition at request of the data subject and submission by a professional representative.

For legal persons the sourcePIN may be stored for identification.[40]

A so-called administrative signature[41] is to be regarded as equivalent to the secure signature until 31 December 2007. An administrative signature is a signature which provides adequate security for the purposes of validating identity and authorisation, but which does not necessarily satisfy all the requirements for a secure signature and, in particular, is not necessarily based on a qualified certificate.[42]

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[37] Natural as well as legal persons who are not registered in Austria (Central Register of Residents; respectively Register of Company Names or Central Register of Associations) may register in a Supplementary Register. See the Regulation of the Federal Chancellor on the Supplementary Register *(Verordnung des Bundeskanzlers über das Ergänzungsregister nach dem E-Government-Gesetz (Ergänzungsregisterverordnung - ERegV))*, Official Gazette *(Bundesgesetzblatt)* II 241/2005; in force since 2 August 2005.

[38] See the Regulation of the Federal Chancellor on the SourcePIN Register (Verordnung des Bundeskanzlers, mit der Tätigkeiten der Stammzahlenregisterbehörde betreffend das Stammzahlenregister nach dem E-Government-Gesetz näher geregelt werden (Stammzahlenregisterverordnung - StZRegV)), Official Gazette (Bundesgesetzblatt) II 57/2005; in force since 3 March 2005.

[39] Regulation of the Federal Chancellor on the E-Government Sectors Delimitation (Verordnung des Bundeskanzlers, mit der staatliche Tätigkeitsbereiche für Zwecke der Identifikation in E-Government-Kommunikationen abgegrenzt werden (E-Government-Bereichsabgrenzungsverordnung - E-Gov-BerAbgrV)), Official Gazette (Bundesgesetzblatt) II 289/2004; in force since 16 July 2004.

[40] The report of the Austrian Federal Chancellery, *Administration on the Net: An ABC Guide to E-Government in Austria*, provides detailed information on the citizen card and related aspects.

[41] The security and organisational requirements of the administrative signature are specified by the Regulation of the Federal Chancellor on Requirements of the Administrative Signature *(Verordnung des Bundeskanzlers, mit der die sicherheitstechnischen und organisationsrelevanten Voraussetzungen für Verwaltungssignaturen geregelt werden (Verwaltungssignaturverordnung - VerwSigV))*, Official Gazette *(Bundesgesetzblatt)* II 159/2004; in force since 16 April 2004.

[42] See: N. Forgó, Königsweg Verwaltungssignatur? Einige Bemerkungen zu signaturrechtlichen Fragen des E-Government-Gesetzes, RFG (Rechts- und Finanzierungspraxis der Gemeinden) 2004/29, p. 110 et seqq.

Austrian law provides that the Electronic Signature Act applies also for open electronic transactions with courts and other authorities unless a law stipulates otherwise. As in the private sector, a secure electronic signature is legally to be regarded as equivalent to a handwritten signature.

It may be noted that the most prominent applications in the public sector, those of the tax authorities (FinanzOnline) and the administration of justice (E-Justiz) do not use a secure electronic signature so far. § 89c para. 1 of the Act on the Organisation of Justice[43] provides that other secure procedures that guarantee the authenticity and integrity of the electronic document may be used. At the moment, discussions are ongoing on a further extension of this practice.

Amendments to the Delivery Act and accompanying legislation[44] enables that electronic documents issued by court or other authorities may be delivered electronically. Registration for the electronic delivery service requires a citizen card. The accredited delivery services are published on http://www.bka.gv.at/zustelldienste. For the time being only one official electronic delivery services is available. It is operated by the Federal Chancellery and accessible at http://www.zustellung.gv.at.

Although the Electronic Government Act favours in its legal framework the secure electronic signature, in practice, the two dominating applications E-Justiz and FinanzOnline are still not based on electronic signatures.

The Austrian's administration of justice established an advanced system to enable paperless electronic communication between parties and courts (*Elektronischer Rechtsverkehr - ERV*). Although the system is used to a level of 95 % by lawyers, the application is since 2000 open for everyone. There existed some restrictions on the use of ERV, in particular as regards transmission of supplements and land and commercial register matters. However, the current reform of the ERV-system and accompanying legislation (e.g. the implementation of work-related secure electronic signatures for notaries, advocates, civil engineer and judiciary) will allow for electronic supplements and extend ERV to land commercial register mattes in the near future.[45], [46]

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[43] Act on Judical Organisation (Gesetz womit Vorschriften über die Besetzung innere Einrichtung und Geschäftsordnung der Gerichte erlassen werden (Gerichtsorganisationsgesetz - GOG), Official Gazette (Rechtsgesetzblatt) 217/1896, as amended.

[44] Regulation of the Federal Chancellor on Delivery Services (Verordnung des Bundeskanzlers über die Zulassung als elektronischer Zustelldienst (Zustelldiensteverordnung - ZustDV)), Official Gazette (Bundesgesetzblatt) II 233/2005; and Regulation of the Federal Government on Delivery Forms (Verordnung der Bundesregierung 1982 über die Formulare für Zustellvorgänge (Zustellformularverordnung 1982)), Official Gazette (Bundesgesetzblatt) 600/1982, as amended.

[45] For further information on this topic see K. Starl, Verfahrensautomation in der Justiz und ERV, in: Jahnel et al. (Eds.), p. 159-175; and A. Zisak, Urkundenarchive in der Justiz: Firmenbuch, Grundbuch, Berufsrechts-Änderungsgesetz 2006, in: Schweighofer et al. (Eds.), Aktuelle Fragen der Rechtsinformatik 2006 (IRIS 2006), Boorberg, Stuttgart et al. (in print).

[46] The legal basis for ERV is established by the Act on Judical Organisation; the Regulation of the Minister of Justice on ERV *(Verordnung der Bundesministerin für Justiz über den elektronischen Rechtsverkehr (ERV 2006))*, Official Gazette *(Bundesgesetzblatt)* II 481/2005, in force since 1 January 2006; and the Regulation of the Minister of Justice on ADV-Form *(Verordnung des Bundesministers für Justiz über Formerfordernisse in mit Hilfe automationsunterstützter Datenverarbeitung durchgeführten gerichtlichen Verfahren sowie Erstellung von Erledigungen in gekürzter Form (ADV-Form Verordnung 2002 - AFV 2002))*, Official Gazette *(Bundesgesetzblatt)* II 510/2002, as amended, in force since 1. January 2003.

The legal framework for electronic communications with the Austrian tax administration was developed already in 1994 (§ 86a of the Federal Fiscal Code[47]). Implementation details are found in the FinanzOnline Regulation enacted in 2002[48]. At the beginning, FinanzOnline was available only for professional representatives but since 2003 the system is open for everyone. Most important transactions are the monthly and annual VAT declarations and income (company) tax declarations. As described below, special rules now obligatorily require electronic declarations by enterprises. Electronic services are only allowed if the recipient expressly agrees to that (§ 97 Federal Fiscal Code).

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The bill of exchange is a prime example of a negotiable instrument and is used in business circles for various purposes. Originally, the bill of exchange was designed as a payment method but over time it has evolved into an instrument for debt collection, credit and investment. Bills of exchange have a long history. For example, in Austria the first codification was enacted in the 18th century[49]. Austria is party of the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes in 1930[50] and its Act on Bills of Exchange[51] follows this convention.

A bill of exchange is an instrument in written form[52] that contains a number of mandatory statements that a certain amount is paid by the drawer or a third person. The bill has to be signed by the drawer. The Austrian law differs between two types of bills of exchange: promissory note of the drawer (*Eigener Wechsel* or *Solawechsel)* and draft of the drawer on the drawee (*Gezogener Wechsel* or *Tratte*).

Whereas the Electronic Signature Act recognises the validity of secure electronic signatures for the requirement of a written document and expressly prohibits denying legal effectiveness to electronic signatures solely on the grounds that is in

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[47] Federal Fiscal Code (Bundesgesetz betreffend allgemeine Bestimmungen und das Verfahren für die von den Abgabenbehörden des Bundes verwalteten Abgaben (Bundesabgabenordnung - BAO)), Official Gazette (Bundesgesetzblatt) 194/1961, as amended.

[48] Regulation FinanzOnline *(FinanzOnline-Verordnung 2002)*, Official Gazette (BGBl.) II 46/2002, as amended.

[49] Exchange Regulation for Vienna and Lower Austria 1717 (*Wechselordnung für Wien und Niederösterreich 1717*) and Exchange Regulation for Innerösterreich 1763 (*Wechselordnung für Innerösterreich 1763*).

[50] Uniform Law on Bills of Exchange (*Einheitliches Wechselgesetz*), Official Gazette (*Bundesgesetzblatt*) 289/1932.

[51] Act on Bills of Exchange (Bundesgesetz betreffend das Wechselrecht (Wechselgesetz 1955)), Official Gazette (Bundesgesetzblatt) 49/1955, as amended.

[52] See G. Roth, *Grundriß des österreichischen Wertpapierrechts*, 2nd Edition, Manz, Wien 1999, p. 5 et seq.

electronic form (§ 3 Electronic Signature Act[53]), this law however does not modify or invalidate existing requirements of form that impose the use of paper. A systematic interpretation of the law shows that the bill of exchange is a unique piece on paper and cannot be replaced by an electronic document without further modifications of the law. The autographic signature is a formal requirement to the existence of the bill (Art 1 Z 8 Act on Bills of Exchange). For endorsements, an autographic signature has to be placed on the unique piece or an attached page (Art. 13 Act on Bills of Exchange). Any copy made must be clearly identifiable (Article 64 et seq. Act on Bills of Exchange).

Thus, under the aspect of the above mentioned reasons, structure and wording of the law clearly mandate the use of paper.

This practical obstacle can be solved by involving a trusted third party acting as a clearinghouse. However, so far, no such developments have been reported in Austria.

C.1.2. Documentary credit[54]

A documentary credit is a document issued by a financial institution which essentially acts as an irrevocable guarantee of payment to a beneficiary.

Usually, the documentary credit was used as a method of payment between trade partners who are unfamiliar with each other with a view to minimise their risk. Nowadays, it is also used as a credit/lending instrument.

From a legal perspective, the documentary credit is based largely on convention, and in most countries there is no law regulating it as such.

Austria is an exception to this rule. The documentary credit is based on the civil order *(Bügerrechtliche Anweisung) (*§§ 1400 – 1403 Civil Code), but these rules may be changed by contract. This means in practice that the Civil Code provides only the basic rules and documentary credits are primarily governed by contract law. The Civil Code does not impose any formal requirements on documentary credits. As no legal barrier exists for the use of electronic contracts, electronic documentary credits are admissible.

Despite this, there is a conventional framework that has found a certain degree of general acceptance: the new Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation or "eUCP[55]". eUCP is an extension to the UCP-500. UCP provides a common framework for documentary credits. It was created under the auspices of the International Chamber of Commerce (ICC) and adopted in 1994. In 2000 the ICC banking commission established an expert task group on the recognition of electronic documentary credits. The outcome, the eUCP, was adopted on 1 April 2002. It should be noted that the eUCP applies only to the

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[53] See C. Brenn, Das österreichische Signaturgesetz - Unterschriftenersatz in elektronischen Netzwerken, ÖJZ (Österreichische Juristen-Zeitung) 1999, 587.

[54] See R. Holzhammer, *Allgemeines Handelrecht und Wertpapierrecht*, 8th Edition, Springer, Wien 1998, p. 300 et seqq; G. Roth, *Wertpapierrecht*, p. 114 et seqq.

[55] See http://www.dcprofessional.com/content/eucp.asp.

presentation of the documentary credit, and not to the issuing or advice procedure (which were already concluded electronically).

The eUCP does not revise but rather extends the UCP. It provides more specific rules than the UCP and aims toward technological neutrality. The eUCP is designed to enable the use of electronic as well as of paper documents. In order to force the extension of the electronic documentary credit, it also allows for the use of a mixture of electronic and paper documents.

Article 3 (a) (iii) refers to electronic signatures as an alternative to traditional signatures. As such, the eUCP appears to be compatible with the e-Signature Directive. Entity authentication and verification of integrity are key notions of both, the eUCP and the e-Signature Directive.

The eUCP applies where the parties express their will to do so, both for paper and for electronic documents. Also as regards electronic documentary credits, the parties receive a great amount of freedom in the practical organisation. They may agree between themselves on the format of the electronic document and the place of presentation. In the case where the bank cannot accept the presentation due to technical difficulties, the bank is considered to be closed, and the expiry date will be extended to the first following banking day on which it is able receive an electronic record. It is clear that the eUCP relies heavily on the concept of functional equivalence for the resolution of practical problems: when technology causes uncertainties, a solution will be sought in analogy with similar situations in a non-electronic context.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

When a good is transported by any means, various documents are issued during the various steps of the transport. As an example of this type of document this report will examine the use of "bills of lading". In most countries this type of bill is used for the transportation of goods in land and maritime traffic. The Austrian Code of Commerce provides two types of bills of lading: the *Ladeschein* (§§ 444–450), which is used for the traffic on land, rivers and waterways, and the *Konnossement* or *Seeladeschein* (§§ 642-663) for maritime traffic.

The *Ladeschein* is issued by the carrier at the shipper's request after the conclusion of a transportation contract. It is defined as a document establishing 1) the receipt of the goods to be transported (especially quantity, weight and dimension), and 2) the transporter's commitment to transport them. The carrier is liable to the recipient for any inequality between the *Ladeschein* and the transported goods. The shipper usually transfers the *Ladeschein* to the recipient. The holder of the *Ladeschein* is entitled to the reception of the goods upon arrival at their final destination. The Commercial Code does not define the form of the *Ladeschein*, but specifies the information which has to be included. Depending on the notification of the beneficiary, Austrian law distinguishes three sub-types: the *Rektaladeschein* (the rightholder is named in the commercial paper and a transfer has to be done by cession), the *Orderladeschein* (the rightholder is named in the paper but can be more easily transferred by endorsement) and the *Inhaberladeschein* (the rightholder is the possessor of the paper without mentioning him by name). The *Inhaberladeschein* is transferred only by handing over of the *Ladeschein*.

The *Konnossement* or *Seeladeschein* is very similar to the *Ladeschein,* but applicable for maritime transport only. Depending on the transferability of the bill, Austrian law again distinguishes three sub-types: the *Orderkonnossement,* the *Rektakonnossement* (unusually), and the *Inhaberkonnossement* (unusually)[56].

The Code of Commerce does not explicitly require a paper document, neither for the *Ladeschein* nor for the *Konnossement*. However, a systematic interpretation of the relevant provisions and of the prevailing opinions in the literature concerning the general attributes of securities[57] show that the bill of lading has to be a unique and signed paper document.

There exists another type of consignment note, the *Frachtbrief* (§§ 426, 432 and 433 Code of Commerce). It is issued by the shipper at the freight carrier's request and not transferable. The *Frachtbrief* is not a commercial paper but a private document and contains only the proof of the contract of carriage. In this case there exists no legal barrier for the use of electronic means for the conclusion of the consignment note.

In April 1994 the project Bolero (Bills of Lading for Europe) was launched and tried to establish electronic bills of lading. Under the project, which provided strong security controls and procedures to protect the integrity and prove the authentic electronic messages, the services were based on the exchange of EDI messages between a central service (called the registry) and users. The central registry stored the documents of shipping and denied access without certain authentication.

In Austria neither the described primary Bolero system nor the recent Bolero product[58] is used in practice so far. A reason may be legal obstacles as negotiable documents are still considered as unique paper documents.

C.2.2. Storage contracts[59]

For the conclusion of storage agreements (§§ 416 – 424 Commercial Code) no legal barrier for the use of electronic contracts exists.

The stockist can issue a warehouse warrant (*Lagerschein*, §§ 424 et seq. Code of Commerce), which confirms 1) the receipt of the storage goods and 2) the restitution of the goods on presentation of the warrant. This warrant is characterised as a commercial paper and occurs in three types, called *Rektalagerschein*, *Inhaberlagerschein* and *Orderlagerschein*.

No explicit provision exists that the document has to be in paper form. However, as in the case of the bill of lading, a systematic interpretation of the relevant provisions and prevailing opinions in the literature show that the *Lagerschein* has to be a unique and signed paper document.

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[56] See R. Holzhammer, Allgemeines Handelsrecht und Wertpapierrecht, p. 315 et seq.

[57] R. Holzhammer, Allgemeines Handelsrecht und Wertpapierrecht, p. 281 et seq.; and G. Roth, Wertpapierrecht, p.5

[58] See http://www.bolero.net.

[59] Sources: R. Holzhammer, *Allgemeines Handelsrecht und Wertpapierrecht*, p. 312 et seq.; H. Krejci, Handelsrecht, 3rd Edition, Manz, Wien 2005, p. 389 et seq.

C.3 Cross border trade formalities: customs declarations

The implementation of electronic customs has already started, also under participation of Austria.[60]

Austrian customs offices have gradually started to use electronic communication for customs declarations by electronic data exchange between customs offices and the holder of a certain authorisation in 1998. In implementing Regulation 648/2005/EC of 13 April 2005 amending the Regulation 2913/92/EEC establishing the Community Customs Code, the Austrian Ministry of Finance has launched in 2005 the project *e-zoll*[61]. The offices have started to join the NCTS-network (New Computerised Transit System), which permits the exchange of electronic data with connected offices. According to a time schedule of the Ministry of Finance[62] the first functions were available in July 2005, and the last will be established and obligatory to use in October 2006. From October 2006 the offices will require all declarations to occur electronically, using EDIFACT-based messages which can be sent through software systems which have been designed to use EDI.[63]

The project *e-zoll* offers for the trader the advantage of saving of expenses and a faster availability of goods. For the use of the electronic customs declarations only a personal computer, a printer and a fax machine are required. For authorisation a TIN (Trader Identification Number) and a RIN (Representative Identification Number) code is used. The TIN-code is a one-time used identification number for each operation and for each concerned person. The RIN-code is used as an entitlement for declarations of a certain person in the system. Both numbers can be requested by a competent customs office.

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60 http://ec.europa.eu/taxation_customs/customs/policy_issues/electronic_customs_initiative/index_en.htm.

61 See https://www.bmf.gv.at/Zoll/ezollat/_start.htm.

62 See https://www.bmf.gv.at/Zoll/ezollat/AktuellerStandbeiezoll/.

63 Regulation of the Minister of Finance on the Content of Declarations Using Data Processing (Verordnung des Bundesministers für Finanzen betreffend die Festlegung des Inhalts von schriftlichen oder mit Mitteln der Datenverarbeitung abgegebenen Anmeldungen (Zoll-Anmeldungs-Verordnung 1998)) of 20 July 1998; and on the Implementation of Written Formalities Based on Information Technology (Verordnung des Bundesministers für Finanzen betreffend die Durchführung von schriftlich zu erledigenden Förmlichkeiten auf der Grundlage von Informatikverfahren (Zoll-Informatik-Verordnung)) of 20 July 1998. The Regulations are available at http://www.bmf.gv.at/Zoll/Wirtschaft/ZollHandbcherundKun_1452/.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing[64]

For the longest time, no adequate legal framework has been available to suit business needs, i.e. a framework that would meet with international approval, could offer legal certainty, and would be technically well suited for trans-global business activities.

The e-Invoicing Directive[65] is the most influential European initiative thus far to remedy this situation. It attempted to harmonise the applicable legislation in the Member States, most notably in the field of VAT. The aspired result was the general acceptance of electronic invoices for VAT-administration purposes, thus providing a significant stimulus to the use of e-invoicing in general.

The Directive was transposed in Austrian national law by amendments to the VAT Code[66] in 2002. Additionally, a regulation by the Minister of Finance on the requirements of invoices transmitted electronically[67] was enacted in 2003.

As required by the Directive, the Austrian law now allows electronic invoicing where the origin and integrity of the invoice are guaranteed and the trade partner (implicitly or explicitly) accepts e-invoicing.

As regards VAT, § 11/2 of the VAT Code allows for the use of electronic invoicing. According to the Regulation on the Requirements of e-Invoices, electronic invoicing may take place in two different ways: either by use of an "advanced" electronic signature (§ 2 Z 3 lit a-d Electronic Signature Act; has not to be based on a qualified certificate) or via EDI.

A Regulation of the Minister of Finance from 13 July 2005[68] explicitly states that also a fax invoice is to be regarded as an electronic invoice. Therefore not only invoices transmitted by e-mail but also invoices transmitted by fax machine require an electronic signature to be valid for VAT return. A fax invoice not containing an electronic signature will be tolerated for VAT return till the end of the year 2006.[69]

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[64] See H. G. Ruppe, *Umsatzsteuergesetz Kommentar*, 3rd Edition, WUV-Universitäts-Verlag, Wien 2005, p. 1341 et seqq.

[65] Directive 2001/115/EC amending Directive 77/388/EEC with a View to Simplifying, Modernising and Harmonising the Conditions Laid Down for Invoicing in Respect of Value Added Tax; Official Journal L 015, 17/01/2002, P. 0024–0028.

[66] VAT Code *(Bundesgesetz über die Besteuerung der Umsätze (Umsatzsteuergesetz 1994 - UStG))*, Official Gazette *(Bundesgesetzblatt)* 663/1994 (as amended). The mentioned amendments entered into force on 20 August 2003.

[67] Regulation of the Minister of Finance on the Requirements of e-Invoices (Verordnung des Bundesministers für Finanzen, mit der die Anforderungen an eine auf elektronischem Weg übermittelte Rechnung bestimmt werden), Official Gazette (Bundesgesetzblatt) II 583/2003; in force since 24 December 2003.

[68] Decree (*Erlass*) of the Minister of Finance BMF-010219/0183-IV/9/2005, 13 July 2005.

[69] Due to problems of transposition the deadline has been extended for another year (Information of Ministry of Finance of 29 November 2005 (*Information des Bundesministeriums für Finanzen vom 29. November 2005*), https://www.bmf.gv.at/Steuern/Fachinformation/Umsatzsteuer/Informationen/Faxrechnungenund

Electronic invoices per EDI require an additional summary invoice in paper form or in electronic form. An electronic summary report requires again an electronic signature. As a precondition for the recognition of invoices transmitted by EDI there has to exist an agreement according to Article 2 of Recommendation 94/820/EC[70], which provides for a process that guarantees the origin and integrity of the invoice.

§ 11/2 VAT Code determines that electronic invoices and EDI agreements have to be stored in a way which guarantees origin and integrity of the data for a period of seven years. Therefore also in Austria it is not sufficient to save a printed copy only, also proof of origin and integrity (electronic signature, EDI agreement) has to be stored.

C.4.2. Electronic accounting

Austrian rules for accounting can be found in the Code of Commerce (accounting as an obligation of a commercial activity) and the General Tax Code (accounting as an obligation of the tax law). In both systems, Austrian law does not contain obstacles for electronic accountancy.

§§ 189-190 of the Code of Commerce[71] provides that the principles of good accountancy have to be respected.[72] No paper documentation is needed, however, the accountancy software has to fulfil the requirement that the documentation cannot be changed[73]. If electronic media are used, the legibility must be guaranteed until the end of the period of record-keeping. Accounting and supporting documentation must be kept for a period of seven years (§ 212 Code of Commerce).

§ 131 of the Federal Fiscal Code contains similar but more detailed rules on accountancy. Books can be kept in electronic form provided that all transactions are completely and correctly recorded and the unchangeability of the documentation is guaranteed by sufficient means. According to § 132/2 of the Federal Fiscal Code, paper invoices, paper receipts and business papers may be saved either in their original paper form or as a digital copy. If a digital copy is made, complete, sorted and coextensive reproduction, which corresponds to the original document, has to be guaranteed at any time (e.g. by scanning, microfilming).[74]

Whenever storage takes place electronically, the finance authorities have to be granted easy access to the stored records within a reasonable period of time, furthermore all necessary support, assistance and devices have to be provided at the expense of the party involved (§132/3 Federal Fiscal Code). Where necessary, printouts may also be requested by the financial authorities.

Buc_5548/_start.htm). See also J. Zehetner and U. Zehetner, *Umsatzsteuer - Rechnungslegung mittels Fax ab 2006 nicht mehr möglich*, GBU (GmbH-Bulletin) 2005/07-08/20.

[70] Recommendation 94/820/EC relating to the legal aspects of electronic data interchange; Official Journal L 338, 28/12/1994, p. 98-117..

[71] A revised version of § 190 Code of commerce will enter into force with 1 January 2007.

[72] See M. Straube, *Kommentar* zum *Handelsgesetzbuch* mit einschlägigen Rechtsvorschriften 2, 2nd Edition, Manz, Wien 2000, p. 39 et seqq.

[73] See M. Tanzer, BAO 2005 - Einführung und *Kurzkommentar* zur Bundesabgabenordnung, LexisNexis, Wien 2005, p. 65.

[74] See C. Ritz, *Bundesabgabenordnung Kommentar*, 3rd Edition, Linde, Wien 2005, p. 393 et seq.

Accounting and supporting documentation may be kept in either electronic or paper form in principle for a period of seven years (§ 132/1 Federal Fiscal Code).

It is interesting to note that since the assessment year 2003 the submission of tax returns regarding income tax (§ 42 Income Tax Code[75]), corporation tax (§ 24 Corporation Tax Code[76]), and VAT (§ 21/4 VAT Code) as well as the monthly VAT summary report (§ 21/1 VAT Code) must take place electronically, unless electronic submission is unreasonable for lack of technical requirements.[77] The details of this obligation of electronic submission of tax returns are governed by a Regulation of the Minister of Finance.[78] According to this regulation submissions must take place electronically if the applicant (or her/his professional representative) has Internet access and the annual turnover exceeds € 100.000.[79] Voluntary electronic submission is permitted in all cases.

Austrian legislation also requires the periodic deposit of a company's annual account with the competent authorities, e.g. the tax office and the Court of Commerce acting as a business register. An electronic deposit is allowed by the tax office as an electronic submission of the annual income tax declaration. The business registers will accept balance sheets in electronic form beginning with 1 January 2007.

So, from a practical perspective, a strictly electronic accountancy system is allowed in Austrian law. Software has to ensure that the documentation and electronic documents are organised in such a manner as to ensure their unchangeability; a principle that is valid for both paper and electronic documents.

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[75] Income Tax Code (Bundesgesetz über die Besteuerung des Einkommens natürlicher Personen (Einkommensteuergesetz 1988 - EStG)), Official Gazette (Bundesgesetzblatt) 400/1988, as amended.

[76] Corporation Tax Code (Bundesgesetz über die Besteuerung des Einkommens von Körperschaften (Körperschaftsteuergesetz 1988 - KStG)), Official Gazette (Bundesgesetzblatt) 401/1988, as amended.

[77] The electronic data transmission system *FinanzONLINE* of the Austrian Public Finance, is available at https://finanzonline.bmf.gv.at.

[78] Regulation of the Minister of Finance on the Electronic Submission of Sales, Income and Corporation Tax Returns (Verordnung des Bundesministers für Finanzen über die elektronische Übermittlung von Umsatz-, Einkommen- und Körperschaftsteuererklärungen), Official Gazette (Bundesgesetzblatt), II 192/2004, as amended; in force since 5 May 2005.

[79] According to § 21 VAT Code in conjunction with the Regulation of the Minister of Finance on Exemptions on the Duty to Submit a VAT Summary Report *(Verordnung des Bundesministers für Finanzen betreffend die Abstandnahme von der Verpflichtung zur Abgabe von Voranmeldungen)*, Officiall Gazette *(Bundesgesetzblatt)* II 206/1998, as amended a monthly VAT summary report becomes obligatory if the yearly turnover exceeds 100.000 €.

D. General assessment

D.1 Characteristics of Austrian eCommerce Law

- Austrian civil and commerce law allows a high degree of private autonomy. Therefore, trade partners enjoy a fair amount of flexibility in arranging methods of contract conclusion and evidence of commercial relationships. The e-Commerce Directive has endorsed this general principle.

  Exceptions to this rule are particularly more formal documents. For precaution reasons, a number of contract types require written documents for validity, or even a more formal procedure, e.g. certification by a court or a notary. Commercial papers are traditionally based on paper as a physical carrier that embodies the underlying legal reality, and as a specific value is attached to the document (as is the case e.g. for bills of exchange). Written documents can be replaced by electronic documents with a secure electronic signature. In 2007, certification by a court or a notary can be also done electronically. However, parties must present themselves before the notary or the court.
- Technical solutions for emulating the traditional paper environments for commercial papers are not used so far due to legal obstacles.
- For a small open economy like Austria, international regulations play a strong unifying role (e.g. eUCP). Based on the flexibility of Austrian commercial law besides negotiable papers, such rules provide a measure of legal certainty agreed by the parties.

D.2 Main legal barriers to eBusiness

- From a purely legal perspective, the Austrian legal system presents no significant hindrances. Private and public law are open for electronic documents. Most transactions with governments can be done electronically. Practice on establishing authenticity and integrity of electronic documents is not uniform so far.
- On the one hand, the Austrian E-Government Act knows a complex system with secure electronic signature and an identity link via a citizen card and is considered as the model of the future. However, use of the secure electronic signature is still quite low and acceptance of the system is thus not as high as expected so far. Cost of electronic signatures and infrastructure may be a main reason for that.
- On the other hand, laws in special areas provide for other solutions and therefore main applications of the public sector still rely on other secure means of establishing authenticity and integrity of electronic documents (in particular *E-Justiz* and *FinanzOnline)*. A discussion is ongoing if these electronic communications may be also be used in the future, e.g. after 2007. Whereas the E-government Act provides for free choice of means, the rules for *E-Justiz* and *FinanzOnline* stipulate electronic documents (e.g. VAT declaration).

- No strong need can be found for a quick move to electronic commercial papers, neither from the banks nor the economic operators. This situation is based on tradition or practical considerations, e.g. for the bill of lading as a meeting in person in necessary for exchange of physical goods. The Bills of Lading for Europe (Bolero) was never used in practice, nor the recent Bolero product.

D.3 Main legal enablers to eBusiness

- As noted above, Austrian commercial legislation allows trade partners a good deal of flexibility, by allowing them to regulate among themselves which methods of contract conclusion they deem to be acceptable. This existing framework has been amended by additional regulations, often inspired by European Directives, including the Electronic Commerce and Electronic Signature Directives, as well as several consumer protection Directives, resulting in a fairly complete picture.
- The Electronic Commerce Act and the Electronic Signature Act have been a significant step forward, as § 4 of the Electronic Signature Act gives electronic documents the same value as written documents. As a result, electronic contracting knows relatively few legal barriers. As such, the law rarely disallows electronic documents completely.
- This allows European and international regulations to assume a prominent and unifying role, through the voluntary adoption of a suitable framework, e.g. the UNCITRAL Model Law for eCommerce, which includes definitions of technologically neutral descriptions of such notions as writing, signature, and original, based on the functions underlying these concepts[80].
- Austrian legislation has therefore eliminated most of the legal barriers to the development of eBusiness and therefore trade partners can agree on a suitable framework when required.

[80] See http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm.

Belgium National Profile

A. General legal profile

Belgium is a constitutional federal monarchy, consisting of three Regions[81] and three Communities[82]. At a lower administrative level, Belgium comprises 10 Provinces[83] and 589 Municipalities[84].

Commerce and contract law is a federal matter, which is generally incorporated into the Civil Code[85] and Code of Commerce[86], both of which largely follow Napoleonic traditions[87].

As a result, eCommerce is also regulated at the federal level, through a number of specific laws and royal decrees[88].

Disputes regarding commercial relations are typically dealt with by the Justice of the Peace[89] for matters with a financial value of € 1875 or less; or by the Commercial Court[90] for matters of higher value. Appeals against the decisions of the Justice of the Peace can be lodged with the Commercial Court, and with the Court of Appeal[91] for decisions of the Commercial Court. The Supreme Court[92] only hears points of law.

B. eCommerce regulations

Most questions regarding the validity and recognition of electronic documents must be answered based on doctrine, at least in cases where legislation does not offer a clear rule. In this section, the main tenets of Belgian doctrine regarding the legal value of electronic documents are briefly commented.

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[81] Gewesten / Régions

[82] Gemeenschappen / Communautés

[83] Provincies / Provinces

[84] Gemeenten / Communes

[85] Burgelijk Wetboek / Code Civil

[86] Wetboek van Koophandel / Code de Commerce

[87] Belgian legislation can be consulted through the following portal site: http://www.juridat.be/ (Dutch and French).

[88] Koninklijke Besluiten / Arrêtés royaux

[89] Vrederechter / Justice de Paix

[90] Rechtbank van Koophandel / Tribunal de Commerce

[91] Hof van beroep / Cour d'appel

[92] Hof van Cassatie / Cour de Cassation

B.1 eCommerce contract law[93]

B.1.1. General principles

Regarding the validity of electronic contracts, Belgian law is – as a general rule – quite flexible. Barring certain more formal types of contracts[94], Belgian contract law typically only demands that a consensus exists between parties regarding the essential elements of a contract; a written document is not typically required[95]. However, irrespective of the validity of the contract itself, the question of proof often hinges on the existence of credible documentation. The final result is that the question of the validity of the contract is often not of pivotal importance; the contracting parties will often be a great deal more concerned over the possibility of submitting an electronic document as proof.

Both in civil and in commercial cases, proof is often dependant on the existence of a written document[96], without the law emphatically indicating whether or not this document may be electronic. In those cases, it is mostly up to doctrine and jurisprudence to fill the gap.

In the past, Belgian jurisprudence has solved this problem by requiring that a document display the qualities that can traditionally be expected from paper writings, regardless of its form. In order to be considered a document in a legal sense, jurisprudence has required "a fixation of (readable) signs on a material carrier"[97]. This implies that the document must be instantly interpretable (i.e. readable as such), difficult to alter (i.e. unchangeable to a significant degree) and could be preserved for a period of time (i.e. stable).

In a number of cases, Belgian jurisprudence has decided that an electronic document could meet these criteria, despite the noteworthy criticism that an electronic document cannot be instantly read, as it requires an interpretation by an intermediating device[98]. This was not considered a fundamental problem, as the requirement of additional interpretation is not unique to electronic documents[99]. The legal validity of electronic

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[93] See J.DUMORTIER and P. VAN EECKE, *Elektronische handel : commentaar bij de wetten van 11 maart 2003,* Brugge, Die Keure, 2003, 335 p. ; and M.DEMOULIN, D.GOBERT and E. MONTERO, *Commerce électronique: de la théorie à la pratique,* Bruylant, Brussels, 2003, 201 p.

[94] Such as e.g. the sale of real estate.

[95] E.g. S. STIJNS, *Verbintenissenrecht,* Die Keure, Brugge, 2005, p.37 and following. As we shall see below, the consequences of this position are far reaching. Even more specialised types of contracts do not typically require extensive written documents to be legally valid, which can often result in practical difficulties.

[96] See art. 1341 Civ. Code: in civil relations, written contracts are required as proof for any commitment with a value of 375 EUR or higher.

[97] This interpretation was supported by the Belgian Supreme Court (Cass., 21 juni 1981, *Pas.*, 1981, I, p.1242.), and later followed by lower courts in an ICT context (Liège, 26 februari 1992, *J.L.M.B.*, 1992, p.1346).

[98] See amongst others the aforementioned decision of the Court of Appeal of Liège (Liège, 26 februari 1992, *J.L.M.B.*, 1992, p.1346).

[99] One might simply consider the example of written documents in a foreign language, or even in a specific code (such as morse code). Both would require additional interpretation before being intelligible, and yet both would likely be considered valid writings if they had been fixed on a paper medium.

documents has therefore been accepted for a number of legal issues, even when the law did not explicitly take this possibility into account. In short, jurisprudence has allowed itself to be led by the theory of functional equivalence.

This evolution has been more or less formally recognised within Belgian legislation itself, most notably through the transposition of the eCommerce directive. Article 16, §2 of the Belgian transposition law of March 11th 2003 stipulates that "the requirement of a written document has been met by a succession of comprehensible signs which are accessible for later consultation, regardless of carrier and transmission modalities".

Additionally, the primary requirement for a document submitted as proof of a contract was the presence of a signature. The use of electronic signatures has been recognised in Belgian legislation since the year 2000[100]: article 1322 of the Belgian Civil Code explicitly recognises electronic signatures as (potentially[101]) valid for the proof of contracts.

Since the transposition[102] of the e-signature directive, more precise rules have been determined. However, the recognition of electronic signatures in some circumstances (depending on the quality of the electronic signature) obviously implies the recognition of electronic documents as proof. Therefore documents can no longer be refused by Belgian courts as proof on the sole grounds that they are electronic. As such, they receive an analogous treatment to paper documents.

Within the confines of commercial law (which is the area this study is predominantly concerned with), Belgian legislation has traditionally been relatively flexible. Article 25 of the Belgian Code of Commerce allows any form of evidence to be brought before the court, regardless of the value of the contract (unlike civil contracts). This would allow electronic documents to be invoked as evidence, although the judge is in principle free to determine the actual value of the document as evidence. This includes the right to discard it altogether, should he decide that it has no real value (e.g. if it contains no form of signature, and its origins are otherwise unverifiable). In commercial affairs, parties are free to conclude arrangements between themselves in which they can specify explicitly which forms of evidence can be deemed acceptable in a court of law, and such agreements are binding. This has been a great facilitating factor, given the specific nature of many types of modern trade and transportation contracts.

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[100] To be precise: since the entry into force of the Law of 20 October 2000 introducing means of telecommunications and the electronic signature in judicial and extrajudicial procedure (*Wet van 20 oktober 2000 tot invoering van het gebruik van telecommunicatiemiddelen en van de elektronische handtekening in de gerechtelijke en de buitengerechtelijke procedure / Loi du 20 octobre 2000 introduisant l'utilisation de moyens de télécommunication et de la signature électronique dans la procédure judiciaire et extrajudiciaire (Moniteur belge, 22 December 2000)).*

[101] Article 1322 of the Civil Code states that an electronic signature (defined as a "unit of electronic data which can be attributed to a specific person and demonstrates the preservation of the integrity of the document") *can* be accepted as a signature. In a court of law, the judge will have to determine its validity autonomously. However, the validity of the signature may not be denied solely on the grounds that it is electronic.

[102] This transposition took place through the Law of 9 July 2001 establishing certain rules regarding the legal framework for electronic signatures and certification services (*Wet van 9 juli 2001 houdende vaststelling van bepaalde regels in verband met het juridisch kader voor elektronische handtekeningen en certificatiediensten / Loi du 9 juillet 2001 fixant certaines règles relatives au cadre juridique pour les signatures électroniques et les services de certification (Moniteur belge, 29 September 2001))*. As per its European example, the law equates electronic and classic signatures when the electronic version meets specific requirements (and can be considered an advanced electronic signature). In this case, it must be accepted as valid.

This existing legal framework has been amended and clarified through the transposition of the eCommerce directive.

B.1.2. Transposition of the eCommerce directive

Not unlike the eSignature directive, the eCommerce directive has also had a profound impact on Belgian contract law. The eCommerce Law[103], which transposed the eCommerce directive, greatly facilitates the electronic conclusion of contracts. However, the law is limited to contracts related to services of the information society (further referred to as online contracts). Contracts concluded in other contexts do not benefit from this clause and thus formal requirements to use paper may continue to exist. This creates an obligation for businesses that engage in online and offline transactions to create parallel business processes to accommodate arbitrary legal differences between online and offline trade. The narrow transposition of the e-commerce directive has introduced this discrimination between online and offline trade in Belgian law.

The Belgian legislator opted not to tackle individual barriers to the conclusion of contracts online, but to insert a blanket provision in the e-commerce law (article 16, §1), which states that any requirement of form applicable to the conclusion of contracts online is fulfilled if the functional qualities of the requirement are fulfilled. The task of defining the functional qualities of a requirement of form is left to the parties involved. The blanket provision gives the parties involved a great amount of freedom to design the contract conclusion process. Identifying the functional qualities of a formal requirement may prove a daunting task for businesses, especially for SME's.

Where the e-commerce law is concerned, a written document must be considered to be a succession of intelligible signs that are accessible for later consultation, regardless of its medium or of transmission modalities (article 16, §2). As this definition closely resembles the definition used by jurisprudence, it is expected to pervade civil law in general. As such, the conclusion of electronic contracts is generally permissible when the law requires a written document. However, there is very little jurisprudence to date about the legal value of electronic documents.

Similarly, article 16, §2 of the eCommerce Law also details that the requirement of a signature can be met in an electronic context by an eSignature which complies with the requirements of 1322 of the Civil Code (an advanced signature), or the requirements of article 4, § 4 of the eSignature Law (a qualified signature).

However, article 17 of the eCommerce Law excludes a number of contract types from its scope, most notably contracts regarding real estate (with the exception of lease contracts); contracts which require the intervention of the courts or a different public organ or public service provider; contracts regarding securities by persons acting in their private capacity; and contracts regarding family law or successions. As a result, a number of important contract types (particularly contracts involving the intervention of public notaries) are excluded from the eCommerce Law.

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[103] Law of March 11th, 2003 on legal aspects of services of the information society (Wet van 11 maart 2003 betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij / Loi du 11 mars 2003 sur certains aspects juridiques des services de la société de l'information (Moniteur belge of 17 March 2003))

All of the considerations above in no way pre-empt the lawmaker's authority to impose additional requirements for certain categories of documents. Several examples of such requirements will be discussed in the remainder of this study.

B.2 Administrative documents

In addition to contract law considerations, governments also impose certain administrative requirements on their citizens and corporations in connection with international trade. This is a potentially much more influential factor than contract law. After all, contract law typically allows parties a certain degree of freedom to regulate their relations (and to a certain extent allows them to specify the validity of electronic documents), whereas administrative law allows no such thing. Instead, parties are required to adhere to the rules set forth by governmental regulations, without a possibility of agreeing to a more flexible electronic communications mechanism. Legal thresholds maintained in administrative regulations can only be alleviated by government itself.

Within the sectors of social security and fiscal procedure, this realisation has led Belgian authorities to make significant investments to allow for a certain degree of legally binding electronic communication[104]. In many other sectors, including the trade and transportation sectors electronic documents have not yet broken through to the same extent, mostly because of a lack of coordinated government initiatives in this field.

Nonetheless, the possibility for greater flexibility has been recognised and has been given a legal framework. The Programme Law of 2002[105] contained a section specifically dedicated to administrative simplification and eGovernment, which was intended to grant the government a great deal of flexibility in the adaptation of administrative requirements, thus facilitating the introduction of electronic documents. Article 409 and 410 of this law granted the government the authority to lift, amend, alter or replace existing legislation to make electronic communication between citizens and enterprises and the government possible[106]. Through these articles, the possibility to easily alter administrative requirements to allow the use of electronic documents exists.

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[104] More information regarding this evolution can be found on the website of Fedict, the Federal Public Service for ICT. The possibility to file income taxes online is a prime example of this trend, as is the DIMONA-system, which allows employers to notify the government electronically when new employees enter their service. Since both of these are in fact eGovernment services, and cannot as such be considered to constitute eBusiness processes, they will not be examined further in the course of this profile.

[105] Programme Law of 24 December 2002 (Programmawet / Loi-programme, Moniteur belge, 31 December 2002)

[106] A similar rule exists for contract law. The Belgian transposition law of the e-commerce directive grants the government the authority (for a limited period of time) to modify any legal disposition which could impede the conclusion of contracts through electronic means. As such, this disposition can mostly be considered a "safety net" for any loopholes in the transposition law.

C. Specific business processes

In this section of the study, we will take a closer look at certain capita selecta of the applicable Belgian legislation and legal and administrative practice. Specific examples of common document types will be examined to assess the validity and recognition of their electronic counterparts, along with an analysis explaining the (lack of) prevalence of any allowable electronic document types.

The section below is organised according to four stages in the electronic provision of goods on the European market. They comprise credit arrangements, transportation and storage, cross border trade formalities and financial/fiscal management.

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The bill of exchange is a prime example of a negotiable instrument and is used in business circles for various purposes. Originally, the bill of exchange was designed as a payment method but over time it has evolved into an instrument for debt collection, credit and investment. Bills of exchange have a long history and their importance for international trade is proven by the conclusion of the Geneva Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes in 1930. This law was incorporated into the Belgian Code of Commerce[107].

A bill of exchange is an instrument in written form that contains a number of mandatory statements and is signed by the drawer of the bill. Although the law does not mandate the use of paper, this is often assumed to be the case by legal scholars and professionals due to the traditional formalistic approach to trade bills[108]. In light of the recent changes to Belgian civil law to accommodate e-commerce, the time has come to evaluate this assumption.

Article 1322 Civil Code recognises the validity of certain electronic signatures within the boundaries of its scope of application, namely the proof of contracts. However, with regard to bills of exchange, the signature is a formal requirement for the legal *existence* of the bill, not merely to constitute valid *evidence* of its existence (i.e. without a signature, there is no bill from a legal perspective). This falls outside the scope of article 1322 Civil Code. The law of July 9th 2001 establishing a legal framework for electronic signatures and certification service providers (hereafter cited as CSP Law) expressly prohibits denying legal effectiveness to electronic signatures solely on the grounds that

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[107] Coordinated Laws of 31 December 1955 regarding bills of exchange and order bills (Gecoördineerde wetten op wisselbrieven en orderbriefjes / Lois coordonnées sur la lettre de change et le billet à ordre, Moniteur belge, 19 January 1956).

[108] R. Van den Bergh, E. Dirix, H. Vanhees, *Handels- en economisch recht in hoofdlijnen*, Antwerpen, Intersentia, 2002, p. 145-146. Contra: J. Ronse, *Wisselbrief en orderbriefje*, Deel 1, Gent, Story-Scientia, 1972, nr. 81.

it is in electronic form[109]. However, this law does not modify or invalidate existing requirements of form that impose the use of paper.

The e-commerce law was designed to remove remaining legal obstacles to the conclusion of contracts online. Bills of exchange are considered to be a contract between the drawer of the bill and the person to whom the bill is payable by most legal scholars. Therefore, the conclusion of bills of exchange by electronic means and between absent parties falls within the scope of the e-commerce law. As a consequence, the requirement of a signature and a written document may be fulfilled electronically.

In theory, bills of exchange concluded in electronic form between parties that are physically at the same location do not benefit from the provisions of the eCommerce law. The fate of these bills depends on whether judges will now interpret the notions 'signature' and 'writing' to include electronic implementations beyond the boundaries of the e-signature and e-commerce laws. Although this inconsistency in the law is unfortunate, the parties can easily avoid problems by making sure they only conclude contracts in electronic form at a distance, or by simply agreeing beforehand that they both accept the legality and validity of electronic bills of lading.

The absence of legal obstacles is a necessary but by no means sufficient condition to ensure that electronic bills of exchange are a useful tool in e-business. Practical considerations must be taken into account as well. By its nature, a paper bill of exchange is a unique document. Any reproduction is immediately recognizable as such due to the lack of an original signature. In case of electronic bills, the proliferation of identical copies presents grave risks to all parties involved, as each copy can lead a life of its own. The Belgian legal framework for bills of exchange is built upon the assumption that each bill is a unique piece.

The rules on the multiplicity of bills of exchange affirm this assumption. A bill may be drawn in identical parts of a set[110] and each holder has the right to make copies[111]. In the former case, the drawer must number the parts of the set before signing the bills. His signature serves to prevent the production of subsequent originals by an unauthorised party. In the latter case, any copy made by the holder must indicate that it is a copy and mention who has the original. Before this copy is handed over to another party, it must be signed for endorsement. In either case, no confusion is possible between the original parts of the set or the original and its copy.

An electronic document is not unique by nature. Quite to the contrary: infinite exact copies can be made that are indistinguishable from one another. Although the holder who negotiates several copies concurrently acts unlawfully and can be held responsible, this knowledge may not alleviate doubts of potential users. The risk involved may simply appear too great or too difficult to assess, thus depriving the business community of a financial tool that has proven its worth to international trade in the past.

The practical obstacles outlined above could be overcome by involving a trusted third party in the process to perform the role of a clearinghouse. Possession of the paper document could be replaced by asking the third party to transfer control over a bill from one account to another. Existing networks, for instance the Bolero (www.bolero.net)

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[109] Art. 4 §5 CSP Law.

[110] Article 64 of the Coordinated Laws of 31 December 1955 regarding bills of exchange and order bills

[111] Article 67 of the Coordinated Laws of 31 December 1955 regarding bills of exchange and order bills

system, commented below, could be extended to include negotiable instruments in this way.

C.1.2. Documentary credit[112]

Flexible and dependable possibilities for credit creation are essential to the development of international trade. Specifically for States within the European Union and the EEA, the continued growth of the EEA market means that corporations are more frequently confronted with the possibility of conducting trade with previously unknown partners abroad. The availability of a means of financing that allows the minimisation of risk for both parties can prove to be a great catalyst in this scenario. The documentary credit has traditionally fulfilled this role. The Invitation to Tender describes the documentary credit as "a written undertaking by a bank (issuing bank) given to the seller (beneficiary) at the request, and on the instructions of the buyer (applicant) to pay at sight or at a determinable future date up to a stated sum of money, within a prescribed time limit and against stipulated documents."

Traditionally, the documentary credit has been considered a method of payment, intended mostly to facilitate business relations between trade partners who are unfamiliar with each other, and who wish to minimise their personal risk. In recent times, it is more frequently used as a credit/lending instrument.

From a legal perspective, the documentary credit is based largely on convention, and in most countries there is no law regulating it as such. Belgium is no exception to this rule. As in most nations, the Belgian legal system subjects the documentary credit mostly to general rules of contract law, doctrine and jurisprudence. It goes without saying that there is therefore no explicit legal framework for electronic documentary credit agreements.

Despite this, there is a conventional framework that has found a certain degree of general acceptance: the new Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation or "eUCP[113]". This is an extension to the UCC-500, the documentary credit framework that was created by the International Chamber of Commerce, which entered into force in 1994. It should be noted that the eUCP applies only to the presentation of the documentary credit, and not to the issuing or advice procedure (which were already concluded electronically, even before the eUCP became a reality).

The legal status of the eUCP as codified custom or even Lex Mercatoria is debatable. Whatever its status may be, its application on documentary credit agreements requires the parties to express their will to do so, both for paper and for electronic documents. It should be noted however that the eUCP mostly reiterates rules that are generally thought to apply to documentary credit agreements, so that judges will be inclined to apply rules that are similar to the eUCP, even when it is not emphatically declared applicable. This is of course a simple consequence of its debated classification as codified

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[112] Sources: B.M. DE VUYST, G. MEYER, *Documentaire kredieten*, Reeks Algemene Praktische Rechtsverzameling, Story-Scientia, Mechelen, 2003, 140p.; C. CAUFFMAN, "Jonge regels voor een jong fenomeen: de aanbieding van elektronische documenten onder een documentair krediet, *DAOR*, 2002-2003, 61, p.81-96

[113] See http://www.dcprofessional.com/content/eucp.asp

custom. This issue has limited practical relevance, as parties typically voluntarily adhere to the UCP.

The eUCP entered into force on April 1st 2002, and must be considered to be an extension to (rather than a revision of) the UCP. In combination with the UCP, the eUCP intends to provide the necessary regulatory framework for the presentation of the electronic equivalents of paper documents under letters of credit. The eUCP is applicable whenever the parties have explicitly indicated this. In these cases, it takes precedence over the more general rules of the UCP.

Comparable to the principle behind the European e-directives, the eUCP aims towards technological neutrality, in an attempt to remain flexible and adaptive. Its main function is to redefine certain concepts of the UCP that must by necessity be interpreted differently in an electronic context. As such, it redefines such notions as "appears on its face", "document", "sign" and "stamped". It explicitly refers to the use of electronic signatures as an alternative to the classical notion of a signature. As such, the eUCP appears to be entirely compatible with and complementary to the e-signature directive. Entity authentication and verification of integrity are key notions within the eUCP, as within the e-signature directive.

The parties receive a great amount of freedom in the practical organisation of the documentary credit. They may agree between themselves on the format[114] of the electronic document and the place of presentation (if they choose to accept the presentation of the document in electronic form). In the case where the bank cannot accept the presentation due to technical difficulties, the bank is considered to be closed, and the expiry date will be extended to the first following banking day on which it is able receive an electronic record. It is clear that the eUCP relies heavily on the concept of functional equivalence for the resolution of practical problems: when technology causes uncertainties, a solution will be sought in analogy with similar situations in a non-electronic context.

From a practical point of view, many preliminary transactions regarding the opening of a documentary credit are frequently concluded electronically (such as the transmission of instructions to the issuing bank, the transfer of credit information between banks, and (to a lesser extent) the issuing of the credit advice)[115]. Initiatives such as the Bolero system (discussed below) can play an important part in this process, by setting up a trusted third party which can coordinate and facilitate the exchange of electronic documents.

The last phases of the documentary credit – most notably the presentation of the documents to the bank – are still mostly handled through paper documents.

The uptake of the electronic documentary credit has been relatively slow for a number of reasons. For one, the eUCP is relatively new (entry into force on April 1st 2002), and it will obviously take some time before a significant number of services can develop which use its framework.

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[114] The Microsoft Word and the Adobe PDF-format are common choices, although other more structured format types are equally acceptable.

[115] Suitable standards for these types of transactions have been developed within the framework of the UN's EDIFACT programme. These standards include e.g. DOCAPP (*Documentary Credit Application Message*), DOCINF (*Documentary Credit Issuance Information Message*) and DOCADV (*Documentary Credit Advice*).

Besides that, there are still some unanswered questions concerning certain articles of the eUCP, which jurisprudence and doctrine need to clear up. For instance, the eUCP specifies that an electronic record is considered to be received when it "enters the information system of the applicable recipient in a form capable of being accepted by that system" (art. e3, b, v). When interpreted strictly, this means that the submitted data need not necessarily be legible for the system (or its user); it suffices that it is "accepted". Under this interpretation, the rule could be a strong disincentive to the recipient of the message to use electronic documentary credits; after all, he would suffer the legal consequences of the reception, without necessarily being able to know its contents. This could become an issue, notably because the eUCP does not specify a format or standard which all parties must use when requesting or issuing documentary credit agreements.

A second example can be found in a rule the eUCP has instituted concerning the relationship between original documents and their copies. Following the example of article 8(1) of the UNCITRAL Model Law on Electronic Commerce, article e8 of the eUCP specifies that "Any requirement of the UCP or an eUCP Credit for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record." In other words, the eUCP adheres to the philosophy that in a digital context, the distinction between originals and copies loses its meaning. Some authors[116], however, dispute this logic, arguing that (in particular for documentary credits), the original document not only serves to authenticate the original sender and to guarantee its integrity, but also to ensure that there is but one original version of any documentary credit at any given time. Thus, only one person could at any given time present himself with the original document[117]. This function is lost if the aforementioned logic is followed. Although the same level of security can be maintained in an electronic context, the changes introduced into the legal framework of the documentary credit could result in a "mental barrier", if not in a legal one.

From a more general point of view, instruments such as the documentary credit are based largely on customs and jurisprudence. It is not entirely certain that the same rules that have been consistently applied to paper documentary credits will be readily applied to their electronic equivalents. In other words: it remains to be seen to what extent jurisprudence will stand by its existing interpretations in an electronic context.

As an additional factor, its technical neutrality is a mixed blessing, as it is in most case. Although it allows for a greater flexibility, it will also take longer to form a "beaten path" (e.g. no standard file format). In short, the remaining issues for the documentary credit are likely to be sorted out over time, and can be left to the market.

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[116] C. CAUFFMAN, "Jonge regels voor een jong fenomeen: de aanbieding van elektronische documenten onder een documentair krediet, *DAOR*, 2002-2003, 61, p.93

[117] This is, of course, the same problem that was also mentioned in section C.2.1, regarding bills of exchange in general.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

When a good is transported by any means, various documents are issued during the various steps of the transport, starting with a receipt (nonnegotiable or negotiable) issued by the enterprise receiving the good and handed over to the owner of the good. Other documented steps may be the loading and unloading.

As an example of this type of document, this study will examine the use of so-called "bills of lading". These bills are an internationally accepted fundamental tool for facilitating the transportation of goods, most notably in maritime traffic. We will briefly discuss the applicable Belgian rules, and how (if) they can be applied to electronic bills[118].

Bills of lading are issued after the conclusion of a transportation contract. They are generally defined as a document establishing 1) the reception of the goods to be transported and 2) the transporter's commitment to transport them. It is issued by the carrier at the shipper's request. The holder of the bill of lading is entitled to the reception of the goods upon arrival at their final destination. The bill can be either transferable or non-transferable (although the latter is very exceptional), depending on the shipper's wishes.

In the Belgian legal system, they are subjected to Title III of the Maritime Code[119]. When Belgian law is applicable, bills of lading are subjected to article 85 to 91 of this Code. The Maritime Code does not detail the form of the bill of lading, so that it need not necessarily be incorporated in a paper document. The law does specify which information must be included in the bill, but the list is non-obligatory, and parties may therefore agree to omit or include certain information.

Mostly for reasons of security and cost-efficiency, several attempts have been made to replace the paper bills of lading by an electronic equivalent. Although the Maritime Code was clearly written with paper bills of lading in mind, no part of it is intrinsically incompatible with electronic versions. The discussion regarding the permissibility of electronic bills in lieu of paper ones therefore is essentially the same as discussed above.

Similar to the situation of documentary credit, a more specific framework exists. As early as 1990, the Comité Maritime International[120] (CMI), a non-governmental international organization consisting of lawyers, ocean transport executives and insurance managers, drafted a general framework of rules which can be applied to electronic bills of lading, known as the "CMI Rules on Electronic Bills of Lading". Parties involved in the exchange of an electronic bill of lading may choose to voluntarily apply these Rules to the exchange, in accordance with the general principles of commerce legislation set out above. In order to be applied to any subsequent acquirers of the electronic bill, they are also required to explicitly accept the Rules.

From a technical point of view, the Rules are dependant on the existence of a central electronic registry, controlled by the transporter, in which the details concerning a

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[118] F.STEVENS, *Vervoer onder cognossement*, De Boek & Larcier, Gent, 2001, 334p.

[119] The Belgian Maritime Code (*Zeewet / Loi Maritime*) is a part of the Belgian Code of Commerce, of which it constitutes the second book.

[120] http://www.comitemaritime.org/home.htm

specific transport are entered. Upon verification of the correctness of the entry in the registry, the shipper receives a secret electronic key[121]. It is this key that performs the essential function of the bill of lading: it demonstrates that the owner of the key is indeed entitled to the cargo. Should the shipper wish to designate a new recipient (i.e., should he wish to transfer the bill to a new owner), then he can do so by contacting the transporter, and notifying him that the cargo is to be delivered to a new key holder. The transporter can then issue a new electronic key to the new holder of the electronic bill, at which point the old key is rendered invalid.

It is important to note that in the transfer of this "electronic bill of lading", the transporter plays a central role, whereas this was not the case for the paper equivalent. He could therefore in practice obstruct the negotiability of an electronic bill, and will in addition be aware of all successive owners of the bill. Possession of the electronic bill could also be difficult to prove towards third parties. The lack of a trusted third party could be a deterrent towards the uptake of electronic bills, as could the lack of security measures regarding the exchange of electronic communication. These problems could conceivably be resolved by the introduction of a PKI infrastructure within the Rules, but thus far, this has not occurred. Practical application of the Rules in an unmodified form is therefore problematic.

The Bolero system is an attempt to overcome these difficulties. Initially conceived as a European research project, the system is now a fully developed commercial undertaking that aims to be an adequate electronic substitute for the paper bill of lading. Users of the system must commit to adhering to its Rule Book and its Operating Procedures, which describe their legal and technical obligations in detail. Like the CMI Rules, the Bolero system is therefore based on a contractual relationship, and not on legislation. However, the Bolero system does not require the conclusion of a new contract for each new Bill of lading, unlike the CMI Rules. Its practical functioning relies on the exchange of different types of electronic records, along with a central registry that contains the details of each transaction. The security of these exchanges is maintained through the use of a PKI platform.

It is important to note that the systems discussed above have spontaneously developed on a purely contractual basis. Belgium's regulation neither expressly authorises nor forbids electronic bills of lading, but merely allows parties to arrange this matter privately. For this reason, the uptake of the electronic system is an interesting test case in determining to what extent additional legislative action is necessary to stimulate international commerce.

C.2.2. Storage contracts

The temporary storage of certain goods in warehouses or otherwise is a frequently used intermediary step in international trade. Again, this process relies heavily on a chain of documents to establish its legal validity and recognition, most notably through the conclusion of storage agreements and the issuing of negotiable or non-negotiable receipts. Specifically where negotiable receipts are concerned, the use of electronic documents could prove to be a catalyst for international trade, as it would afford business partners the same flexibility, as is the case with e.g. (negotiable) bills of lading.

[121] Contrary to what one might expect, this key is not part of a PKI-infrastructure.

From a legal perspective, the storage of goods in Belgium is for the most part regulated by Book III, Title XI of the Civil Code[122] (which also applies to commercial contracts). For certain special categories of goods, the Belgian legislator has deemed it necessary to provide a separate legal framework[123], but as these areas have mostly been excluded from the subject field by the call for tender[124], we shall not elaborate on this. We will only focus on the possibilities of the storage agreement as described in article 1915-1954quater Civil Code.

The storage agreement is a formal contract in Belgian law, in the sense that the contract is not concluded until after the items to be stored have been transferred to the storer, either physically or by proxy (article 1919 Civ.C). The transfer by proxy suffices when the storer is already in possession of the items as a consequence of an anterior legal basis. Apart from this requirement, article 1923 Civ.C. repeats[125] that the contract can only be proven by a written document, and that evidence through witness testimony is not admissible in cases where the value of the stored goods surpasses 375 Euros. This contract can often fulfil the role of a receipt; or alternatively, a separate receipt can be issued to demonstrate the acceptance of the goods by the storer.

The law therefore requires two formal elements: a written document and the transfer of the goods (either factually or by proxy). The second element can be neglected for the purposes of this study, as we are only concerned with the possibility of using electronic documents. The practical reality of having to transfer the goods in order to store them has no real relevance for this question, and will not be further examined.

The requirement of a written document, however, is at the heart of this study. It is important to note that the law does not require a *paper* document for a storage contract to be legally binding, so that there is no reason to deny legal validity to storage contracts concluded electronically. For the purposes of evidence, the principles of contract law described above can be applied. As indicated above, written proof is now understood to include both paper and electronic records.

As such, there is no legal barrier for the use of electronic contracts in the conclusion of storage agreements.

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[122] "*Bewaargeving*" in the Dutch text; "*Dépôt*" in the French text.

[123] This is the case e.g. for the storage of dangerous substances (including certain chemicals), explosives, gasoline and (nuclear) waste.

[124] p.25 of the call, which states that the subject field excludes "agricultural products (...), and excluding as well as arms, ammunitions or explosives."

[125] This is in fact no more than a repetition of the general evidence rules which apply to civil contracts, as expressed in article 1341 of the Civil Code.

C.3 Cross border trade formalities: customs declarations

Once connected to the NCTS[126], the Belgian offices require all declarations to occur electronically[127], using EDIFACT-based messages which can either be sent through software systems which have been designed to use EDI or SADBEL[128], or by a secured website[129]. All of these systems use advanced electronic signatures to ensure secured communication[130]. Users must first register with the Belgian customs authorities, in order to obtain a TIN (Trader Identification Number)[131].

The system allows transit declarations to be registered electronically, as well as a variety of other electronic transactions[132]. From a practical perspective, the system has not yet been flawlessly implemented, causing occasional interruptions or errors in the service.

Project development continues, and a web site on the Belgian NCTS implementation[133] is currently available, which offers access to the system through a web interface[134], through EDIFACT or through SADBEL.

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[126] See http://www.minfin.fgov.be/portail1/nl/douanes/douanesnl.htm

[127] Article 8bis of the Ministerial Decree of 22th July 1998 concerning declarations for customs and taxes.

[128] The Transbel-system is an example of this. Using a combination of EDI and NCTS, it allows electronic declarations of transit documents (T1- and T2-documents). It also permits the declaration of a variety of alternative customs-and transportation documents.

[129] See http://ccff02.minfin.fgov.be/CCFF_SP6_Extra/login.do

[130] Presently the system recognises three certification authorities: Certipost, GlobelSign and Isabel.

[131] See instructions for registration at http://fiscus.fgov.be/interfdanl/bedrijven/e_diensten/NCTS/download/gegevens_voor_tin_en_connecties_met_links.pdf

[132] See the extensive use manual at http://www.minfin.fgov.be/portail1/fr/WebNCTSConfigGuide_1_0.PDF

[133] http://fiscus.fgov.be/interfdanl/bedrijven/e_diensten/NCTS/index.htm

[134] http://www.minfin.fgov.be/portail1/nl/douanes/douanesnl.htm

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

For the longest time, no adequate legal framework has been available to suit business needs, i.e. a framework that would meet with international approval, could offer legal certainty, and would be technically well suited for transglobal business activities.

The e-Invoicing directive[135] is the most influential European initiative thus far to remedy this situation. It attempted to harmonise the applicable legislation in the Member States, most notably in the field of VAT. The aspired result was the general acceptance of electronic invoices for VAT-administration purposes, thus providing a significant stimulus to the use of e-invoicing in general. This Study will examine Belgian legislation with a view of identifying conditions not sanctioned or specified by the e-invoicing directive[136].

The directive was transposed in Belgian national law by the Law of 28 January 2004 modifying the VAT Code (L.VAT)[137,138]. Besides this, Royal Decree n°1 regarding the payment of VAT[139] and countless other executive decrees were modified[140]. The new rules retroactively entered into force on 1 January 2004. The L.VAT was since modified through a law of 27 December 2005[141], in order to facilitate electronic storage of invoices.

As required by the directive, the Belgian law now allows electronic invoicing[142] under the conditions imposed by the directive[143] (i.e. guaranteeing the origin and integrity of the

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135 More formally known as Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax; *Official Journal L 015 , 17/01/2002 P. 0024 - 0028*

136 For example, the Call for Tender mentions that "when invoices are sent through EDI, paper copies should not be requested, since EDI solutions are considered as a simple but secure solution for sending invoices electronically. Similarly, [...] the requirement imposed by some countries for qualified certificates is seen as problematic due to the higher handling costs and the lack of commonly agreed standards in this area."

137 Law of 28 January 2004 modifying the VAT Code (Wet tot wijziging van het Wetboek van de belasting over de toegevoegde waarde / Loi modifiant le Code de la taxe sur la valeur ajoutée, Moniteur belge, 10 February 2004)

138 A consolidated version in the official languages can be found at http://fisconet.fgov.be/.

139 Royal Decree n°1 of 29 December 1992, modified by the Royal Decree of 16 February 2004 (Koninklijk besluit nr. 1 met betrekking tot de regeling voor de voldoening van de belasting over de toegevoegde waarde / Arrêté royal n° 1 relatif aux mesures tendant à assurer le paiement de la taxe sur la valeur ajoutée Moniteur, 27 February 2004).

140 Royal Decree of 20th February 2004 (*Moniteur belge,* 27 February 2004).

141 Law regarding several provisions of 27 December 2005, Moniteur belge 30 December 2005 (Wet houdende diverse bepalingen / Loi portent des dispositions diverses).

142 For more detailed comments see I. Lejeune, S. Beelen and J.-M. Cambien, "BTW en elektronisch factureren – de ultieme persiflage van harmonisering?", in *Computerrecht*, 2003, 193-198

143 It is worth keeping in mind that e-invoicing is only permitted when the trade partner accepts this implicitly or explicitly. Art. 1 §2 Royal Decree n° 1 of 29th December 1992 (*Moniteur,* 31th December 1992).

invoice, art. 53 octies L.VAT and art. 1, §3 Royal Decree n°. 1). Additional options allowed by the directive were largely disregarded:

- the advanced electronic signature need not be based on a qualified certificate or be created by a secure-signature-creation device;
- EDI[144] need not be combined with a paper document;
- no additional methods of e-invoicing have thus far been authorised, although the Minister of Finance may choose to permit other means of invoicing under the conditions he deems appropriate (art. 1 §4 Royal Decree n°1). He may also impose additional requirements if the invoice is sent from a non-Member State (art. 1 §3 2nd section Royal Decree n°. 1);

Electronic invoices may be stored throughout the Union, provided that the taxable person notifies the administration (Art. 60 §3, 1st section L.VAT) and that the invoices can be accessed electronically from Belgium. Storage outside of the Union is not permitted at all, which is contrary to the directive[145].

Electronic invoices must be archived in their original form (Art. 60 §3 L.VAT). This means that only the original electronic document, including all data regarding its authenticity and its integrity, can be archived, and that is thus not sufficient to save a printed copy. By contrast, invoices which were received in paper form may be saved either in their original paper form or as a digital copy. If a digital copy is made, the technology used must guarantee the authenticity of its origin and the integrity of its contents. Thus, Belgian law is flexible with regard to electronic archiving of invoices.

The storage period has been fixed at seven years[146], both for the recipient and for the sender of the invoice (art. 60 L.VAT)[147].

It is interesting to note that Belgian law expressly permits invoices to be drafted in any language, although the authorities may demand them to be translated to any one of the national languages for shipments of goods and services provided in Belgium, as well as for invoices received by taxable persons established within Belgium (art. 61 §1 4th section L. VAT).

Of course, invoices often serve purposes outside of VAT law. This implies that other legislation may impact the form an invoice must take. In Belgium, invoices are considered a part of the accounting records. Fortunately, the law on accounting does not prescribe formal requirements for invoices. It only demands that these records are kept

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[144] As in the Directive, the actual implementation of EDI is based purely on agreements between the parties. The use of international standards, such as UN/EDIFACT, is not required.

[145] See I. Lejeune, S. Beelen en J.-M. Cambien, "BTW en het elektronisch bewaren van facturen – de grote sprong voorwaarts?", in *Computerr.*, 2004, 18

[146] The period has been fixed at seven years since the entry into force of the aforementioned Law regarding several provisions of 27 December 2005, on 9 January 2006; before, the storage period was ten years. The reduction of the storage period was introduced specifically to facilitate electronic storage.

[147] However, the Administration accepts that the customer – meaning a natural person who intends to use the goods or services for personal use only and who has nonetheless received an invoice – need only store the original invoice for a period of five years.

for 10 years (this period has not yet been reduced to 7 years), or 3 years for records that cannot serve as evidence against third parties. Accounting law is generally less demanding than VAT law, as it allows all invoices to be archived either in their original form or as a copy, digital or photographic[148].

C.4.2. Electronic accounting

This section will evoke the major principles of Belgian accountancy legislation. To what extent does Belgian legislation permit the use of electronic documents for accounting purposes?

Where accounting is concerned, the fundamental Belgian regulation has been incorporated in the law of 17 July 1975 on the accountancy of the enterprise[149] (referred to as the Accountancy Law) and its executive decrees. From a practical perspective, most (if not all) major corporations have taken to use accountancy software, although regulations often pose requirements[150] that can only be fulfilled in a paper environment. Most notably, three essential books (the daily transaction book, the central registry and the inventory) must be kept on paper. As such, it is therefore not possible to maintain a strictly electronic accountancy system within the confines of Belgian law. For other kinds of documents, the use of paper is often not explicitly or even implicitly required. But even when electronic documents are used, these documents must be organised in such a manner as to ensure their unchangeability (article 7 §2 of the Accountancy Law); a principle that is valid for both paper and for electronic documents.

Although it is technically perfectly possible to ensure the unchangeability of electronic data, few accountancy programmes actually do this. In this case, even the data that enterprises are allowed to keep electronically will have to be fixed in an unchangeable (read: paper) document in order to meet legal requirements. (art. 8 Accountancy Decree).

For storage purposes, article 9 of the Accountancy Decree requires the books to be kept safe for a period of ten years, starting on the first January of the year following the date of closure. For non-essential documents (i.e. with the exclusion of the three books mentioned above), Belgian legislation allows the storage of electronic copies in lieu of any paper originals (art. 9 Accountancy Decree). The three essential books however must be stored in their original paper form.

For any supporting documentation, the rule is the same as for non-essential documents: they may be kept in either electronic or paper form, in principle for a period of ten years.

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[148] Art. 6 of the Law of 17 July 1975 on corporate accounting (Wet met betrekking tot de boekhouding van de ondernemingen / Loi relative à la comptabilité des entreprises, Moniteur belge, 4 September 1975).

[149] Law of 17 July 1975 on corporate accounting (Wet met betrekking tot de boekhouding van de ondernemingen / Loi relative à la comptabilité des entreprises, Moniteur belge, 4 September 1975)

[150] For example the requirements introduced by art.5 of the Royal Decree of 12 September 1983 (referred to as the Accountancy Decree), which requires a stamp to be applied to certain documents by the clerk of the court of commerce where the enterprise is registered. Additionally, unless these documents have been bundled into a bound registry, each page must be signed or stamped individually by the clerk.

As in most countries, Belgian legislation also requires the periodic deposit of a company's annual account with the competent authorities, a role that has been allocated to the Belgian National Bank. An electronic deposit has been emphatically allowed[151], by the introduction of the notion "deposit by an information carrier". Submissions of the annual account are accepted on both disks or through electronic networks. The applicable protocols which must be followed can be found on the website of the Belgian National Bank[152]. It is worth noting that Belgian policy clearly leans towards the encouragement of electronic annual accounts: the deposit using an information carrier has been made cheaper than the deposit using paper (art. 178 §1 of the aforementioned Royal Decree of 30 January 2001).

Although electronic accountancy has made a strong impact on corporate management in practice, it is clear that legislation still lags behind in this field, incorporating formalistic requirements that are clearly geared towards a traditional paper environment. As a result, most businesses keep paper printouts of their electronic accountancy documents. The existing legislation only allows electronic accountancy for certain non-essential documents, and only insofar as its unchangeability is guaranteed. In conclusion, Belgium clearly only allows computer aided accountancy, and only limited electronic accountancy as such.

D. General assessment

D.1 Characteristics of Belgian eCommerce Law

- Belgian commerce legislation has traditionally allowed trade partners a fair amount of flexibility in arranging methods of contract conclusion and evidence of commercial relationships. In a sense, the eCommerce directive is therefore a natural continuance of this general principle.
- The exception to this rule are certain more formal documents, where the physical carrier is traditionally considered to be an embodiment of the underlying legal reality, and where contract partners therefore attach a specific value to the document (as is the case e.g. for documentary credit). While technological solutions are perfectly capable of emulating the traditional paper environments, no single standard or platform is often available and familiar to all parties involved. As a result, traditional paper documents are still usually the solution of preference by default.
- International regulations can play a strong unifying role, as has been observed e.g. through the eUCP and the CMI Rules on Electronic Bills of Lading. While these rules typically do not provide a technical framework for contracting partners, they do provide a measure of legal certainty, provided the partners choose to declare such regulations applicable to their situation.

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[151] Regulated by the Royal Decree of 30 January 2001 executing the Code of Enterprise (Koninklijk besluit tot uitvoering van het wetboek van vennootschappen. / Arrêté royal portant exécution du code des sociétés, Moniteur belge, 6 February 2001)

[152] See www.bnb.be. At the time of writing, the most recent version of the submission software, Sofista, could be downloaded free of charge from http://www.nbb.be/doc/BA/sofista.exe

D.2 Main legal barriers to eBusiness

- From a purely legal perspective, the Belgian legal system presents two significant hindrances. The first of these is the existence of administrative barriers. As explained above, several administrative regulations (e.g. accounting regulations) still require commercial undertakings to maintain an administration that is (partially) paper-based. While this does not necessarily prevent business partners to engage in electronic contracting, it can none the less be considered a disincentive to organising a purely electronic business.
- Secondly, the Belgian lawmaker has taken a fairly open approach to the transposition of the eCommerce directive. The Belgian eCommerce law acknowledges the principle that electronic contracting should be a possibility and stresses the importance of functional equivalence[153] (i.e. the theory that a formal requirement can be met in an electronic context if it is ensured that its purpose is met), but it offers only few guidelines as to how this should be achieved. For many formal paper-based requirements (e.g. the use of a specific lay-out or colours), contracting parties therefore must determine on their own how this requirement is met in electronic documents. While this allows a great degree of flexibility, it also increases the risk to eCommerce businesses, who can never be sure that a judge might not refuse to acknowledge that their solutions meets legal standards.
- From a broader point of view, the legislative insistence on technological neutrality is a mixed blessing. Although it allows ample space for the development of initiatives in the private market, the lack of de facto standards has also slowed down the introduction of electronic contracting, as markets have struggled to come up with generally accepted/acceptable standards and frameworks. This is most notable in the fact that many of the aforementioned solutions (e.g. the Bolero system) require the intervention of a trusted third party (TTP). Belgian legislation has no general rules on the obligations and responsibilities of such TTPs, and this has also been commented on as an impeding legal factor[154]. Possibly, a general legal framework for TTPs, comparable to that of the certification service providers in eSignature legislation, would be desirable.
- Finally, there are also practical impediments in some specific cases. For example with regard to storage contracts, the need for electronic contracting is not quite as great as in other sectors, since parties generally are required to meet in person to exchange physical goods. Only if the stored goods are non-physical in nature (e.g. in software escrow agreements), or if there is a third party involved who may be allowed to withdraw the goods from storage upon presentation of a specific document, is the availability of electronic contracting a real advantage.

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[153] For more details concerning this theory, see D.GOBERT and E.MONTERO, "La signature dans les contrats et les paiements électroniques: l'approche fonctionnelle", *DAOR,* 2000, nr. 53, P. 17-39; E. CAPRIOLLI and R. SORIEUL, "Le commerce international électronique: vers l'émergence de règles juridiques transnationales", *J.D.I.*1997/2, P. 323-393, inz. p. 380-382.

[154] See for example the Third Advice of the Internet Observatory, an advisory organ to the Ministry of Economics, entitled "Possibilities to strengthen confidence in electronic commerce" p.23; available through http://www.internet-observatory.be/internet_observatory/pdf/advices/advice_nl_003.pdf (Dutch version) or http://www.internet-observatory.be/internet_observatory/pdf/advices/advice_fr_003.pdf (French version).

D.3 Main legal enablers to eBusiness

- As noted above, Belgian commercial legislation allows trade partners a good deal of flexibility, by allowing them to regulate among themselves which methods of contract conclusion they deem to be acceptable. This existing framework has been amended by additional regulations, often inspired by European directives, including the eCommerce and eSignatures directives, as well as several consumer protection directives, resulting in a fairly complete picture[155].
- The eCommerce Law has been a significant step forward, as article 16 of this law introduces a general principle of functional equivalence, allowing formal hindrances in many contract types to be overcome. As a result, electronic contracting knows relatively few legal barriers. As such, the law rarely disallows electronic documents completely, although its rules may be slanted in favour of paper documents.

  This allows European and international regulations to assume a prominent and unifying role, through the voluntary adoption of a suitable framework, e.g. the UNCITRAL Model Law for e-Commerce, which includes definitions of technologically neutral descriptions of such notions as writing, signature, and original, based on the functions underlying these concepts[156].
- As such, it would be accurate to say that, although Belgian legislation certainly does not eliminate all legal barriers to the development of eBusiness, it typically allows trade partners the possibility of agreeing to a suitable framework when required.

[155] See also E.MONTERO, "La commerce électronique: faut-il encore légiférer?", accessible through www.internet-observatory.be/internet_observatory/events/doc/MONTERO.doc, 8 March 2004

[156] See http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm

Bulgaria National Profile

A. General legal profile

Bulgaria is a parliamentary republic. The territory of the country is divided into 29 administrative regions[157].

The national legislation of Bulgaria follows the Roman civil law traditions and implements the main principles of the French and the German legal systems. Legislative power is an exclusive authority of the Parliament. Upon delegation of legislative powers set forth by the law, the executive authorities can issue by-laws of secondary legislation.

The main regulation of commerce and contract law can be found in several acts - the Contracts and Obligations Act[158], the Commercial Act[159], the Property Act[160] etc.

Presently, electronic commerce is not thoroughly regulated. The Directive on E-commerce is partly transposed into the Electronic Document and the Electronic Signature Act[161]. Some general rules haven proven to be equally applicable in respect to

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[157] области

[158] *Закон за задълженията и договорите*, Promulgated in State Gazette (SG) 2/3 Jan 1950, prom. SG. 275/22 Nov 1950, amend. SG. 69/28 Aug 1951, amend. SG. 92/7 Nov 1952, amend. SG. 85/1 Nov 1963, amend. SG. 27/3 Apr 1973, amend. SG. 16/25 Feb 1977, amend. SG. 28/9 Apr 1982, amend. SG. 30/13 Apr 1990, amend. SG. 12/12 Feb 1993, amend. SG. 56/29 Jun 1993, amend. SG. 83/1 Oct 1996, amend. SG. 104/6 Dec 1996, amend. SG. 83/21 Sep 1999, amend. SG. 103/30 Nov 1999, amend. SG. 34/25 Apr 2000, suppl. SG. 19/28 Feb 2003, amend. SG. 42/17 May 2005, amend. SG. 43/20 May 2005.

[159] *Търговски закон*, Promulgated in SG 48/18 Jun 1991, amend. SG. 25/27 Mar 1992, amend. SG. 61/16 Jul 1993, amend. SG. 103/7 Dec 1993, suppl. SG. 63/5 Aug 1994, amend. SG. 63/14 Jul 1995, amend. SG. 42/15 May 1996, amend. SG. 59/12 Jul 1996, amend. SG. 83/1 Oct 1996, amend. SG. 86/11 Oct 1996, amend. SG. 104/6 Dec 1996, amend. SG. 58/21 Jul 1997, amend. SG. 100/31 Oct 1997, amend. SG. 124/23 Dec 1997, suppl. SG. 39/7 Apr 1998, suppl. SG. 52/8 May 1998, amend. SG. 70/19 Jun 1998, amend. SG. 33/9 Apr 1999, suppl. SG. 42/5 May 1999, amend. SG. 64/16 Jul 1999, amend. SG. 81/14 Sep 1999, amend. SG. 90/15 Oct 1999, amend. SG. 103/30 Nov 1999, amend. SG. 114/30 Dec 1999, amend. SG. 84/13 Oct 2000, amend. SG. 28/19 Mar 2002, amend. SG. 61/21 Jun 2002, suppl. SG. 96/11 Oct 2002, amend. SG. 19/28 Feb 2003, amend. SG. 31/4 Apr 2003, amend. SG. 58/27 Jun 2003, amend. SG. 31/8 Apr 2005, amend. SG. 39/10 May 2005, amend. SG. 42/17 May 2005, amend. SG. 43/20 May 2005, amend. SG. 66/12 Aug 2005.

[160] *Закон за собствеността*, Promulgated in SG. 92/16 Nov 1951, amend. SG. 12/11 Feb 1958, amend. SG. 90/8 Nov 1960, amend. SG. 99/20 Dec 1963, amend. SG. 26/30 Mar 1973, amend. SG. 27/3 Apr 1973, amend. SG. 54/12 Jul 1974, amend. SG. 87/8 Nov 1974, amend. SG. 55/14 Jul 1978, amend. SG. 36/8 May 1979, amend. SG. 19/8 Mar 1985, amend. SG. 14/19 Feb 1988, amend. SG. 91/2 Dec 1988, amend. SG. 38/19 May 1989, amend. SG. 31/17 Apr 1990, amend. SG. 77/17 Sep 1991, amend. SG. 33/19 Apr 1996, amend. SG. 100/31 Oct 1997, amend. SG. 90/15 Oct 1999, amend. SG. 34/25 Apr 2000, amend. SG. 59/21 Jul 2000, amend. SG. 32/12 Apr 2005.

[161] *Закон за електронния документ и електронния подпис*, Promulgated in SG. 34/6 Apr 2001, amend. SG. 112/29 Dec 2001.

regulation of eCommerce. New eCommerce legislation has been recently drafted and is expected to be submitted to Parliament very soon.

Disputes regarding commercial relations having a monetary value of € 5.000 (BGN 10.000) or less are typically brought before the District Court[162]. The Regional Court[163] resolves matters of a higher value. Appeals against the decisions of the District Court can be lodged with the Regional Court; while the decisions of the latter acting as a first-instance court could be appealed before the Court of Appeal[164]. The Supreme Court of Cassation[165] operates as a final cassation instance for commercial disputes.

B. eCommerce regulations

B.1 eCommerce contract law

B.1.1. General principles

Pursuant to the general rules regulating the commercial activity of merchants in Bulgaria, electronic commerce has been performed on a fully regulated basis for many years now[166]. However, until the entry into force of the Electronic Document and Electronic Signature Act (EDESA) in 2001 there was a notable lack of specific legal provisions to facilitate and to guarantee the legal interests of eCommerce subjects. In other words, problems resulted from the absence of particular rules for guaranteeing the validity of electronic statements when such statements were meant to create, terminate or alter rights and obligations, rules for regulating the specific obligations and activities performed by newer market players, such as information society service providers, rules for ensuring the legitimate interest of the consumers in the digital world, etc.[167]

Currently, the main general legal acts in force that regulate the commercial activities and obligations of these subjects, and that are thus applicable to the conclusion of contracts in an electronic form and by electronic means, are the Commercial Act and the Contracts and Obligations Act. Depending on the particular type of relationship or commercial activity, and subject to regulation, all laws applicable to the protection of consumers (Protection of Consumers Act), protection of competition (Protection of Competition Act), finance and insurance activities etc., shall also apply in an on-line context.

The Contracts and Obligations Act establishes general provisions for the conclusion of contracts in any form of activity, including eCommerce, unless otherwise provided by a special law. It regulates the conditions for sending an offer and its receipt, the legal

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[162] *Районен съд*, Article 80 of the Civil Procedure code.

[163] Окръжен съд

[164] Апелативен съд

[165] Върховен касационен съд

[166] Dimitrov, G., *Some Legal Aspects of E-commerce in Bulgaria*, Market and Law Magazine, November 2001

[167] Ibid.

effects of contracts and unilateral expressions of will, the rights and the obligations of the parties, the performance, non-performance and invalidity of contracts etc.[168]

The Commercial Act regulates the eCommerce transaction as a commercial transaction where one of the parties has the capacity of a merchant, performs commercial activities or enters into commercial transactions under the meaning of Article 1. Pursuant to article 293, par. 1 of the Commercial Act "*the validity of a commercial transaction requires a written or other form only in cases provided for by law*" – i.e., in case an agreement is reached by the parties, the contract can be concluded in any form, *inter alia* in an electronic form[169]. According to the legislation presently in force, even in cases where the written form is required by law for the validity of any given transaction, it is still possible for the written form to be considered observed if the contract is executed in electronic form. Pursuant to Article 293, para. 4 of the Commercial Act "*the written form shall be considered observed, should the statement be stored by technical means, which allow for its reproduction*". The above provisions have opened the door back in 1996 for the validity of the electronic contracts, concluded by email, through a web-interface, or by other electronic means. However, it should be noted that such "equalisation" of the electronic form to the written form was only possible where the contracting parties were merchants. The regime was not applicable to cases where the parties were not merchants[170].

In view of the real necessity of a contemporary legislative framework for the development of electronic commerce, on the one hand, and the strategic emphasis on the harmonisation of Bulgarian legislation with that of the European Union, on the other hand, the Bulgarian Council of Ministers adopted by its Decision 679 of 29 October 1999 a Strategy for the Development of the Information Society and a National Program for the Information Society. One of the most important elements in this strategy was the development of electronic signatures and the security of information exchange and data protection.

On 6 April 2001 the new Law on Electronic Documents and Electronic Signatures was promulgated in the State Gazette. The law was enacted under a special *vocatio legis* term and entered into force six months after the date of its promulgation. The law was elaborated on the basis of EU Directive 1999/93/EC[171] and the UNCITRAL Model Law on Electronic Commerce[172].

The Law on Electronic Documents and Electronic Signatures aims at regulating the legal regime of electronic documents, the validity of electronic signatures, and the rules and conditions for providing certification services. The law does not apply to contracts for which other laws require a qualified written form, or to cases in which keeping a document or a copy thereof has a specific legal meaning, such as for bills of exchange, securities, bills of lading etc.

The law provides a number of new terms for the Bulgarian legal system that concern electronic commerce.

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[168] Kalaydjiev, A., Law on Obligations. General Part, SIBI, 2001

[169] The said rules were enforced in 1996 (SG №83/1996).

[170] Dimitrov, G., *Ibid.*

[171] Directive 1999/93/EC on a Community framework for electronic signatures promulgated in OJ L 13/12 of 19 January 2001.

[172] UNCITRAL Model Law on Electronic Commerce was adopted with a Resolution of the General Assembly 51/162 of 16 December 1996 with additional article 5 bis as adopted in 1998,

In first instance, the term "*electronic document*" was introduced. It is defined through another term - "*electronic statement*". Under the law, an electronic statement (i.e. communication) shall be understood to be any verbal statement, or a statement containing non-verbal information, presented in digital form through a generally accepted standard for the transformation, reading and visualization of information[173]. An electronic document shall be considered any electronic statement stored on a magnetic, optic or other media that provides the possibility of being reproduced[174].

Two very important principles for the development of the e-commerce in the Bulgarian legal system were introduced by EDESA.

First of all, the law provides that the written form shall be considered observed if an electronic document has been created. In fact, this norm reads that where a law requires written form as a condition for the validity of given statements, *inter alia* regarding enforcement, altering or termination of a contract, the written form shall be considered established should the statement be made and stored electronically. *Per argumentum a fortiori,* where the law requires a verbal or any other form for validity of given statements, the electronic form should be also considered as meeting those statutory requirements[175]. The said rules shall not apply to cases where a qualified written form is required (for example handwritten testaments, notary deeds, etc.) or where ownership of a written document implies a legal value in its own right (for example bearer shares, promissory notes, etc.)[176]. The said rules will be discussed *infra*.

Secondly, the law introduces the principle of freedom of using the electronic form. Under Bulgarian law no one may be forced to accept statements in electronic form, unless he or she agrees or the law requires him or her to do so[177]. Whether the person has agreed to accept electronic statements shall be judged by the court in any individual case, depending on the circumstances. Currently, the Bulgarian legislator is also introducing rules, whereby given subjects are obliged to use electronic form – specifically including all state authorities whether they perform their statutory powers or enter into contractual relationships[178].

Being a transposition of the UNCITRAL Model Law on Electronic Commerce, the EDESA also contains a regulation of the activity of intermediaries[179]. It also regulates the regime of submission and receipt of electronic statements, the legal value of the electronic receipt, the determination of the moment of acknowledgement of electronic statements[180] etc.

The EDESA has a relatively wide scope. It establishes a clear and specific general regime for electronic statements both in public and private relationships, *inter alia* in

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[173] Article 2, para.1 of EDESA.

[174] Article 3, para.1 of EDESA.

[175] Kalaydjiev, A., Belazelkov, B., Dimitrov, G., Yodanova, M., Stancheva, V, Markov, D., Electronic Document. Electronic Signature, Legal Regime. Ciela Publishing/CID, 2004, p.34.

[176] *Per argumentum* of Article 1 (2) of EDESA, in relation to §1, p.1 of EDESA.

[177] Article 5 of EDESA.

[178] Art.41 of EDESA rules that the state authorties shall be obliged to accept and issue acts in electronic form, should requested by citizens. See also Kalaidjiev, A., et al., *Ibid*. p.42

[179] Art.6 of EDESA.

[180] Art. 7-12 EDESA.

eCommerce. Therefore, unless more specific rules are applicable to a given e-commerce transaction, the rules of EDESA shall apply as general rules. Where no rules could be found in EDESA, the general rule of the Commercial Act and the Contracts and Obligations Act shall apply.

Besides the regime of electronic documents, EDESA also regulates the regime of electronic signatures. It introduces two main types of electronic signatures – basic and advanced – as well as a variation on the advanced electronic signature, called a universal signature. With regard to their legal consequences, both main types are equal to the handwritten signature, except for cases where the signatory or addressee of the electronic statement is the state, a state body or a local government body. The universal e-signature has an equal value as the handwritten signature in respect to everyone[181]. Since the regime and the particularities of the electronic signatures remain out of the scope of this work, they shall not be discussed further.

B.1.2. Transposition of the eCommerce directive

The directive's provisions are transposed in the text of the draft law on eCommerce, as some dispensable rules are adapted to the general law-drafting traditions followed by the Bulgarian legislator.

The draft law on eCommerce creates the basic legal framework for the regulation of social relationships connected to the provision of informational society services through the use of modern technologies. It acknowledges the general principles that are in force in the EU in the field of eCommerce, particularly as set forth by the Directive 2000/31/EC. The draft law follows the directive's logic not only by its purpose but by its structure as well. It transposes the general provisions, the subject, the basic notions, the obligations of the providers, etc. For the first time in the Bulgarian legislation the notion of "unsolicited commercial communication" is introduced and explicit rules for its sending are provided.

Obligations for access to information and to the general provisions of contracts are regulated, as well as special rules for determining the moment when the electronic contract is considered concluded. The draft law also provides special rules for due diligence with regard to the restriction of liability of the service providers. A separate chapter defines the applicable law where international providers conducting their business on the Bulgarian territory are concerned. The same chapter regulates the legal status of Bulgarian providers, who provide cross border informational society services.

Unlike the Directive, the conclusion of contracts through electronic means is not subject to regulation in the draft law. Those rules are introduced by the Electronic Document and Electronic Signature Act and the Obligations and Contracts Act. These acts exclude the respective application of contracts concluded by electronic means and in electronic form, when special acts require a special form for validity of a given transaction.

As the rules of articles 12 and 13 of the Directive have already been transposed in the Bulgarian civil procedure legislation, they are not subject to implementation. The draft law confines the liability of the service providers for the storing of consumer information, providing access thereto or placing hyperlinks.

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[181] Dimitrov, G., Electronic Signatures: Advanced Electronic Signature, Market & Law Journal, i.3, 2003.

The draft law establishes an obligation for information society service providers to specify codes of conduct they adhere to. The law aims at encouraging self-regulation and adoption of codes of conduct.

The provision of art.17 of the Directive is already implemented as the Act does not provide for any restrictions in this respect. Out-of-court dispute settlements shall be conducted according to the provisions of special acts (the Mediation Act, the International Commercial Arbitrage Act, etc.).

Although the procedural rules of Article 18 of the Directive are not subject to the draft law, they are transposed through corresponding alterations into the Bulgarian civil procedure legislation. In addition, the draft law provides for the possibility for collective protection of consumers rights.

B.2 Administrative documents

The process of introduction of eGovernment services to citizens to facilitate eCommerce is still an ongoing effort. A non-comprehensive legal framework on eGovernment has already been established and certain provisions thereof have an impact on eCommerce. Such rules for example concern the recent amendments to the Corporate Tax Act, the Accountancy Act, the Customs Act, the Tax and Social Security Procedure Code, etc.

Most of the envisaged issues will be discussed *infra*.

C. Specific business processes

Certain general rules of the Bulgarian legislation applicable to eCommerce will be reviewed in the following section. Some documents and instruments used to secure the different stages of eBusiness processes will be analysed with regard to the possible usage of their electronic equivalents.

The section below is organised according to four stages in the electronic provision of goods on the European market. They comprise credit arrangements, transportation and storage, cross border trade formalities and financial/fiscal management.

C.1 Credit arrangements: Promissory notes and documentary credit

C.1.1. Promissory notes

The promissory note is one of the most common and widely used debt instruments on the Bulgarian market. Bulgarian doctrine finds that the promissory note reveals a dualistic nature – it serves as a security, on the one hand, and could be seen as a unilateral legal transaction (act), on the other hand. As a security instrument, the promissory note is a materialized, constitutive, transferable security, which materializes a claim to monetary receivable. In this respect, the promissory note could be considered a chattel (movable property) and is subject to property rights. From a legal point of view

the promissory note is a formal unilateral legal act[182]. The drawer of a promissory note irrevocably promises to pay a given amount of money to a certain person or entity. The regime of the promissory notes can be found in the Commercial Act.

The promissory note can be easily transferred by endorsement. The endorsement represents a unilateral legal act made by the promissory note creditor. The number of endorsements is not limited by law. The endorser has the same liability as the promissory note debtor. The identity of the endorsee follows from the uninterrupted chain of the endorsements[183].

The biggest advantage and main reason for the wide usage of the promissory notes is the fact that it empowers the creditor to commence compulsory execution proceedings against the promissory note debtor without bringing a lawsuit[184]. In such respect the promissory note is a cost-effective and a time-saving instrument.

However, it is important to stress the fact that the promissory note does not grant any privileges to the creditor. According to Article 133 of COA, the entire property of the debtor serves as general security of the creditors, who have equal rights to be satisfied, provided no legal grounds for preference are present. The receivables arising from promissory notes do not fall among those that are privileged[185].

Nonetheless the law requires a written form for validity of the promissory note, so that the rule of EDESA providing that the written form shall be considered met should the document be executed in electronic form shall not apply[186]. As a result, the promissory notes shall not be considered valid if executed in electronic form. The said rule does not apply to documents itself, the physical holding of which has a legal value and meaning[187].

C.2.2. Documentary credit

The documentary credit is regulated on a national level by the Commercial Act. On an international level the regulation is provided by the new Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentations or "eUCP".

The Commercial Act describes the documentary credit as "a unilateral written statement by a bank, under which it undertakes to pay to the appointed in the documentary credit legal person the documentary credit sum, upon a presentation in good time of the described documents and fulfillment of the other documentary credit conditions"[188]

In Bulgarian doctrine and legal texts the term "documentary credit" is used to name different notions. Firstly, it is acknowledged as a method of payment. The documentary credit is the most secure instrument for payment subject to given conditions, thus it is very convenient for international trade between even previously unknown partners. The

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[182] Kalaidjiev., A., *The Non-cash Payment*, Sibi, 1999.

[183] Gerdjikov, O., *Commercial transactions*, 2nd edition, Labour and Law, 2000, p. 277-278

[184] Article 237 (e) of the Civil Procedure Code.

[185] Article 136 of the Contracts and Obligations Act and article 722 of the Commercial Act.

[186] Discussed in section B.1.1, *supra*.

[187] Kalaidjiev, A., et al., *ibid*, p.42

[188] Article 435, p. 1 of the Commercial Act.

second meaning of the term is focused on the legal nature of the documentary credit – a unilateral act under which the issuer (the bank) undertakes to pay to the beneficiary.

Bulgarian Law does not provide for any specific rules on the execution in electronic form of the documentary credit. No specific requirements in respect to the written form could be identified either. Therefore the general rule of Article 3, paragraph 2 of EDESA shall apply. The documentary credit may be executed in electronic form and shall be considered valid and binding. No legal hindrance for the usage of electronic means for the conclusion of conducting of all actions regarding the documentary credit can be identified.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

The transportation of goods is always connected to the issuance of different types of documents. As far as Bulgarian legislation is concerned, there are no general provisions regarding the form of the transportation documents. The Commercial act introduces the bill of lading as a document which can be optionally issued by the carrier. The special laws regarding the different types of transportation regulate the different types of transportation documents[189],[190].

Under Bulgarian law the bill of lading is a security which incorporates the right of the legal person who possesses it to receive the transported goods. It can be transferred by means of endorsement[191].

Insofar as the bill of lading is regulated as a security instrument whose possession has a legal value and legal consequences, and there are no specific legal provisions providing for execution in electronic form, it shall be considered that pursuant to the rule of art.1, para.2, i.2 of EDESA it may not be executed in electronic form. Moreover the envisaged rule explicitly restricts the applicability of law to the bills of lading.

C.2.2. Storage contracts

The temporary storage of goods in warehouses or otherwise is based on certain documents. Under articles 573 and 574 of the Commercial Act the contract of storage in a public warehouse should be concluded in writing and should be entered into the warehouse register. Additionally, the contract shall be considered concluded upon the transfer of the goods which are to be stored to the depository[192].

Since there are no special provisions regarding the conclusion of the contract, the general rules of EDESA shall apply. Based on its provisions, it could be concluded that

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[189] Zlatarev, E., Hristoforov, V., *Commercial Law*, Sibi, 1999, p.177.

[190] The Commercial Shipping Code (SG 1 January 1971); Vehicle Transportation Act (SG 17 September 1999); Railway Transportation Act (SG 1 January 2002).

[191] Article 371, p. 1 of the Commercial Act.

[192] Zlatarev, E., Hristoforov, V., *Ibid*.

there is no legal obstacle for the storage contract to be executed in electronic form. However the warehouses register and its maintenance are regulated by an Ordinance of the Minister of Justice. The latter Minister has executed by-laws whereby the Ministry should accept electronic documents from citizens. However, no means exist allowing the relations and the procedures to be performed electronically so far.

The Bulgarian Commercial Act provides for the possibility of issuance of a warehouse warrants[193]. Under the Bulgarian law the warehouse warrant is considered to be a security instrument. As such it cannot be executed in electronic form since it falls within the legal barriers of Article 1, paragraph 2 of EDESA.

C.3 Cross border trade formalities: customs declarations

The Bulgarian Customs Act provides for the possibility of declaration of certain circumstances by electronic means before the customs administration[194]. It should be mentioned that in respect to this rule a deviation could be identified from the general rule applicable to the paper declarations. The latter rule requires given documents to be submitted in order to proceed with the declared goods. To a contrast, in case of electronic declarations the applicant is entitled to submit the documents at a later stage, for the purpose of customs control[195].

The above alleviating regime undoubtedly stimulates corporations and citizens to use the electronic form to exercise their administrative rights by using electronic means.[196]

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

Directive 2001/115/EC amending Directive 77/388/EEC allowed the general acceptance of electronic invoices and influenced respective amendments in Bulgarian legislation.

EDESA regulates the general regime of the electronic documents and electronic signatures, but it does not regulate electronic invoicing and electronic accounting documents in particular.

C.4.2. Electronic accounting

The Bulgarian Accountancy act does not explicitly or implicitly require the use of paper for production and maintenance of the respective accountancy documents. On the

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[193] Art.577 – 578 of the Commercial Act.

[194] See: article 67, p. 1, i. 2 of the Customs Act.

[195] See: article 83, p. 1 and par. 2 of the Customs Act.

[196] Analysis of the general status of the Bulgarian eGovernment, Center for Law of Information and Communication Technologies, 2006 (www.clict.net).

contrary, article 9 allows for accountancy software to be used and all records to be kept electronically. Furthermore, as already mentioned above, article 6 implements the general principle of the European legislation, that all accountancy documents can be issued and stored in an electronic form.

The Accountancy act[197], however, in its Art. 6., para.1 provides that an accountancy document is a paper or technical carrier of accountancy information, classified as a primary or secondary document, or as a register:

- the primary document is a carrier of information for economic operation registered for a first time;
- the secondary document is a carrier of a transformed (summarised or differentiated) information obtained from the primary accountancy documents; and
- the register is a carrier of chronologically systematised information for economic operations from primary and/or secondary accountancy documents.

Para.3 of the said article explicitly envisages that the accountancy document can be created as an electronic document when the requirements of this law and of the EDESA have been met. Furthermore, in drawing up the primary accountancy documents through technical means the handwritten signatures can be replaced by identification codes or by electronic signatures in the context of the EDESA. The persons who have drawn up and signed the accountancy documents and the technical information carriers shall be responsible for the correctness of the information (Art.11 AA).

In respect to storage of accountancy information, the Bulgarian law also reads that the accountancy information shall be stored by the enterprise by order of the Law for the State Archive Fund. It can be stored on paper or on a technical carrier and in archives organised by the enterprise, in compliance with the requirements of the law. Upon entry (transfer) of the accountancy information from paper onto a magnetic, optic or other technical carrier providing its reliable reproduction, the paper carrier can be destroyed. Upon expiration of the term of their storing the carriers (paper or technical) of accountancy information which are not subject to submission to the State Archive Fund can be destroyed.

D. General assessment

D.1 Characteristics of Bulgarian eCommerce Law

- As a general assessment it could be stated that the Bulgarian civil and commerce legislation establish a fairly good framework for eCommerce regulation.
- The Bulgarian law has introduced in a clear way the legal possibility for the conclusion of contracts by electronic means. The legal norms are somewhat scattered and can be found in some general acts, like the Commercial Act and the Contracts and Obligations Act, but also in some particular acts, like the

[197] Promulgated in SG. 98/16 Nov 2001, amend. SG. 91/25 Sep 2002, amend. SG. 96/29 Oct 2004.

Electronic Documents and Electronic Signatures Act, transposing the Directive 1999/93/EC on e-signatures.

- The rules of EDESA create a clear regime on establishing the moments of sending, receiving and acknowledging the content of the submitted electronic statements.
- The law equalizes the electronic form to the written form. As regards to cases where the law requires a qualified form for given statements or where the physical possession of the document is essential for exercising the underlying rights, the electronic form is not applicable.
- The expected entry into force of the draft eCommerce Law, transposing Directive 2000/31/EC will complement the general liability regime on eCommerce in Bulgaria by establishing particular rules in respect to the unsolicited commercial communication, the liability of the information society service providers, the applicable law to eCommerce activities, etc. The draft law will not encompass all legal aspects regarding eCommerce and especially the relations which are subject to separate regulations. As such would remain the financial electronic services, the protection of intellectual property rights, the protection of personal data, taxation, the criminal aspects of eCommerce etc. Such regulations are either already implemented (like invoicing, electronic contracting, etc.), or still have to be drafted.
- Many other provisions applicable to eCommerce exist in different other laws.
- The procedural provisions in force do not specifically regulate the possibility for electronic documents to be presented as evidence before the court. As far as the law allows for the possibility for the parties to validly enter into relationships by using electronic means, then electronic documents in court proceedings to prove the material relationship may not be denied legal effect. Thus it can be stated that there are no legal hindrances for presenting of such documents in civil proceedings.
- Our observations are that the electronic exchange of documents and statements is already ingrained in business processes in Bulgaria to a significant extent, even where the execution of contracts or making statements with a legal value is concerned. However, it should be also noted that parties rarely pay sufficient attention to any legal complications and do not usually take measures to organise those business processes in an adequate way to secure their legitimate interests.

D.2 Main legal barriers to eBusiness

- Firstly, administrative thresholds still exist and require merchants to maintain a paper-based documentation. For example for the purposes of taxation and tax supervision, the tax authorities always require documents in writing to prove the existence of any given relationships. Apart from the fact that this practice does not have any legal basis, business organizations generally prefer to avoid difficulties in dealing with the tax authorities and thus prefer executing contracts in writing.
- Secondly, most people believe that the judicial system is not ready to deal with the electronic world due to lack of knowledge of the magistrates, and thus, when

it comes to civil proceedings the court would not recognize and acknowledge the validity of duly executed electronic contracts or statements.

- Thirdly, it is worth noting the reluctance of many people to use electronic means of contracting due to distrust of information and communication technologies. This situation, of course, has its roots in diverse causes, but one of the most substantial reasons is still the ignorance and fear of IT and the electronic world.
- Fourthly, key legal acts still have to be enacted that will bring more trust to the general public in usage of electronic means of communications to perform business or to use the services provided in the cyber world. Most of these rules have to be enacted by the end of 2006 in the course of the harmonization of the Bulgarian legislation with the *acquis communautaire*. As examples we could refer to the E-commerce Act, necessary amendments to the Protection of Consumers Act, necessary amendments to the Intellectual Property and Neighbouring Rights Act, necessary amendments to the Personal Data Protection Act, and others.
- Last but not least, the current market situation of the banking system and the services the banks are ready to provide in respect to securing electronic payments, especially when it refers to usage of credit cards for payments through Internet, deprives the merchants of any incentive to invest money in the development of e-shops and web tools for selling products and services on-line. There is still no bank institution in Bulgaria that offers a service for opening merchant accounts to businesses that are willing to receive payments from credit cards through Internet. Such a market situation does not seem to be caused by any legal restrictions stemming from banking or other laws. However, it practically restricts the most common way for electronic payments on the Internet, which definitely could be considered a barrier.

D.3 Main legal enablers to eBusiness

- As already mentioned, no serious legal barriers for the development of eBusiness in Bulgaria could be found, except for the necessity of finishing the process of harmonization of the Bulgarian legislation with the *acquis communautaire* in the eCommerce area. Only thereupon a proper assessment of the effect of the comprehensive legal regime on eBusiness development could be made and adequate legal enablers could be identified.
- A quite useful legal enabler to eBusiness development could be seen in the enactment of by-laws and acts of secondary legislation whereby the administrative authorities could regulate the attitude and readiness of the administration to accept and work with electronic documents and thus to meet the necessities of the day.
- All other enablers that could have a positive impact on the eBusiness market in Bulgaria have a mostly commercial rather than legal nature. As such could be identified *inter alia* an adequate campaign of the Government and the branch organizations and the NGOs on informing the general public, the magistrates and the state administration in knowing and working with electronic documents, intervention and measures on behalf of the National Bank to stimulate the provision of given services by the banks, that could lead to providing instruments to the merchants to accept electronic payments by credit cards through the Internet, and many others.

Croatia National Profile

A. General legal profile

Croatia is a republic administratively divided in 22 regions[198] which enjoy a certain degree of autonomy, but it is not a federal state.

The prevalent part of today's Croatia was part of the Austrian Monarchy – and later the Austro-Hungarian Monarchy – for several centuries, and the rest was under strong influence of Venice and Italy. These facts led to general acceptance of Roman-German legal traditions. The European Union opened accession negotiations with Croatia on 3 October 2005.

Until 1978 private law was basically and generally regulated by rules of the Austrian General Civil Code (ABGB). In 1978 the Law on Obligations (further: LO) was introduced under the influence of Swiss Law on Obligations. In 2005 new LO was enacted, in which several solutions of EU Directives (Consumer protection, Combating Late Payment, Commercial representation) were integrated. The LO regulates general aspects of obligations, contractual and extra contractual obligations generally in the same way for civil and commercial obligations, but it is also applied to commercial contracts after course of dealing and commercial usages.

Companies are regulated by the Law on Commercial Companies under the influence of the German Commercial Code (HGB) and the "*Aktiengesetz*" and Austrian Law on private limited liability companies (*GmbH Gesetz*).

ECommerce disputes may have commercial or civil natures, where a commercial dispute may be understood as a dispute between two merchants[199] deriving from their business activity. Other disputes are not commercial.

The competent court (in the first degree) is determined by the nature of the dispute. If a dispute is of a commercial nature the Commercial Courts[200] are competent; and if a dispute is not of a commercial nature, Local Courts[201] are competent. In the second degree – i.e. for deciding on appeals – for commercial disputes the High Commercial Court of the Republic of Croatia is competent[202]; and for other disputes the District Courts[203]. For both types of disputes the Supreme Court of the Republic of Croatia[204] is competent in the third degree, and this is only when the prerequisites for "revision"

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[198] Zupanije

[199] Merchant is every physical or legal person which is - independently and continously – involved in economic (business) activity with a purpose of gaining profit (Art. 1. Law on Commercial Companies)

[200] Trgovački sud

[201] Općinski sud

[202] Visoki trgovački sud Republike Hrvatske

[203] Županijski sudovi

[204] Vrhovni sud Republike Hrvatske

prescribed by law have been fulfilled (including the value of the dispute, which must be above a certain amount defined by law).

B. eCommerce regulations

B.1 eCommerce contract law

B.1.1. General principles

Croatian contract law recognizes and applies the principle of autonomy of will as one of its basic principles, not only in contract law but in private law in general. The principle of autonomy of will is generally limited by public order i.e. policy (*ordre public*) consisting of the Constitution, mandatory rules and morality[205]. Yet every violation of *ordre public* is not automatically null and void, but only if the purpose of the rule does not indicate another sanction[206]. This means that the principle *favor negotii* applies.

Generally speaking, for the conclusion of a contract the only mandatory requirement is that parties express their consent about the *essentialia negotii* prescribed for a particular type of contract they are concluding[207]. Their consent (i.e. their will) they can express either by words, usual signs or any other behaviour that indicates a certain conclusion about the existence of their will, its contents and the identity of a party[208]. There is no obligatory form generally required for the validity of a contract, i.e. the principle of informality of a contract generally applies.

Both civil and commercial contracts are regulated by the LO, generally in the same way, as in the Swiss OR. Therefore – generally speaking – a higher degree of flexibility does not exist in regard of formation of commercial contracts.

Yet, two circumstances allow more flexibility.

The provisions of the LO apply subsidiarially to commercial contracts, and practices established between two parties and commercial (trade) usages apply primarily. So, if either the practices established between two parties or trade usages would indicate more flexibility in formation of the contract than the LO does, a higher flexibility would exist. There is no practice or jurisprudence on this question because the former LO required primary application of its provisions, and the new LO only entered into force on 1 January 2006.

An offer to conclude contracts may be accepted tacitly only in cases prescribed by the LO, and these are

> (1) a contract is concluded tacitly when the offering and offered party are in a permanent business relation concerning certain type/s of goods and the offered

[205] Art. 2. LO.

[206] Art 322. par. 1. LO.

[207] Art. 247. LO.

[208] Art. 249. par. 1. LO.

party does not reject the offer concerning the same type of goods without undue delay or within the time defined by the offering party;

(2) a contract is concluded tacitly when the offered party is either a person who has offered to the other to execute (fulfil) a mandate or a person whose business activity emphasizes fulfilling such mandates i.e. acting on behalf of other persons (e.g. banks, commercial agents, forwarders). In both cases the contract is concluded at the moment when the offer i.e. the mandate has reached the offered party[209].

The codification of e-commerce in Croatia started in 2002 with the emanation of the Law on Electronic Signatures[210] that was followed by the Law on Electronic Commerce[211] in 2003 and by the Law on Electronic Documents[212] in 2005. These laws were enacted in the process of harmonising the Croatian legal system with the EU regulations.

Croatian doctrine doesn't provide a uniformly accepted definition of electronic commerce[213]. Some authors give wide and imprecise definitions that consider as electronic commerce all information technologies that accelerate and simplify business procedures[214]. Other wide definitions define it as all activities between business subjects, between traders and consumers and between private persons, and which have the characteristics of business transactions[215]. Also, there are definitions that separately describe direct and indirect electronic commerce, where in indirect electronic commerce the use of electronic networks is just a means to stipulate a contract and where it concerns only the form of the legal act; and where direct electronic commerce entails business transactions that are completely stipulated and executed by electronic means[216].

In legislation, the electronic document is defined as a uniformly connected group of data that are formed electronically (made with computer or other electronic appliance), sent, received or saved on electronic, magnetic, optic or other media, and that have attributes that determine their source (author), the integrity of the content of the document, and that proves documents content stability over time. Contents of the electronic document include all forms of written text, data, pictures and drawings, maps, sound, music and speech[217].

The Law on Electronic Document equates electronic and paper documents, if electronic documents are used in accordance with this law (Art. 2). All the laws that regulate electronic commerce include the regulation that a specific document can not be denied

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[209] Art. 265. par. 3. – 5. LO.

[210] Zakon o elektroničkom potpisu, Narodne novine, no. 10/2002.

[211] Zakon o elektroničkoj trgovini, Narodne novine, no. 31/2003.

[212] Zakon o elektroničkoj ispravi, Narodne novine, no. 150/2005.

[213] Tepeš, N.: Elektronička trgovina određivanje nadležnosti u potrošačkim sporovima, Pravo i porezi, no. 6, 2005, page 61.

[214] Nikšić, S.: Sklapanje ugovora elektroničkim putem, magistarski rad, Zagreb, 2003, page 6-12.

[215] Petrić, S.: Zakon o elektroničkoj trgovini i zaštita potrošača, Zaštita potrošača i ulagatelja u europskom i hrvatskom pravu, ur. Tomljenović, V. & Čulinović – Herc, E., Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2005., page 124-125.

[216] Gorenc, V.: Sklapanje ugovora putem interneta, Pravo i porezi, no. 10, 2000, page 9.

[217] Art. 4. p. 1 of the Law on Electronic Document.

legal value (validity) on the sole ground that it is in electronic form. The Law on Electronic Signature says that:

> *"A document can not be rejected only for it is made or emanated in electronic form with electronic signature or advanced electronic signature."*[218]

Also the Law on Electronic Commerce determines that:

> *"When electronic messages or an electronic form are used for stipulation of a contract, the legal validity of that contract can not be denied on the sole ground that it has been made in the form of an electronic message, or in an electronic form."*[219]

The Law on Electronic Documents also considers electronic documents as valid, but with the requirement that the involved parties (natural or legal persons) have accepted the use and transactions of electronic documents for their use and for business and in other relations with other subjects[220]. Although there is no relevant jurisprudence in the matter, this regulation should be interpreted as an opt-in obligation, so that without the prior consent to the use of electronic documents, it shouldn't be used as a binding form. Also considering the short period since this law entered into force, it has not been clearly defined what behaviour should be considered as valid acceptance of electronic communication among parties. From the standpoint of general rules of contracting, it might be concluded that a mere electronic communication constitutes acceptable parties' consent with electronic contracting, because according to these rules party can express its will (i.e. consent to a contract) by words, usual signs or any other behaviour from which may be concluded with certainty that a will exists, the content of a will and the identity of the parties involved[221], and because such consent may be given through various means of communication[222].

Croatian eCommerce laws include extremely wide limitations of the application of electronic documents for certain types of contracts and legal acts. The first enacted law, the Law on Electronic Signatures, provided that electronic documents signed with an electronic signature could be rejected as invalid if the document was:

- a legal act with which property of an immobile is transferred or a right on an immobile is created;
- legal acts of succession;
- prenuptial or nuptial agreements regarding property;
- all acts of burden or alienation of property that requires social services consent;
- succession contracts stipulated during life;
- contracts on life long maintenance;
- donation contracts;
- all other legal acts that the law requests to be stipulated by way of a notary act;

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[218] Art. 6. par. 1, Law on Electronic Signature.

[219] Art. 9. par. 3, Law on Electronic Commerce.

[220] See: Art. 3. of Law on Electronic Document.

[221] Art. 249. par. 1. LO.

[222] Art. 249. par. 2. LO.

- all other legal acts that other laws or sub law regulations require a handwritten signature or notary confirmation of signature[223].

The Law on Electronic Commerce also contains a long list of legal acts that are not valid if stipulated in electronic form:

- prenuptial or nuptial agreements concerning property and other contracts regulated by the Family Act;
- all acts of burden or alienation of property that requires social services consent;
- succession contracts stipulated during life, contracts of life long maintenance, and agreements regarding succession, contracts of refusal of heritage, contracts of partial transfer of heritage before the repartition, all legal acts regarding wills and other contracts regulated by the Succession Act;
- donation contracts;
- a legal act with which property of an immobile is transferred or a right on an immobile is created, except rental rights;
- all other legal acts that the law requests to be stipulated as a notary act;
- all other legal acts that other law or sub law regulations requires handwritten signature or notary confirmation of signature;
- contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession.[224]

Thus, the list of limitations of the Law on Electronic Commerce is slightly broader wider, because it also includes contracts of suretyship stipulated out of business or profession.

The Law on Electronic Signatures in point (1) considering rights on immovables doesn't allow contracts concerning rental rights to be validly signed by an advanced electronic signature, that is allowed by the Law on Electronic Commerce (point 5). This should be considered as *lex posterior derogate legi priori,* even though it doesn't contain a specific derogation of the provision, because the first Law allows contracts about rental rights to be invalid for the sole reason that they have been signed by an electronic signature, whereas the second allows them to be valid in electronic form. However, contracts that regulate rental rights on immovables are still required to be signed in paper form, because the fiscal and social regulations still require them to be signed with the notary confirmation of the signature, so practically this modification is irrelevant at this time.

The restriction regarding donation contracts is rather unnecessary. Simple donation contracts do not require a special form, except contracts of donation of immovables (written form) and contracts of donation without real transfer of possession (notary act)[225]. The transfer of rights on immovables (which is a wider term and donations of immovables are certainly part of it) is already excluded from the possibility of stipulating

[223] Art. 6. par. 2. of the Law on Electronic Signature.

[224] Art. 9 par. 4 of the Law on Electronic Commerce

[225] Art. 482. LO.

contracts in electronic form[226], and all acts that any specific law requires to be in the form of notary acts are also excluded[227].

Although the Directive on electronic commerce allows the exclusion of acts requiring by law the involvement of courts, public authorities or professions exercising public authority from application of electronic forms of contract, many EU countries have not implemented this restriction. And more importantly, the Directive allows the exclusion of legal acts that by law require public authority involvement. Croatian laws even exclude acts that require public authority involvement because of legal regulations that are made by the administration under legal authorisation, although the LO states that contracts can be concluded in any form, except when the law requests otherwise[228]. So, only the law, not administrative regulations can impose a form which is required to render the contract valid. Therefore electronically concluded contracts that by some executive regulation require public authority intervention (but not by law) are binding, and as a result the obligation to sign a paper document exists to avoid administrative sanctions, but the electronic contract itself is valid.

The Croatian LO[229] states that contracts can be stipulated in any form[230], if the law does not require some special form[231]. So informality is the rule for contractual obligations, and therefore electronic documents were formally allowed for contracts that did not legally require a specific form. But in practice this has not been possible and still isn't, despite the laws on electronic commerce and documents having been passed in Parliament. As a matter of fact, the legal system requires some contracts to be deposited at specific administration offices for publication or taxation, and these regulations require a paper form in practice. Thus, the contract itself is valid, but to fulfil legal requirements in practice, it is necessary to draft them on paper. For example, the contract of transfer of property on a vehicle does not require a special form, but a vehicle has to be registered, and for natural persons the competent Ministry requires for this purpose a written form with a notary confirmation[232].

The LO expressly regulates the conclusion of contracts by electronic means[233]. It says:

> *"The contract is stipulated by electronic means, when parties have reached an agreement on the main points" [234]* (essentialia negotii).

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[226] Art. 6. par. 2, p. 1 of the Law on Electronic Signature, and Art. 9. par. 4, p. 5 of the Law on Electronic Commerce.

[227] Art. 6. par. 2, p. 8 of the Law on Electronic Signature, and Art. 9. par. 4, p. 6 of the Law on Electronic Commerce.

[228] Art. 286. par. 1. LO.

[229] Croatia does not have a Civil Code, so the general part on obligations that includes the general regulations on the form of the contracts are included in the LO.

[230] See: VSH, Rev-1995/87, 22.03.1988., Pregled sudske prakse prilog Naše zakonitosti, no. 41, where the Croatian Supreme Court defines that the will to stipulate a contract can be expressed in words, signs, or other behaviour that can give the certainty of its existence. (This regulation from the former Art. 28. is steel included in art. 249 of new LO).

[231] Art. 286. par. 1 LO.

[232] See other examples: Dulčić, K.: Elektronička forma pravnog posla (magistarski rad), Pravni fakultet Sveučilišta u Rijeci, 2004., page 6-10.

[233] Art. 293., LO.

[234] Art. 293. par. 1. LO.

The law thus allows the conclusion of contracts by electronic means[235], and it does not impose additional requirements to the parties in comparison to other contractual types[236]. It also defines that an offer made by electronic means shall be considered an offer made among present parties, on the condition that there is a possibility of immediate answer[237]. This rule should be considered alongside with the obligation of confirmation receipt and the definition of the moment of conclusion of contract as set by the Law on Electronic Commerce[238] that will be discussed below.

The validity and limits of the application of electronic signatures is regulated by special laws, because electronic signatures are not restricted to purely private use, but include administrative and government use as well, so that the legislator considered it would be better to have separate regulations to regulate it[239].

General rules of the LO in principle apply equally to civil and commercial contracts[240].

By virtue of the Law on electronic commerce, it is provided that the party that offers services of the information society has the duty to notify the receipt of an offer or acceptance of the offer made to the other party by a separate electronic message. Private persons are allowed to recede explicitly of that obligation, and it is also not applicable to contracts concluded by e-mail[241].

The conditions of valid notification are determined by the Law on Electronic Documents. In cases where it is required to send an electronic notification, it has to be done according to terms that have to be previously established in the request for notification by the sender[242]. The notification has to be done as agreed, and the reception of the electronic document has to be confirmed in material form, which includes even automated systems of confirmation of reception[243].

The notification has to contain a notice that the received electronic document conforms to the request for its validity previously stipulated between the parties[244].

In cases where in due time the sender of an electronic document has not received the notification of the receiving party, he is obliged to notify the receiver that he has not received this notification of the sent electronic document. The sender should determine a new term in this request for notification, and if the notification does not get sent in this due time, this electronic document is considered not sent[245].

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[235] Kačer, H., A. Radolović, Z. Slakoper: Zakon o obveznim odnosima s komentarom, Poslovni vjesnik, Zagreb, 2006, page 302.

[236] Gorenc, V. et al.: Komentar Zakona o obveznim odnosima, RRIF plus, Zagreb, 2005., page 418., See also art. 247. of the LO.

[237] Art. 293. par. 2 of the LO.

[238] Art. 14. and 15. of the Law on Electronic Commerce.

[239] Gorenc, V. et. al., op. cit., page 419.

[240] According to Art. 14. par. 1. LO «provisions concerning contracts apply to all types of contracts, with reserve to expresselly different provisions for commercial contracts».

[241] Art. 14. of Electronic commerce law.

[242] Art. 17. par. 2 of the Law on Electronic Document.

[243] Art. 17. par. 3 of the Law on Electronic Document.

[244] Art. 17. par. 7 of the Law on Electronic Document.

[245] Art. 17. par. 4 and 5 of the Law on Electronic Document.

When a valid notification is received, the electronic document is considered delivered[246].

Electronic registered mail has not been implemented in the Croatian legal system yet. As it is impossible to be done without legal framework, it is impossible to determine where it is going to be applied.

The Law on Electronic Documents also includes provisions regarding electronic archiving. Electronic archiving of electronic documents has to be done either in the information system itself or on any media that allow electronic documents to be stored and saved for the time of obligatory archiving of a particular type of document. The electronic archive has to be safeguarded by the natural or legal person obliged to store a particular type of document[247].

According to Art. 1. par. 2. of the Law on Electronic Documents its provisions will not apply in such cases where other laws explicitly require the use of paper documents. Since interpretation *a contrario* is valid and since Art. 1. par. 1. defines the scope of application of this Law as general (i.e. it does not exclude any particular type of document), it may be concluded that electronic archiving is generally allowed and forbidden only when explicitly provided by *lex specialis*, as – per example – by the Law on Accountancy.

The electronic archive has to guarantee the maintenance of the original form and contents of the document. Documents have to be readable and accessible to persons allowed to access them. Electronic signatures used to sign those documents have to be stored, too, and also the means to verify them, thus to assure the integrity of the document content, and to preserve the possibility of confirming the signer of the document at any time the document is accessed. The origin, author, time of receiving, form and modality of the document's reception has to be verifiable for the whole period the document is stored. The documents have to be protected against modifications and deletion. The procedures of storage and substitution of the media have to ensure that the contents of the document can not be modified. The time of obligatory secure storage is equal for the documents of same type in paper form[248].

There is still no jurisprudence that would explicitly acknowledge the acceptability of electronic documents as equivalent to traditional written documents. However, there has been a ruling where the primary decision was not about electronic documents and their equivalency to paper documents, but about the destruction of electronic data, in which the offending person was found guilty of destruction of documents[249].

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[246] Art. 17. par. 6 of the Law on Electronic Document.

[247] Art. 20. par. 1 and 2 of the Law on Electronic Document.

[248] Art. 20. par. 3 of the Law on Electronic Document.

[249] VSRH, Revr 176/02, of 13 June 2002.

B.1.2. Transposition of the eCommerce directive

The transposition of the eCommerce related directives has been completed. Croatia has the Law on Electronic Signatures, The Law on Electronic Commerce and the Law on Electronic Documents. Also, the required regulations for practical application of the laws have been enacted[250].

As in the directive, the Law on Electronic Commerce does not define electronic commerce, but it defines information society services, that is,

"any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services[251]."

This is identical to the definition of information society services given by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, that is recalled as the definition by the Directive 2000/31/EC on electronic commerce[252]. Croatian law does not have a definition of the concepts of "distance", "by electronic means" and "at the individual request of a recipient of services", as used in the Directive 98/48/EC, but it mentions some examples of those services, like sale of goods and services via Internet, offering of data on the Internet, Internet advertising, electronic browsers, and possibility of requesting of data and services that are transported by electronic network, mediation for network access or storage of users data[253].

The provisions of the Law on Electronic Commerce are not applicable to data protection, taxation, notary activity, representation of parties and protection of their rights in courts of law, and games of chance with financial stakes, including lottery, casino games, betting, slot machines, etc[254].

The lists of restrictions indicated supra are merely an elaborated list of the possible (but not obligatory) limitations offered by the EU Directive 2000/31/EC on electronic commerce:

> *"Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:*
>
> - *contracts that create or transfer rights in real estate, except for rental rights;*
> - *contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;*

[250] Pravilnik o evidenciji davatelja usluga certificiranja elektroničkog potpisa, Narodne novine br. 54/02.; Pravilnik o mjerama i postupcima uporabe i zaštite elektroničkog potpisa i naprednog elektroničkog potpisa, sredstva za izradu elektroničkog potpisa, naprednog elektroničkog potpisa i sustava certificiranja i obveznog osiguranja davatelja usluga izdavanja kvalificiranih certifikata, Narodne novine, br. 54/02.; Pravilnik o registru davatelja usluga certificiranja elektroničkog potpisa koji izdaju kvalificirane certifikate, Narodne novine br. 54/02.

[251] Art. 2. par. 1 p. 2 of Law on Electronic Commerce.

[252] P. 17. of the Preamble of the Directive 2000/31/EC.

[253] Art. 2. par. 1 p. 2 of Law on Electronic Commerce.

[254] Art. 1. par. 2 of the Law on Electronic Commerce.

- *contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;*
- *contracts governed by family law or by the law of succession[255]."*

Excluding the legal acts already mentioned above in the lists of non-validity of electronic documents, the Croatian LO explicitly requires a written form that can be substituted with electronic documents in the following contracts:

- contracts of sale of goods with payment instalments (art. 465.);
- contracts of construction (art. 620 par. 2);
- contracts of licence (Art. 700);
- contracts of commercial representation (Art. 806);
- allotment contracts (Art. 910);
- insurance contracts (Art. 925. par. 1);
- banking contracts (Art. 1008, 1022, 1026, 1028 and 1039);
- contracts of suretyship except those concluded outside ones trade, business or profession (Art. 105.).

Thus, the list is rather modest.

Electronic documents, in order to be considered equivalent to paper documents, have to be made, transported and made accessible through any available informatics technology[256]. From a more substantial perspective, they also must have a uniform identifier, to be distinguishable from any other electronic documents. The author of the document must be uniquely and uniformly identifiable. The integrity of electronic document has to be preserved. It has to be accessible during the whole document lifecycle, and it has to be kept in a form that allows easy access to its content[257].

Each electronic document has two inseparable parts: firstly, the general data, i.e. its content, and secondly, its special data (metadata), that consists of one or more electronic signatures, data when it has been created, and other document attributes[258].

The Croatian legal system distinguishes between electronic signature and advanced electronic signature. The definition of the electronic signature[259] and the advanced electronic signature[260] in the Croatian Law on electronic signatures is identical to the definition of the electronic signature in Art. 2 par. 1 point 1 of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures[261].

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[255] Directive 2000/31/EC, Art. 9. Par. 2.

[256] Art. 5. of the Law on Electronic Documents.

[257] Art. 6. of the Law on Electronic Documents.

[258] Art. 7. of the Law on Electronic Documents.

[259] Law on Electronic Signature, Art. 2., par. 1./1. The definition of electronic signature is repeated in Art. 3. of the same Law, except that the part "attached to or logically associated with other electronic data" is omitted.

[260] Art. 4. of the Law on electronic signatures.

[261] See: Art. 2. p. 2. of the Directive 1999/93/EC.

The advanced electronic signature is a valid substitution for the written signature for natural persons, and for the signature and stamp for legal persons[262].

B.2 Administrative documents

The Law on Electronic Documents in its Art. 1 allows the use of electronic documents in relation to bodies of administrative government.

The Croatian Government has declared it a priority to implement the use of electronic documents for communicating with its bodies. However, while it would be legally possible to make requests to local and State administration, it is still not possible to do so in the majority of local regions[263] due to technical limitations. As a recent report shows[264], the majority of services are still at the level of communicating the state of a given procedure and providing the necessary information. Some offices offer electronic forms to be filled, printed and delivered in paper form.

Electronic tax stamps do not yet exist. The most extensive service is the VAT declaration for legal persons and professionals, which can be made through the internet.

The administrative services are growing rapidly in number, although this growth is not occurring equally in all regions. More developed parts of Croatia have more services and more possibilities to benefit from the approved legal regulation. The majority of offers are concentrated in the City of Zagreb, both for local and central government.

C. Specific business processes

C.1 Credit arrangements: Documentary credit

In Croatia there is specific legislation on documentary letters of credit, although it does not emphatically deal with electronic letters of credit. They are regulated by 11 Articles of the LO that partly follow the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, Publication 500 (further: UCP). Shortly, these provisions contain the principle of independence of the letter of credit of the underlying transaction, definitions of the documentary (letter of) credit, of revocable and irrevocable letters of credit, and of transferable and divisible documentary (letters of) credit.

Since trade usages are to be applied to commercial transactions primarily – i.e. in the first place and before provisions of LO – and since notifications of opening of letters of credit very often state that UCP would apply, the relevance of this Croatian legislation is reduced. The extensive use of documentary credit is based on the fact that this type of document is regulated by a widely accepted international regulatory regime. Regulation concerning documentary credit is to a large extent based on international regulations adopted by the International Chamber of Commerce (ICC) in Paris, Uniform Customs

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[262] Art. 5. of the Law on electronic signatures.

[263] The aforementioned *županija.*

[264] See http://www.e-hrvatska.hr/modules.php?name=News&file=article&sid=123, Studija dostupnosti javnih usluga na Internetu, completed in 2006.

and Practice for Documentary Credits (abbreviated UCP, or more precisely UCP 500, where UCP 500 is the prevailing regulation). A new regulation will probably enter into force in 2007, the UCP 600. As in most countries, Croatia does not have an explicit regulation on documentary credit. However, adjacent issues to documentary credit can be governed by general rules on national contract law etc.

The eUCP is known and accepted in Croatia, and also presented in doctrine[265], but to the author's knowledge of banking practice, this should not be taken to indicate that banks would accept electronic presentation of documents under letters of credit.

As concerns the understanding and interpretation of the eUCP, we refer to the Belgian national profile.

C.2 Transportation and storage of goods – Bills of lading and sea waybills

Electronic documents concerning transportation of goods are mainly subject to regulation by the Maritime Law (further: ML)[266]. Other laws containing provisions concerning contracts of carriage do not mention electronic documents specifically, so that the general rules above apply[267].

Bills of lading and sea waybills are subject to the ML's rules, which should however not be observed in isolation, but rather in conjunction with the CMI Rules for Electronic Bills of Lading and CMI Uniform Rules for Sea Waybills.

Legal issues connected with electronic bills of lading are discussed in Croatian doctrine[268].

The provisions concerning bills of lading do not explicitly mention electronic bills of lading, leaving to the parties to the contract of carriage to agree – or not – to the application of the CMI Rules for Electronic Bills of Lading. There are no special rules regulating the possibility of valid contracting through electronic bills of lading, so that the general rule of party autonomy applies.

On the other hand, the CMI Uniform Rules for Sea Waybills don't emphasize electronic transmission of documents, and the Croatian legislator stead inserted some provisions relating to this subject. These provisions rely on the phrase "electronic data exchange", which is generally not unusual, but due to the context in which it is used and the possibility of literal interpretation leaves some room for doubt regarding its meaning. A first example for this problem may be found in a provision dealing with contracts for transportation of goods and issuing of the waybill:

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[265] Maurović, Ljiljana: Dodatak Jedinstvenim pravilima i običajima za dokumentarne akreditive za elektroničku prezentaciju UCP – uvođenje dokumentarnog akreditiva u elektroničku eru, Hrvatska pravna revija, br. 6./2003.

[266] Pomorski zakonik, Narodne novine no. 181 of 21. 12. 2004.

[267] Zakon ougovorima o prijevozu u željezničkom prometu (Narodne novine no. 87 of 16. 10. 1996.) and Zakon o obveznim i stvarnopravnim odnosima u zračnom prometu (Narodne novine no. 132 of 9. 10. 1998.).

[268] Ćesić, Zlatko: Teretnica – od tradicionalne do elektroničke isprave, Hrvatska pravna revija, istopad 2001.

"The provisions for sea waybill are to be applied by analogy when carriage of goods - on the grounds of a contract of carriage – is performed on the grounds of electronic data exchange"[269].

Literally this may lead to the conclusion that "electronic data exchange" – and not only a contract of carriage – would be legal grounds for transportation only when such electronic data is used cumulatively with a contract.

Yet, since such understanding would not be rational, the quoted provision should be interpreted as a provision expressly enabling the conclusion of contracts of carriage of goods by means of electronic data exchange, and enabling the delivery of transport documents by means of teletransmission. This interpretation is supported by the provision that follows, where it is stated that *"in this case the shipper can request the issuance of a transport document in paper form at any time"*[270]. This interpretation is also consistent with the general rule of contract law according to which a will may be expressed by various means of communication, which also includes electronic communications[271].

In case of contracting and issuing of transport document in electronic form, there is a presumption (*praesumptio iuris*)[272] of the parties' consent that communicated and confirmed electronic data and those in the memory of computer are equal to data in a written form on paper.

A second provision where a literal interpretation of the phrase "electronic data exchange" may cause problems is the provision defining the carrier's duty to issue transport document where the carrier is obliged to issue a "*bill of lading, waybill, electronic data exchange or other transport document*"[273]. This should be interpreted as a carrier's duty to issue one of the possible transport documents and to deliver it to the shipper by means of electronic communication, and such an interpretation would be consistent with the aforementioned interpretation of other provisions of the ML.

Consistently the ML enables electronic signature on a sea waybill[274]. Although the provision literally says that electronic data exchange can replace signatures, the used expression should be understood as a provision enabling electronic signature and electronic communication of the document signed electronically. This is also an implicit confirmation that transport documents may be issued in electronic form, because electronic signatures are obviously only possible on electronic documents.

In summary it can be concluded that the ML allows electronic contracting, electronic delivery of transport documents, and the use of electronic signatures on electronically delivered documents.

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[269] Art. 519. par. 1. ML.
[270] Art. 519. par. 2. ML.
[271] Art . 249. par. 2. and Art. 293. par. 1. LO.
[272] Art. 519. par. 3. ML.
[273] Art. 496. ML.
[274] Art. 513. par. 4. ML.

C.3 Cross border trade formalities: customs declarations

Croatia applies the Croatian national Customs Law, which is quite aligned with the EU Customs Code, including its national transit application. Croatia is preparing its accession to the Common Transit Convention (the target date is 1/1/2008, but it is likely that the effective date for accession will be delayed until 1/1/2009).

It should be noted that Council Decision 2006/145/EC of 20 February 2006 on the principles, priorities and conditions contained in the Accession Partnership with Croatia and repealing Decision 2004/648/EC[275], states that in the short term, Croatia should "[…] continue developing the necessary IT systems to allow the exchange of electronic data with the EU and its Member States."

Customs matters in Croatia are regulated by the Customs Law[276]. According to Art. 73. par. 1. of this law, customs declarations may be submitted in written form, by electronic data exchange «*if technical possibilities enable it and if it is permitted by Main Customs Office*», and even orally.

The form, contents and method (manner) of submitting is prescribed by the Government of Croatia, through the Regulation for the implementation of Customs Law (further: Regulation), where in Art. 127 to 131 electronic submission of customs declarations is regulated more exhaustively than in the Customs Law.

Electronic filing of customs declarations is not a general rule which would *ex lege* apply to all interested parties. Instead the possibility of such filings is opened only to persons who were given the permission to do so. For issuing such permission, only the Main Customs Office[277] of the Croatian Customs is competent, and it may give this permission only to a person who filled a written application request for it[278]. There are no fixed criteria in the Customs Law or in the Regulation which must be fulfilled. Instead, the provisions indicate that the decision on giving the permission is made discretionally by the Main Customs office[279].

The permission may require the filling of written (paper) customs declaration in addition to filing declarations by electronic data exchange[280].

When filing solely by electronic data exchange is permitted, the customs declaration is considered to be filed when the customs office receives an electronic message, which can contain more than one customs declaration[281]. The customs office also confirms the receipt by electronic message, containing the identification data of each submitted declaration, and the number and date of acceptance of the declaration (if the declaration is correct)[282].

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[275] *(OJ L 55, 25.2.2006, p. 30-43)*
[276] Narodne novine no. 78 of 23. 07 1999.
[277] *središnji ured*
[278] Art. 128. Regulation.
[279] Art. 127. par. 1. Regulation.
[280] Art. 127. par. 2. Regulation.
[281] Art. 129. par. 1. Regulation.
[282] Art. 130. par. 1. Regulation.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

The basis of the Croatian legal framework for invoicing and accounting consists of the Law on Accountancy[283] (further: LA) and of the International Accounting Standards.

Documents that are required to be entered into books of accounting (using the double entry system), i.e. their production, signing and delivery, may be done in electronic form. The LA expressly allows creating these documents by computer and keeping them in electronic form, and such electronic documents are a valid ground for entry in books of accounting[284]. They can be signed using the electronic signature in accordance with the Law on electronic signatures[285].

Since these documents emphasize invoices, it may be concluded that electronic invoicing is permitted in the described sense.

The Law on Accountancy does not specify whether a simple electronic signature is sufficient, or if an advanced electronic signature is required. This Law also does not specify particular conditions for the electronic archiving of electronic signatures, and this means the general rules concerning electronic signatures as contained in the Law on electronic signatures would apply.

Furthermore, these documents may be delivered either by electronic telecommunication or on a media carrier containing electronic data (e.g. CD)[286]. In cases where document is delivered by electronic telecommunication, the sender must keep the original document in an archive or on a media carrier[287].

C.4.2. Electronic accounting

Electronic accounting is allowed, although there is no express provision in the LA on this matter. However, the relevant provisions of the LA oblige subjects whose accounting is in electronic form, to print the electronic documents – i.e. to produce a hard copy of books – at the end of each business (fiscal) year[288]. This provision thus implicitly allows electronic accounting, although no business can maintain a purely electronic system.

From the necessary production of a hard copy of the documents follows the necessity to keep a hard copy of the ledger and accounting journal, for a duration of at least 11 years[289].

Conclusively it can be said that electronic accounting – in the described sense – is allowed, but also that ledger and accounting journal at the end of each year have to be printed and kept as hard copies i.e. in the paper form.

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[283] Zakon o računovodstvu, Narodne novine no. 146 of 12. 12. 2005.
[284] Art. 3. par. 2. and 3. LA
[285] Art. 4. par. 5. LA.
[286] Art. 4. par. 6. and 7. LA.
[287] Art. 4. par. 6. LA.
[288] Art. 12. par. 2. LA.
[289] Art. 12. par. 3. LA.

Croatian law requires the deposit of companies' annual accounts (balance sheets and profit and loss accounts) in a paper form with the Tax authority. Any other documents that are to be submitted to the Tax authority should also be in paper form. Exceptionally, VAT statements may be submitted in a form of electronic document.

D. General assessment

D.1 Characteristics of Croatian eCommerce Law

- The policy of the Croatian legislator in regard of electronic documents and more generally in regard of regulating various aspect of practical use of computers, communication by computers and computer networks (e.g. the Internet) should be assessed in the context of the Croatian legislator's general policy and its direction in last years and in the present moment.
- Compliance with the relevant EU regulation, beginning with the relevant Directives, is one of the main policy drivers. Since acccession negotiations began, this process became even more significant.

D.2 Main legal enablers to eBusiness

- The main legal factor encouraging the development of e Business is the recent legislation.

  From 2002 year and up to the present moment Croatian legislator has introduced:

  - Law on Electronic Signatures,
  - Law on Electronic Commerce, and
  - Law on Electronic Documents,

  which are in force, harmonized with EU regulation, and followed up by Regulations (by-laws) necessary for the operational implementation of these laws.
- The new Law on Obligations (2005) adopted new provisions pointing out that a person's will can be expressed by various means of communication and stressing that contracts may be concluded by means of electronic communication (see supra B.1.1.).
- Therefore we were not able to identify significant legal barriers to the development of eBusiness in Croatia, especially in legislation and within the general framework described under B.1. of this report. There are certain types of contracts excluded from the possibility of electronic contract conclusion, but these types of contracts tend to be of lesser importance for business transactions. Since the Laws regulating eBusiness have only recently entered into force, possible obstacles in their practical implementation can not yet be determined.

Cyprus National Profile

A. General legal profile

Cyprus (Κύπρος) is an independent and sovereign Republic with a presidential system of government. For the purposes of administration, Cyprus is divided into six districts[290]. Each district is headed by a District Officer who is essentially the local representative of the Central Government.

Executive power is vested in the President, who is also the Head of State. The President appoints the Council of Ministers which is the main executive instrument of the Republic. There are eleven Ministries, including the Ministry of Commerce, Industry and Tourism, which is responsible according to the relevant eCommerce legislation, for eCommerce issues[291]. The Ministry of Justice and Public Order is responsible for general law and justice issues, including legal issues pertaining to eCommerce. Within the context of implementing the policy followed by the state, the various Ministries are responsible for drafting Bills and presenting the same before the House of Representatives[292] for approval.

The House of Representatives acts as the legislature and its basic functions are the exercise of legislative authority with the approval of Bills presented to it by the Government. It also prepares Draft Laws tabled by its own Members. Secondary legislation is presented to the House by the Government. As a result, eCommerce is regulated by means of Laws (primary legislation) or Regulations and Orders (secondary legislation).

The administration of justice is exercised by the island's separate and independent judiciary. Where eCommerce is concerned, the judicial institutions most likely to be competent to deal with commercial disputes relating to eCommerce consist of the Supreme Court of Justice (administrative court dealing only with complaints lodged against state organs), the Assize Court (appellate jurisdiction), the District Courts (for both criminal and civil jurisdiction) and the Industrial Disputes Court. The legal system is based on the same principles applicable in the United Kingdom and most statutes are essentially based on English law. Nevertheless, since 1997 statutes are also based on European Community Law. The Cypriot legal system of jurisprudence has a binding power of precedent due to the fact that it is based on Common Law.

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[290] επαρχίες

[291] See http://www.cyprus.gov.cy/

[292] Βουλή των Αντιπροσώπων; see http://www.parliament.cy/www_START/index.asp

B. eCommerce regulation

Most questions regarding the validity and recognition of electronic documents are answered based on primary and secondary legislation (Laws, regulations and orders). Thereafter, the decisions taken by the Courts of Justice also play an important role due to the fact that, as the Cypriot legal system is based on Common Law, jurisprudence has a binding effect, and has an equivalent legal value as legislation. In this section, the main aspects of Cypriot legislation regarding the legal value of electronic documents are briefly commented.

B.1 eCommerce contract law

B.1.1. General principles

Contractual freedom

Regarding the validity of electronic contracts, Cyprus law is based on the constitutionally[293] protected freedom of contracting, and is, as a general rule, very flexible, excepting rather few formalities. Accordingly, anyone has the right to enter freely into any contract subject to certain conditions, limitations or restrictions as are laid down by the general principles of the contracts legislation.

Within this framework, the Contract Law[294] provides that a contract is formed by the making of an offer by one person and an acceptance of the offer by the other party to the contract, if both of them intend to make a contract. Furthermore, the Law defines a contract as an agreement concluded by the free will of parties that are able to contract, for lawful consideration and for a lawful purpose, and which are not explicitly characterised by the Law as invalid or unlawful. The Contract Law applies to all contracts in general, including electronically concluded contracts.

As a general rule, a contract may be made in writing, or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.[295]

Where express and implied terms are concerned, according to section 9 of the Contract Law,

> *"…In so far as the proposal or acceptance of any promise is made in writing or in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in writing or in words, the promise is said to be implied."*

It results from the above definition that express or implied terms may be deemed to have the same value when interpreting the contract.

The Sale of Goods Law also sheds some light as to the standing of express and implied terms. Within the context of delivery of goods for example, it derives from section 36 of

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[293] Article 26 of the Constitution of the Republic of Cyprus; see http://www.kypros.org/Constitution/English/index.htm

[294] Cap. 149, as amended.

[295] Section 10 of the Contract Law.

the Sale of Goods Law that the question whether the buyer is under an obligation to take possession of the goods or whether the seller is under an obligation to send them to the buyer is a matter depending, on a case by case basis, on the express or implied agreement between them.

Contractual requirements for a binding electronic contract

When a person engages in an electronic transaction, he needs to consider questions as to the requirements for a binding contract to be made over the Internet and which law will apply to a contract concluded on-line.

By application of the Contract Law, contracts for the sale or purchase of goods or the provision of services over the Internet can be formed by any means provided there is an offer, the acceptance of the offer, valid consideration and intention to create legal relations.

With regards to consideration in an electronic transaction, consideration generally means something of value, usually payment of an amount for purchasing the goods or services which can be given by the customer presenting his credit card in order to honour his obligations under the contract. The intention to create legal relations may be passed over swiftly as this is usually understood to exist by virtue of the fact that the parties are in negotiations.

Offer

According to Section 2 of the Contract Law, a person is said to make an offer when he signifies his willingness to do or to abstain from doing anything, with a view to obtaining the consent of that other person to such act or abstinence to such action or abstention.

When the person to whom the offer is made signifies his assent thereto, the offer is said to be accepted. An offer when accepted becomes a promise. The person making the offer is called the 'promisor' and the person accepting the offer is called the 'promisee'. When, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does, or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise. Every promise and every set of promises, forming the consideration for each other, is an agreement.

Acceptance

Subject to any other mechanism agreed between the parties, it is generally the case under the Contract Law that acceptance becomes effective when it is communicated to the promisor. According to Section 3 of the Contract Law, the communication of the offer, the acceptance of the offer and the revocation of the offer and acceptance, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Communication of Acceptance

By virtue of Section 4 of the Contract Law, the communication of an offer will be complete when it comes to the knowledge of the person to whom it is made. The

communication of an offer is complete as against the promisor, when it is put in a course of transmission to him, so as to be out of the power of the acceptor. As against the acceptor, the communication of an offer is complete when it comes to the knowledge of the promisor.

Formal requirements – no general formality requirements

A written and signed document is not generally a prerequisite for a binding contract due to the fact that both oral and written contracts are equally binding. Nevertheless, this is subject to certain exceptions, i.e. with regards to the sale of immovable property.

Despite the fact that the contract will be considered to be valid if made orally, for evidential purposes parties to the contract usually prefer to have a written contract. In this respect, electronic documents may be used in the place of hardcopies and have equal value to the said hardcopies, as a result of the enactment of legislation recognising the validity of Electronic Signatures.

Regarding the issue of the proof of the existence of a written document, the Evidence Law[296] plays a significant role for parties involved in litigation who seek to prove the existence and value of the terms and conditions on the basis of which they had formed their contract.

Within this context, According to Section 34 of the Evidence Law, the competent Court dealing with civil litigation has discretion to admit statements contained in an original document or a copy of an original document, if the statement is admissible as evidence.

Notion of electronic documents

There is no generally accepted legal definition of an 'electronic' document. The definition provided for the purposes of the Evidence Law concerns all 'documents' in general. In this respect, a 'document' is considered to be any thing, on which any information or representation of any kind is registered or imprinted.

A 'copy,' in relation to a document, includes anything on which the said information or representation has been copied by use of any medium, directly or indirectly.

This general definition of the term 'document' has been introduced in the Evidence Law in 2004 replacing a previous definition which used to take especially into account technological developments. It used to read that a document included a disc, music tape, electronic disc registering visual representations of writing, or any other medium registering visual representations capable of being reproduced either by using another device or without using such device.

Although the new definition does not expressly provide that a document produced electronically is capable of being accepted as evidence, it may be inferred that due to the wide definition of the term, it may include information or representations reproduced directly or indirectly by electronic mediums. As a result, it may also be inferred that the competent courts are conferred with wide discretionary powers with respect to the admissibility of any type of documents, including electronically produced ones.

[296] Cap 9, as amended by Law No. 42/1978, Law No. 86/1986, Law No. 54(I)/1994, Law No. 94(I)/1994 and Law No. 32(I)/2004.

As the Evidence Law is very general, case law also plays an important law in shedding light on the legal validity of an electronic document. It is important, however, to note that the Government and the House of Representatives are currently discussing amendments to the evidence rules applicable in Cyprus, in order to make matters more practical.

For the moment though, according to such case law, an object, such as apparatus, machines and equipment which are the subject matter of the case, or relevant to the case before the Court, may be presented as evidence to the Court. However, if it is practically impossible to bring it to Court, or if its visual appearance is not sufficient to lead the Court to conclusions, supporting evidence may be allowed by persons who came in contact with it, concerning the working condition of the apparatus, its relation to the defendant and the manner in which it was used by the defendant. An expert witness can give such evidence.

Such material as tapes, recordings, videos, etc, may be admissible evidence and may present a tone of voice or visual characteristic. The registration made by the tape must be precise, strong and of good quality, and there must be no change or interference. The same is true for video cameras (e.g. attached to buildings). There is no need for the persons who were responsible for the registration to give evidence themselves.

Evidence from a computer may be admissible as hearsay evidence if evidence is given that the computer was functioning properly and its content has not been altered. Therefore, evidence registered by mechanical means without human interference may be admissible if there is proof that the machine was functioning properly. Similar provisions apply for discs, tape recorder tapes, sound tapes, or other means such as films, negatives, video tapes and electronic discs for the imprinting of visual representations, where sounds or other elements which are not visual representations are imprinted in a way that they can be reproduced with or without the use of other apparatus.

When admitting computer evidence, the courts tend to follow English Common law. In the case of *Marsel* v. *Popular Bank of Cyprus*,[297] the Court made specific reference to Section 5(1) of the Civil Evidence Act of 1968 which read that 'In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) are satisfied in relation to the statement and computer in question'.

In interpreting Section 5 of the English Civil Evidence Act of 1968, the Court referred to Halsbury's Laws of England[298] which states that as an exception to the hearsay evidence rule, a statement contained in a document that has been produced by a computer may be admissible as evidence of any fact stated in it for which direct oral evidence would have been admissible.

Nevertheless, this does not in any way mean that such a statement consists of conclusive proof of any fact stated therein so that, on its own, it can put an end to the search of the correctness of all that is referred to therein. Such a statement is subject to evaluation and is given the corresponding value after taking into account all of the

[297] Civil Appeal No. 10636, 30 November 2001.

[298] Halsbury's Statutes of England, 3rh Edition, Vol. 12, p. 914 and Halsbury's Laws of England, 4th Edition, Vol. 17, para. 59.

circumstances from which any conclusion may be extracted as to the exactness or otherwise of the statement.[299]

Validity of electronic documents

It is useful to note that the adoption of the Electronic Signatures Law[300] for the purposes of the transposition of the e-signatures directive has facilitated assessing the validity of electronic documents that are electronically signed. The Electronic Signatures Law effectively establishes the legal framework governing electronic signatures and certain certification services for the purpose of facilitating the use of electronic signatures and their legal recognition. It does not, however, cover aspects related to the conclusion and validity of contracts or other legal obligations which are governed by requirements as regards their form. Furthermore, it does not affect rules and limitations in relation to the use of documents provided by other applicable legislation in force.

The validity of electronic documents is also recognised by means of the Law Regarding the Conclusion of Consumer Contracts at a Distance[301] which transposes the EU Distance Contracts Directive. The Law applies to distance contracts concerning goods and/or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of *distance communication* up to and including the moment at which the contract is concluded.

Contracts negotiated at a distance involve the use of one or more means of *distance communication* not involving the simultaneous presence of the supplier and the consumer. For the purpose of concluding a distance contract with a consumer, the supplier must make exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded.

The means of distance communication used is any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties. Such means of distance communication include, for the purpose of electronic commerce, the use of electronic mail. Other means of distance communication, *including electronic means*, may be used to allow the transfer and exchange of information and data between the supplier and the consumer, i.e. via a website, whereby there is no simultaneous physical presence of the supplier and the consumer.

Restrictions with regard to form

According to Section 5 of the Law, for a distance contract for the provision of goods to be enforceable, the supplier or his representative must ensure that the consumer has available certain information in good time prior to the conclusion of the contract, including information regarding

(a) The manner of payment, delivery or performance of the contract;

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[299] *D & G. Products Ltd* v. *Premixco Asphalting Company Limited*, Civil Appeal No. 10122, 26 February 1999.

[300] Law No. 188(I)/2004

[301] Law No.14(I)/2000.

(b) Written information on the conditions and manner of exercising the right of withdrawal;
(c) The geographical address of the shop of the supplier to which the consumer may address any complaints;
(d) Information on after-sales services and commercial guarantees which exist;
(e) The conditions for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.

The Law further provides that the above information, the commercial purpose of which must be made clear, must be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions as well as the principles governing the protection of those who are unable to give their consent, such as minors.

Electronic notifications

With regards to the written confirmation of information, the Law provides in Section 6 that in good time during the performance of the contract, and at the latest at the time of delivery where goods not for delivery to third parties are concerned, the consumer must be provided with written confirmation or confirmation in another *durable medium* available and accessible to him of the information referred to above, in a language that was used in the offer for the conclusion of the contract, unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him. Furthermore, the said information must also be given in a language that was used in the offer for the conclusion of the contract. Therefore, the Law is compatible with Article 5 of the Directive but more protective regarding the language to be used.

In the case of goods that will be delivered to third parties, the consumer must be provided with a written confirmation or confirmation in another durable medium available and accessible to him of the aforementioned information, in a language that was used in the offer for the conclusion of the contract, as soon as possible after the delivery of the goods.

The Law also provides that the period within which the contract can be rescinded by giving a written notice to the seller is 14 days, starting from the day after the goods have been received by the consumer or the day after the obligations of the supplier have been fulfilled, whichever comes latest. If the supplier fails to fulfil his obligations, the 14-day period becomes three months, beginning from the day following receipt by the consumer.

The notice sent by the consumer to the supplier for the purposes of rescission of the contract must mention that the consumer has decided to withdraw from the contract, the date at which the notice is given and the name and address of the person to whom the notice is given according to what is provided under the contract. The notice can be given in the form prescribed in a Schedule of the Law or in any other written manner satisfying the aforementioned requirements. A notice of withdrawal sent by post is deemed to have been given at the time of its posting irrespective of whether it has been received or not. Thus the Law is more extensive than the Directive since there is no similar provision in Article 6 of the Directive.

Other relevant legislation on the validity of contracts

As its name connotes, the Sale of Goods Law[302] specifically applies to contracts for the sale of goods. Since electronic contracts in Cyprus are afforded the same legal value as off-line contracts, it may be presumed that the Law will apply to electronic contracts.

According to Section 4 of the Law, a contract for the sale of goods is a contract by which the seller transfers or accepts to transfer to the buyer the ownership of goods for a price. A contract for the sale of goods may also exist between the proprietor of a part of the goods and another party. When, by virtue of a contract for sale, the ownership of goods is transferred by the seller to the buyer, the contract is called a sale, but when the transfer of the ownership is to take place at a later time or is subject to a term that will be performed at a later stage, the contract will be called a sales agreement. A sales agreement becomes a sale when the time elapses or the terms are fulfilled based on which the ownership of the goods will be transferred.

Restrictions on the acceptability of electronic documents

The Contracts Law[303] imposes certain formality requirements with regards to certain agreements. In this respect, an agreement made without consideration is void, unless:

(a) it is expressed in writing and signed by the party to be charged therewith, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(b) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

(c) it is a promise, made in writing and signed by the party to be charged therewith, to pay wholly or in part a debt of which the creditor might have enforced payment, but for any law for the time being in force relating prescription or the limitation of actions.

Additional formality requirements exist under the Contracts Law regarding the 'specific performance' of contracts. In this respect, a contract is capable of being specifically performed by the Courts if, inter alia, it is expressed in writing and it is signed at the end thereof by the party to be charged therewith.[304]

It is also important to note that certain formality requirements also exist with regard to contracts relating to leases of immovable property for any term exceeding one year. These contracts are not valid and enforceable unless they are:

(a) Expressed in writing; and

(b) Signed at the end thereof, in the presence of at least two witnesses themselves competent to contract who have subscribed their names as witnesses, by each party to be charged therewith or by a person who is himself competent to contract and who has been duly authorised to sign on behalf of such party.

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[302] Law No. 10(I)/1994 as amended.

[303] Section 25

[304] Section 76 of the Contracts Law.

Other formality requirements exist in relation to 'bonds in customary form' which must be made in writing and signed. In addition, with regards to pawns, pledges of bills of exchange or of promissory notes or of bonds or of share certificates or warrants are not valid and enforceable unless the contract of pledge is expressed in writing and signed by the pawnor in the presence of two witnesses who also sign the contract.

Electronic registered mail

Where notices are concerned, the Contracts Law does not impose any strict requirements as to the manner in which such notice is to be given, and as a result, it can be presumed that notice may be given by means of electronically registered mail. Basically, parties to a contract are left free to decide on the manner in which notice is to be given, provided that actual notice is effectively communicated. As a result, in most cases, a consensus of both parties is a precondition to the legal acceptability of electronically registered mail.

For instance, according to section 7 of the Contracts Law, at the time that a contract is to be concluded by means of one party accepting the other's proposal, the proposal may prescribe the manner in which it is to be accepted. Thus, the party making the proposal may select that this is made by means of electronically registered mail. More specifically, the party making the proposal may insist that his proposal shall be accepted in the prescribed manner, that is, via electronically registered mail and not otherwise.

Where a person selects to send electronically registered mail, he may rely on the provisions of the Electronic Signatures Law which speaks about secure signature-creation-devices. However, no other provision has been located regarding the manner in which electronic registered mail is to be sent. In addition, no information is available on Trusted Third Parties and their involvement.

The Consumer Credit Law[305] requires that consumer credit agreements are made in writing and signed by the parties and that either the creditor provides the consumer, *by hand*, the original or copy of the agreement in person at the time of concluding the contract or that the creditor sends or provides the consumer the original or copy of the agreement via registered mail within 10 days of concluding thereof. The Law also requires that the credit agreement includes a statement to the effect that the consumer shall be entitled to discharge his obligations under the credit agreement by sending notice of this purpose in writing.

Electronic archiving

No generic legislation has been detected for the electronic archiving of electronic or paper documents although certain announcements have been made with regards to the preparation of legislation for the purpose of implementing relevant EU legislation on data retention.[306] As a result, there are currently no specific criteria in place that should be met by the archiving process, particularly with regard to integrity, authenticity and non-repudiation. Banks and other financial institutions have adopted their own archiving processes due to the legal standards imposed on them by the applicable banking

[305] Law 39(I) of 2001.

[306] Speech delivered by Ms Theodora Piperi, Law Officer of the Republic of Cyprus, on the '*Retention of Data for the purpose of Investigation, Detection and Prosecution of Crime*' at the Cyprus Infosec 2005 Conference on 7 October 2005.

legislation which, in some cases, requires that banks retain critical documents for 25 years, necessitating huge volumes of paper files and large archive rooms at branches worldwide. The Bank of Cyprus for example has adopted the Online Viewing System (OVS) program to reduce or eliminate the bank's dependence on paper-based record keeping.[307]

Jurisprudence

The only available case law regarding the admissibility of electronic documents is based on old section 5A of the Evidence Law, Cap. 9, that used to be in force from 1994 until it was repealed on 12 March 2004 by Law No. 32(I) of 2004. In this respect, section 5A which is no longer in force used to read as follows:

> *"5A(1).- A statement contained in a document that is produced by a computer processor is admissible in any proceeding as evidence of a fact referred to therein where, with reference to such fact, direct oral evidence would have been accepted if the provisions of subsection (2) were satisfied."*

Subsection (2) requires that,

(a) The document containing the statement was produced by a computer during the period of time that the computer was systematically used for the purpose of gathering or processing information relevant to the activities carried out during the said period, by a natural or legal person, for profit making purposes or otherwise.

(b) The computer was systematically fed with information of the same nature as those contained in the statement.

(c) During the whole or a substantial part of the said period of time, the computer was functioning properly, or if it was not, the instances where it was not functioning properly or it ceased to operate, during the said period of time, were not such so as to affect the production of the document or the preciseness of its contents, and

(d) The information contained in the statement match the information or come from information that had fed the computer at the time that it was ordinarily carrying out the above activities.

Section 5A of the Evidence Law was interpreted by the Supreme Court in its appellate jurisdiction in a number of civil cases. In *Attorney General of the Republic* v. *Chrysanthou Anthimou and others*,[308] the Supreme Court held that on the basis of the provisions of section 5A of the Evidence Law, it is not enough that a witness testify orally on the contents of a statement in a computer. The oral evidence of the witness would have been admissible only if the witness had submitted the relevant 'statement' itself that was extracted from the computer. The document would have demonstrated, if it were presented, the amount of the debt in question. In this case, the witnesses' oral statement was considered to be hearsay, thus inadmissible.

In *Mpoulos Marsel a.o.* v. *The Popular Bank of Cyprus Ltd*,[309] it was held that the serious problems brought about by modern technology regarding the acceptance of evidence

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[307] 'Bank of Cyprus Meets 21st Century Archival Needs with TREEV® Report Manager'; http://www.treev.com/realresults/docs/CyprusSuccessStory0803.pdf

[308] Civil Appeal No. 11655, 15 June 2005.

[309] (2001) 1 (Γ) ΑΑΔ 1858, 1867.

emanating from computers were identified in the English case of *R.* v. *Myers*[310] and in the Cypriot case of *Xydias a.o.* v. *The Police*,[311] where it was deemed that data inserted into computers could not be presented in Court except by the same person who had inserted them therein.

The Court further held that for the purpose of filling in the gap that could have appeared where the person who had inserted the information inside the computer was deceased or had emigrated or could not be located, the House of Representatives enacted the Law Amending the Evidence Law of 1994[312] that afforded the Courts with the power to accept, under certain conditions, statements contained in a document produced from a computer without necessitating the presence of the person who had inserted the information inside the computer. The term 'computer' was defined as an apparatus specially designed for collecting or processing information (Section 5A(6)) and the term 'statement' was defined as any statement of fact made orally or in writing or in any other manner, whether within a document or anywhere else (Section 2(α)).

At the moment, it is questionable whether the above case law is still in force due to the fact that the section of the law on which it was based was repealed. No cases were located that are more recent and can shed light on this issue.

B.1.2. Transposition of the eCommerce directive

The eCommerce directive was transposed in Cyprus by means of the 'Law on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce and Associated Matters of 2004'[313] (the eCommerce Law).

The eCommerce Law greatly facilitates the electronic conclusion of contracts, due to the fact that it aims at ensuring the free movement of information society services between Cyprus and the Member States of the European Union, in relation to the establishment of service providers, commercial communications, the conclusion of electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, means of legal protection and the cooperation between Member States.

However, the law is limited to contracts related to services of the information society as it provides that it applies to all information society services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. As a result, contracts concluded in other contexts do not benefit from this clause, such as contracts for the provision of services in the physical presence of the provider and the recipient, even if they involve the use of electronic devices. A very long list of contracts is excluded from the application of this Law and as a result the traditional provisions of the Contracts Law will apply.

It is important to note that the eCommerce Law exempts certain specific fields of information society services from the conditions governing the field of application of the Electronic Commerce Law, such as the transfer of electronic money by institutions, direct insurance and in particular, contractual obligations concerning consumer contacts and

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[310] [1965] AC 101.

[311] (1993) 2 ΑΑΔ 174.

[312] Law No. 54(I)/94.

[313] Law No. 156(I)/2004.

the formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated.

Where consumer contracts are concerned, the eCommerce Law sets out certain obligations for their validity but such obligations are complemented by other consumer legislation which applies in parallel and may not be excluded, such as the Law Regarding the Conclusion of Consumer Contracts at a Distance,[314] discussed above.

Furthermore, the Electronic Commerce Law imposes an obligation on information society service providers established in Cyprus and engaging in the cross-border provision of services within the European Union to comply with specifically designed requirements applicable to the *conclusion of contracts* or the *liability of the service provider*. All such requirements are applicable during the provision of information society services, irrespective of whether the information society service in question is provided within the Republic or in another member state. As a result, service providers have to comply with the requirements of the Contract Law, as well as with other legislation specifically addressed to consumers.

B.2 Electronic Administrative Procedures

For the purpose of providing Cypriot citizens with the facility to get services from anywhere, the Government has developed an Information Systems Strategy (ISS[315]) with the aim of interconnecting government systems over the Government Data Network and provide for the creation of a secure gateway on the web.[316,317]

More specifically, regarding the Interconnection of systems, the core systems (Civil Registry, Lands and Surveys, Registrar of Companies) which own data required by other ministries/departments have been completed and now it is both possible and required to interrelate these systems.

In addition, a Data Management Strategy has been adopted since 1997 which provides an integrated information structure capable of supporting its requirements for strategic and tactical management information systems as well as operational systems.

Another system that was developed is the Courts Administration System (CAS) which has the primary aim of computerizing the Courts Administration by automating all procedures, processes and functions of the Supreme Court, the Criminal Courts, the District Courts, the Military Court and all other Tribunals. The objective of CAS is to maintain the smooth running of the judicial process.

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[314] Law No.14(I)/2000.

[315] See also http://www.moh.gov.cy/Moh/moh.nsf/All/263F6A9F4A451945C2256E2A0050D090?OpenDocument

[316] ICA, '35th Conference Round Table Report: Cyprus', created October 2001; available from http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN005093.pdf; accessed 27 March 2005.

[317] Council of Europe, '15th Colloquy on Information Technology and Law in Europe: 'E-Justice: Interoperability of Systems', (2002).

C. Specific business processes

C.1 Credit arrangements: Electronic Bills of exchange and documentary credit

C.1.1. Bills of exchange

Bills of exchange are regulated by the Bills of Exchange Law, Cap. 262[318] which entered into force in 1928 and to a more limited extent by the Contracts Law which entered into force in 1931. Both Laws were enacted during the rule of the British empire but were kept after Cyprus' independence in 1960 and are still in force today in an amended form. In fact both Laws have had very few amendments.

A bill of exchange according to the Contract Law is included in the definition of the term 'goods' and is considered to be movable property.

According to the Bills of Exchange Law, a bill of exchange is an unconditional order *in writing*, addressed by one person to another, *signed* by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to a bearer.[319]

Bills of exchange can be both inland and foreign. An inland bill is a bill which is or on the face of it purports to be both drawn and payable within Cyprus or drawn within Cyprus upon some person resident therein. Any other bill is a foreign bill.

Bills of exchange may, according to section 8 of the Law be negotiable or non-negotiable instruments. More specifically, when a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid between the parties thereto, but it is not negotiable. On the other hand, a negotiable bill may be payable either to order or to bearer.

As referred to above, a bill of exchange must be given in writing and it must be signed by the person giving it. The term written is interpreted by the Law as to include printed and the term writing as to include print. The fact that the term 'include' is used connotes that the bill of exchange may be given in ways other than in print, thus it may be given electronically.

The signature on the bill is also a formal requirement for the legal existence of the bill. By virtue of section 4(1) of the Electronic Signatures Law, such signature may be in the form of an *advanced electronic signature* which is based on a qualified certificate and which is created by a secure-signature-creation device.

An advanced electronic signature according to the Electronic signatures Law is an electronic signature which meets the following requirements:

(a) It is uniquely linked to the signatory;

(b) it is capable of identifying specifically and exclusive the signatory;

(c) it is created using means that the signatory can maintain under his sole control; and

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[318] As amended by Law N. 16/1986, N. 32(I)/1997 and N. 96(I)/2003.

[319] Section 3 of the Law.

(d) it is linked to the data to which it relates in such a manner that any subsequent change of the said data is detectable;

Such advanced electronic signature has the same validity as a handwritten signature, both in substantial and procedural law. As a result, it may be said that the bill of exchange may be legally valid if it is electronically signed and it is written in any manner, including electronically written.

It is also important to note the provisions of section 45 of the Law as this was amended in 1997 which set out the rules as to the 'presentment for payment'. Section 45(1) provides that a bill must, in general, be duly presented for payment. If it is not, the drawers and indorses shall be discharged. A bill is duly presented for payment if it is presented in accordance with certain rules. *Inter alia*, presentment must be made by the holder or by some person authorized to receive payment on his behalf at a proper place either to the person designated by the bill as payer or to some person authorized to pay or refuse payment on his behalf.

Following the aforementioned amendment of section 45 of the Law in 1997[320] a subsection (2) has been inserted regarding the use of electronic means. More specifically, this subsection provides that where cheques are concerned, the presentment of the bill of exchange includes the transfer of the data on the cheque by electronic means to the bank that acts as payer and to the issuer of the cheque.

Concerning the use of cheques which are considered to be a type of bill of exchange presented in person, a 2003 amendment of the Law has included new sections 74A and 74C which have facilitated the use of electronic methods for the presentation of cheques. Thus, it is no longer required for the holder of the cheque to present the original of the cheque at the bank but it is possible to transmit the essential data of the cheque to the bank by electronic means in order to get his money.

In addition, where the essential data of the cheque are transmitted electronically and not the original cheque itself, the banker of the bank making the payment as well as the banker requesting the payment, are both subject to the same obligations in relation to the payment and collection of the cheque in the same manner as if the original of the cheque had been presented.

The essential data of the cheque that need to be transmitted electronically to the bank are the following:

(a) Cheque number

(b) The code number of the banker of the bank that needs to effect payment

(c) The account number of the issuer of the cheque, and

(d) The amount of the cheque written on the cheque by the cheque issuer.

[320] By N. 32(I)/1997.

C.1.2. Documentary credit - Letters of credit

Generally speaking, banks in Cyprus employ all modern methods of cross-border financing, including letters of credit, bills for collection, documentary credit, and cash against documents.[321]

Where documentary credit is concerned, the usual method of payment for business transactions in Cyprus is by letter of credit, with 90-days credit. Documentary credits (Letters of Credit) are written undertakings given by the bank on behalf of an importer to pay an exporter an amount of money within a specified period of time, provided the exporter presents documents which conform strictly with the terms and conditions of the Letter of Credit.[322]

Use is also made of Documentary collections, that is, import/export collections which provide both parties with a compromise between open account trading and payment in advance, for settlement of international trade transactions. Other forms of documentary credit include outward collections, a process by which the exporter forwards the shipping documents to the bank, with instructions to have them presented through a collecting bank in the buyer's country. Use is also made of inward collections whereby the collecting bank acts as the agent of the overseas bank forwarding the shipping documents. The bank informs the importer of the arrival of the shipping documents and notifies him of the terms of their release. The importer makes payment or accepts the Bill of Exchange and in return, receives the documents. Then the bank transfers the collected amount to the overseas bank (the remitting bank).

Cyprus legislation regarding the formation of contracts or the sale of goods does not make specific reference to letters of credit, their validity, etc. Regarding Cyprus case law, many cases tried involved letters of credit as a means of facilitating transactions between contracting parties but have concentrated mainly on the validity of the contract itself rather than on the validity of the letter of credit. No cases have been traced on the revocability of letters of credit or the effect of insolvency with regards to letters of credit. As a result, there is no specific reference to the use of electronic documents for this business process. The Cypriot legal system subjects the documentary credit mostly to general rules of contract law and case law. It goes without saying that there is therefore no explicit legal framework for electronic documentary credit agreements.

In addition, it is useful to note that despite the lack of an express and clear system regarding the validity of electronic documents within the framework of credit agreements, it is useful to note that the Banking Law as amended specifically defines the term 'document' so as to include accounts, prints, contracts in any form, including those stored in computers. The Law also defines the term electronic money that is a form of money that is acceptable as a means of payment by all companies, other than the issuer.

[321] http://strategis.ic.gc.ca/epic/internet/inimr-ri.nsf/en/gr108935e.html

[322] http://www.bankofcyprus.co.uk/main.asp?id=5531

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

In Cyprus the applicable rules regarding the use of bills of lading as a tool for facilitating the transportation of goods especially in maritime traffic is principally regulated by the Carriage of Goods by Sea Law, Cap. 263. The Law dates back to 1927 and has not since been subject to any amendment, thus not making any provision as to the use of electronic documents for this type of process.

According to section 4 of the Law,

> "…every bill of lading or similar document of title, issued in Cyprus which contains or is evidence of any contract to which the rules in connection to the carriage of goods by sea in ships carrying goods from any port in Cyprus to any other port outside Cyprus apply, shall contain an express statement that is to have effect subject to the provisions of the said rules as applied by this Law."

According to the aforementioned rules, bills of lading and other similar documents of title cover contracts of carriage of goods by sea and are issue on the basis or for the purpose of performing a contract of carriage. Such bill of lading regulates the relationship between the carrier and the holder of the bill of lading during the carriage of the goods, that is, from the time of loading the goods until the downloading of the goods from the ship.

Procedurally, the bill of lading is issued after the carrier delivers the goods which are under his care and the shipper receives the same. It is issued by the carrier at the shipper's request and must contain certain information enabling, inter alia, the identification of the goods. The bill of lading consists of prima facie proof of receipt by the shipper of the goods described in the bill of lading.

The Law does not detail the form of the bill of lading so that it need not necessarily be incorporated in a paper document. The Law specifies which minimum information must be included in the bill, but the list is non-exhaustive and parties may therefore include additional information.

The Law further provides that where loss or damage is sustained, the shipper must give written notice to the carrier at the port where the goods are unloaded prior to or at the time where the goods are being transferred to the care of the persons receiving them. Such written notice need not be given where the goods were examined at the time of receipt.

The Law does not specify the meaning of the term 'notice in writing' therefore, it may include the use of electronic documents.

Relevant case law has not clarified beyond doubt whether use can be made of electronic bills of loading.

C.2.2. Storage contracts

The temporary storage of goods in warehouses or other premises is primarily regulated by the Contracts Law and the Sale of Goods Law as well as by other legislation relating to customs and wharfage dues. The Customs (Wharfage) Law[323] provides for the levying and collection upon all goods landed or shipped at any port in Cyprus of wharfage dues at rates set forth therein. The Customs Code[324] provides inter alia for the storage of goods into public, private and logistics warehouses, temporary or otherwise, for their safe keeping as well as for the levying of taxes, dues and other levies. Goods may be stored in temporary public or private warehouses until they obtain a customs destination or where the goods are in transit. For the storage of goods in such warehouses or for the transfer of the goods, the holder of the goods must file a specific application in writing.

The storage of goods is also regulated by the Sale of Goods Law. The Sale of Goods Law, section 39, deals with the issue of the delivery of goods to the carrier or wharfinger. It provides that where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody is prima facie deemed to be a delivery of the goods to the buyer.

Unless otherwise authorised by the buyer, the seller must make a contract with the carrier or wharfinger on behalf of the buyer. If the seller omits so to do and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself or may hold the seller responsible in damages.

As a result of the above, the existence of a contract with the carrier or wharfinger who store the goods on behalf of the buyer is essential in order for the seller to avoid liability. The Law does not require that such contract be made in writing and as we have already seen above, contracts may be formed either in writing or orally. Since there are no formality issues, it is presumed that the contract may be made electronically. There is no legal barrier for the use of electronic contracts in the conclusion of storage agreements.

[323] Cap. 317.

[324] N. 94(I)/2004 as amended by N. 265(I)/2004.

C.3 Cross border trade formalities: customs declarations

By virtue of the Customs Code[325] electronically generated documents are clearly accepted in certain customs related procedures in Cyprus. This is made clear by section 62 of the Customs Code which provides that, in relation to the transit of goods owing taxes and levies between two points located within the customs territory of the Republic, the holder of such goods must file a transit declaration in a prescribed manner. Such form may be filled electronically.

In addition, section 122 of the Customs Code also provides that where any import or other declaration, statement or document is required to be submitted to the Director of the Customs Department under the Law, it can be submitted either in writing or by using an automated medium provided that this medium is approved by the Director.

Where the Director approves the submission of the documents by using an automated medium, he provides a code number to the person authorised to submit the documents in an automated manner. The code number is deemed to be equivalent to a handwritten signature and is treated as if that person had provided the requested documents in a non-automated manner. The person submitting the documents in an automated manner by using the code number is also deemed to have actual knowledge of the contents of the documents.

It is also relevant to refer to the Mutual Assistance for the Recovery of Claims Resulting from Certain Levies, Duties, Taxes and Other Measures Law of 2004.[326] The Law was enacted for the purpose of harmonisation with Council Directive 76/308/EEC[327] as amended and Commission Directive 2002/94/EC.[328]

According to Section 16 of the Law, there is an obligation of secrecy and business confidentiality imposed on the authority requesting or receiving a request for the exchange of information, where the information is kept on electronic databases and is exchanged and transmitted by electronic means. Breach of this obligation by disclosure to third parties is a criminal offence punishable with imprisonment (up to two years) or a fine (up to 2,000 CYP; approx. 3.480 EUR). The law also establishes a central office with principal responsibility for communication by electronic means with other Member States. The office must connected to the CCN/CSI network, that is, the common platform based on the Common Communication Network (CCN) and Common System Interface (CSI), developed by the Community to ensure all transmissions by electronic means between competent authorities in the area of customs and taxation.

Furthermore, in the field of customs, the Republic has enacted the Law[329] ratifying:

(a) The Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the use of information technology for customs purposes;[330]

(b) The Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the

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[325] N. 94(I)/2004 as amended by N. 265(I)/2004.

[326] Law No. 155(I)/2004.

[327] OJ L73, 19 March 976, pp. 18--23.

[328] OJ L337, 13 December 2002, pp. 41--54.

[329] Law No. 30(III)/2004.

[330] OJ C 316, 27 November 1995, pp. 34--47.

European Communities of the Convention on the use of information technology for customs purposes - Declaration concerning the simultaneous adoption of the Convention on the use of information technology for customs purposes and the Protocol on the interpretation by way of preliminary rulings, by the Court of Justice of the European Communities, of that Convention - Declaration made pursuant to Article 2;[331]

(c) Council Act of 12 March 1999 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the scope of the laundering of proceeds in the Convention on the use of information technology for customs purposes and the inclusion of the registration number of the means of transport in the Convention;[332]

(d) The Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, on the scope of the laundering of proceeds in the Convention on the use of information technology for customs purposes and the inclusion of the registration number of the means of transport in the Convention – Declarations;[333]

(e) Council act of 8 May 2003 drawing up a Protocol amending, as regards the creation of a customs files identification database, the Convention on the use of information technology for customs purposes;[334]

(f) Protocol established in accordance with Article 34 of the Treaty on European Union, amending, as regards the creation of a customs files identification database, the Convention on the use of information technology for customs purposes;[335]

(g) Agreement on provisional application between certain Member States of the European Union of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes.[336]

The Law establishes an automated Customs Information System which may be accessed by all member States and has the purpose of assisting in the prevention, investigation and prosecution of serious contraventions of the national customs legislation.

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[331] OJ C 151, 20 May 1997, pp. 16--28.

[332] OJ C 091, 31 March 1999, p. 1.

[333] OJ C 091, 31 March 1999, pp. 2--7.

[334] OJ C 139, 13 June /2003, p. 1.

[335] OJ C 139, 13 June 2003, pp. 2--8.

[336] OJ C 316, 27 November 1995, pp. 58--64.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

The provisions of the e-invoicing Directive have been adopted by a number of legislative instruments in Cyprus. For example, according to Section 8 of the Electronic Commerce Law, information society service providers have an obligation to render easily, directly and permanently accessible to the recipients of the service a minimum set of information. This includes, where the service provider undertakes an activity that is subject to VAT, the identification number referred to in the legislation on value added tax which has the aim of harmonizing with Article 22(1) of the Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment.[337]

Within the sector of Value Added Tax, the Value Added Tax (General) Regulations of 2001 to 2004 which have been enacted on the basis of the Value Added Tax Law[338] provide that where a person is subject to tax because he carries out a transaction within Cyprus, he has an obligation to deliver an invoice to persons with whom he has transacted.

Such invoice may be transmitted by electronic means if the provider can ensure the authenticity of the origin of the invoice and the integrity of its contents either by means of an advanced electronic signature or Cryptography key or through Electronic Data Interchange (EDI). He must keep the data ensuring the authenticity of the origin and the integrity of the contents of the invoices for as long as necessary.

For this purpose, the provider of the invoice has an obligation to notify the Tax Commissioner not later than 30 days after the initiation of the transfer of the invoice by electronic means.

A provider of the invoice that is subject to VAT also has an obligation to keep in electronic form copies of all invoices which are subject to VAT and which he has transmitted electronically, with regards to the delivery of products or the provision of services carried out by him.

C.4.2. Electronic accounting

The drawing up of company accounts and the accounting profession is primarily regulated by the Companies Law, Cap 113. In general, the financial accounts of a company must be presented not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year. Periodic accounts may be drawn up and presented on condition that all relevant provisions of the International Accounting Standards are fulfilled. Financial accounts shall give a true and fair view of the company. The true and fair view of the company shall be presented by applying International Accounting Standards.

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[337] OJ L145, 13 June 1977, p. 1.

[338] Law No. 95(I)/2000, as amended by Law No. 93(I)/2002, Law No. 27(I)/2003, Law No. 172(I)/2003 and Law No. 95(I)/2004.

The Companies Law does not contain any provisions as to the possibility of using electronic documents for accounting purposes and does not provide whether financial accounts may be filed before the Registrar of Companies in electronic form. In any event and regardless of the legal questions, due to the fact that the system used by the Registrar of Companies and Official Receiver is not yet sufficiently developed, financial accounts are customarily filed in paper form.

D. General assessment

D.1 Characteristics of Cypriot eCommerce Law

- Due to the fact that freedom of contract is a fundamental principle of Cypriot contract law protected by Article 26 of the Constitution of the Republic of Cyprus, Cypriot commerce legislation has traditionally allowed contracting parties a great deal of flexibility in arranging methods of contract conclusion and evidence of commercial relationships.
- Cyprus' accession to the European Union on 1 May 2004 extended this contractual flexibility and has facilitated the use of electronic documents as a means of doing business. Cyprus' efforts to effectively adopt the *acquis communautaire* and develop a comprehensive eCommerce policy commenced a long time prior to Cyprus' accession.
- Realising the significance of the revolution on information and communication technologies, and the importance of eCommerce in the new globalised world, the Government of the Republic of Cyprus commissioned the preparation of a study for a National Strategic Plan in 2001. The objectives of this study were the formulation of the legal framework and a national policy for an eCommerce strategy to place Cyprus at the forefront of the most competitive and dynamic knowledge-based economies.

  As a result, a group of experts had been selected by the Planning Bureau of the Republic for conducting an investigation regarding the market situation in Cyprus and propose measures in order to harmonise Information Technology issues with the *acquis communautaire*, including issues of Electronic Commerce and Electronic Signatures.

  The group of experts' responsibilities were mainly to:

  (a) Propose a general strategy for eCommerce adapted to the Cyprus market.

  (b) Assess the existing legal framework and make suggestions for changes. As a result, legislation on eCommerce and electronic signatures matters was been enacted on 29 April 2004.

  (c) Provide the necessary assistance in the formulation of a strategy and a plan of action to encourage and support the exploitation of eCommerce activities in Cyprus.

  (d) Follow up developments in the EU, evaluate the implications on the Cyprus economy and prepare studies, policy positions and recommendations.

  (e) Suggest ways in which to promote the operation of eCommerce in Cyprus.

The aforementioned policy brought about quite a few changes in traditional legislation and has recognised the validity of electronic documents to a great extent.

D.2 Main legal barriers to eBusiness

- From a legislative perspective, it can generally be said that the Cypriot legal system does not hinder eBusiness due to the fact that contracts can easily be formed in an electronic manner. Nevertheless, from a procedural and administrative point of view, a few problems still remain. For instance, as already mentioned above with regards to electronic accounting, the Companies Law does not contain any provisions as to the possibility of using electronic documents for accounting purposes and does not provide whether financial accounts may be filed before the Registrar of Companies in electronic form. In any event, due to the fact that the system used by the Registrar of Companies and Official Receiver is not yet sufficiently developed, financial accounts are customarily filed in paper form.
- Another example concerns the issue of the acceptance of electronic documents as evidence. The Evidence Law as it stands now is not very clear nor practical and the Government and the House of Representatives are currently under discussions for the purpose of amending the evidence rules applicable in Cyprus in order to make matters more practical. In addition, case law is outdated and it is questionable whether it can be used in procedures involving the acceptability of presentment of electronic documents.
- Finally, no generic legislation has been detected for the electronic archiving of electronic or paper documents although certain announcements have been made with regards to the preparation of legislation for the purpose of implementing relevant EU legislation on data retention.[339] As a result, there are currently no specific criteria in place that should be met by the archiving process particularly with regard to the integrity, authenticity and non-repudiation.

D.3 Main legal enablers to eBusiness

- As mentioned above, Cypriot legislation concerning the formation of contracts is based on the fundamental principle of freedom of contract and permits the contracting parties a fair amount of flexibility when choosing the method of concluding their contract. Subject to certain exceptions requiring the conclusion of certain contracts in a specific manner, in all remaining cases a contract may be concluded in writing or orally. The term writing covers both electronic documents and print.
- This legal framework concerning the conclusion of contracts has been amended by virtue of Cyprus' obligations to implement relevant European directives,

[339] Speech delivered by Ms Theodora Piperi, Law Officer of the Republic of Cyprus, on the '*Retention of Data for the purpose of Investigation, Detection and Prosecution of Crime*' at the Cyprus Infosec 2005 Conference on 7 October 2005.

including the eCommerce and eSignatures directives, as well as several consumer protection directives, and other European legislation concerning value added tax.

- The eCommerce Law has ensured the free movement of information society services between Cyprus and the Member States of the European Union, and has facilitated the establishment of service providers, commercial communications, the conclusion of electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, means of legal protection and the cooperation between Member States.

The Czech Republic National Profile

A. General legal profile

The Czech Republic is a parliamentary republic. The Parliament is composed of two chambers: the Chamber of Deputies and the Senate. The President of the Czech Republic has limited powers in the law enacting process.

The Czech Republic consists of 13 regions, which are further divided into municipalities. These administrative divisions have no effect on applicable law, as the Czech Republic is a unitary country with a single jurisdiction. The capital city of the Czech Republic is Prague.

The Czech Republic's law system follows the continental law tradition. It has several codes that regulate particular fields of law, including the Civil Code[340], the Commercial Code[341], the Criminal Code[342], the Civil Procedure Code[343], or the Labour Code[344]. In addition to these codes, there are many other laws that address specific matters[345]. There is also a secondary (administrative) legislation that concerns exclusively the laws the Parliament passes.

Contractual and commercial law is incorporated in the Civil Code and the Commercial Code. The Civil Code regulates contractual law in general, while the Commercial Code deals with variations of commercial contracts. In the commercial matters the Civil Code applies subsidiarily. There are also a number of specific laws that regulate commercial and contractual matters.

The Czech Republic has a two-instance system of justice administration. In the first instance, District Courts[346] or Regional Courts[347] deal with civil-law matters. Regional Courts typically deal with commercial matters (Section 9 of the Civil Procedure Code). In the second (appellate) instance, hierarchically superior courts deal with appeals: Regional Courts deal with appeals against District Courts' decisions, a High Court[348] deals with appeals against Regional Courts' decisions.

In addition, there is the Supreme Court[349] that has the authority to grant extraordinary relief, the Constitutional Court[350] that supervises compliance of laws and decisions with

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[340] 40/1964 Act; *Obcansky zakonik*

[341] 513/1991 Act; *Obchodni zakonik*

[342] 140/1961; *Trestni zakon*

[343] 99/1963 Act; *Obcansky soudni rad*

[344] 65/1965; *Zakonik prace*

[345] On-line legislation is available through http://zakony-online.cz/

[346] *Okresni soud*

[347] *Krajsky soud*

[348] *Vrchni soud*

[349] *Nejvyssi soud*

[350] *Ustavni soud*

the constitutional law, and administrative judiciary bodies that review administrative decisions.

Czech jurisprudence is not based on precedents although the Supreme Court's decisions, and especially the Constitutional Court's decisions, are highly authoritative. If an appellate court overrules a court ruling, the latter court is bound by a legal opinion of the appellate court, but only with respect to that opinion.

B. eCommerce regulations

Most questions regarding the validity and recognition of electronic documents have to be answered based on the general provisions of contractual law contained in the Civil Code. There are also special legal provisions regarding electronic documents as well and there is an explicit and complex regulation of electronic signatures. In this section, the main features of Czech law regarding the legal value of electronic documents are briefly commented upon.

B.1 eCommerce contract law

B.1.1. General principles

Czech law is relatively flexible regarding the formation and proof of civil and commercial contracts. The basic principle is the autonomy of will. The Civil Code regulates both civil and commercial contracts in general, while the Commercial Code provides for variations and more specific issues of commercial contracts. Although the Commercial Code does not contain a comprehensive independent regulation of commercial contracts, its regulation is more flexible and contractual parties have more freedom to agree on their own terms and to eliminate non-mandatory provisions of law.

Even the less flexible Civil Code allows that contracts need not have a specific form unless explicitly requested by law (a few specific types of contracts; see below) or by contractual parties (Section 40 of the Civil Code; Section 272 of the Commercial Code). Except for these cases and provided a contract meets the general requirements for a legal act, parties may enter into a contract verbally, electronically, or in another manner.

The general requirements for a legal act include an expression of free will, serious intent, comprehensibility, and persons with legal capacity. It is possible to make a legal act explicitly, implicitly, actively, or through omissions. Doctrine[351] recognizes that a legal act can be made by means of a computer or other electronic devices.

With respect to the general requirements for legal acts, a contract is formed by the consent of parties expressed by a valid offer and acceptance in due time.

In civil and commercial matters, parties can enter into a specifically named contract or into an innominate contract provided it does not contradict the applicable law and it specifies the subject (Section 51 of the Civil Code, Section 269 of the Commercial Code). Czech law distinguishes between mandatory and non-mandatory legal provisions.

[351] Svestka, J. a kol., Obcansky zakonik, Komentar, C.H.Beck, Prague 2004; page 211

Regarding non-mandatory legal provisions, parties can agree on different terms but have to comply with mandatory legal provisions (Section 2 of the Civil Code, Section 263 of the Commercial Code). All provisions of Czech law mentioned in this study are mandatory. Consumer contracts contain many mandatory legal provisions that parties cannot avoid by mutual agreement.

Czech contractual law, particularly commercial contractual law, is based on the principle of autonomy of will and emphasizes the expressed will of contractual parties. Only certain types of contracts have to meet the following criteria: a written form (signature) or a public notary's certification of the signature.

Czech contractual law provides no explicit or complex definition of an electronic document. The generally accepted form of an electronic document has been formed by doctrine in accordance with the Civil Code and the Electronic Signature Act[352].

The Electronic Signature Act, implementing eSignature Directive 1999/93/EC, refers to an "electronic data message", which it defines as electronic data that can be transferred by means of electronic communication and stored on recording media. Some authors[353] opine that this definition of an electronic data message has no normative effect in Czech private law, because the notion is irrelevant in the legally regulated process of forming a valid contract. Instead, the notion of an electronic document is implicitly contained in contractual law and recognized by the doctrine.

As mentioned above, legal acts can be made by means of electronic communication. Where the law requires a written form, Section 40 of the Civil Code provides for (i) keeping a "written form" of a legal act made by electronic means, and (ii) substituting a signature with an "advanced electronic signature", as it is defined in the Electronic signature Act (see below). A written form of a legal act is preserved if the electronic means enable (a) to fix the content of the legal act and (b) to specify the author of the legal act. Doctrine[354] has concluded that where a written form of a contract is required, an electronic document containing an advanced electronic signature meets the requirement and is equivalent to a signed paper document.

In procedural law, the Civil Procedure Code permits to submit applications to courts or administrative offices by electronic means. Nevertheless, the regulations for particular procedures differ. In some cases, an electronic document containing an advanced electronic signature can substitute a paper document, while in other cases it is necessary to provide a subsequent paper document (as some authors opine; see section B.2 below).

In contractual law, electronic documents are generally recognized and valid, with the exception of (infrequent) cases where the law requires a special qualified form of documents:

- where law has no specific requirements on the form (which is usually the case), a simple electronic form is sufficient. It only has to meet the requirements for a legal act (free will, serious intent, comprehensibility, and persons with legal capacity).

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[352] 227/2000 Act; *zakon o elektronickem podpisu*

[353] Cermak, ITpravo, http://www.itpravo.cz/index.shtml?x=114821

[354] Svestka, J. a kol., Obcansky zakonik, Komentar, C.H.Beck, Prague 2004; page 241

- where the law requires a written form (which obligatorily implies a signature; Section 40 of the Civil Code), an electronic form including an advanced electronic signature is sufficient and equals the signed paper form.
- only where the law requires a special qualified form, an electronic document can never meet the requirements and is not recognized as sufficient even if it contains an advanced electronic signature. The special qualified form includes, for example, hand written and hand signed documents (Section 476 of the Civil Code; testaments), a public notary's certification of attached signatures (Section 143 of the Civil code; contracts for joint property of spouses), or signatures of parties on one single document (Section 46 of the Civil Code; contracts for real property transfers).

Czech Law provides for types of contracts that require a specific form - either a written form (that also requires an advanced electronic signature) or a special qualified form. Contracts and other documents that require a special qualified form and for this reason may not be made in electronic form are:

i. Contracts for real property transfers. This type of documents has to be in writing and contain the parties' signatures on one single document (Section 46 of the Civil Code);

ii. Testaments. This type of documents has to be documents written and signed with one's own hand, have to contain signatures certified by a public notary, or have to contain signatures of at least three witnesses (Section 476 of the Civil Code);

iii. Contracts concerning community property of spouses. This type of document have to contain signatures certified by a public notary (Section 143 of the Civil Code);

iv. Security interest contracts concerning real property not registered by the Real Estate Registry Office[355] or concerning movable property not handed over at the formation of the contract (Section 156 of the Civil Code);

v. Contracts founding incorporated business organizations and legal acts concerning changes, divisions, mergers, or dissolutions have to contain signatures certified by a public notary;

vi. Contracts concerning some aspect of shares and other securities. This type of documents require a public notary's intervention;

vii. Bills of exchange[356].

It is possible, however, to prove the existence of these documents by evidence in the form of electronic documents if the judge considers the proof reliable and convincing.

Czech law enables the parties to agree on the form of the contract and this agreement is legally binding. However, parties can only agree on a stricter form of the contract than the mandatory legal provisions stipulate. All Czech legal provisions concerning the specific legal form of a contract are mandatory and parties cannot alter them (Section 2 of the Civil Code, Section 263 of the Commercial Code).

Under Czech law, a notification is to be considered a legal act and is one of the elements in the process of entering into a contract (offer and acceptance). Czech law allows

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[355] *Katastralni urad*

[356] Section 2 of the 191/1950 Bills of Exchange and Cheques Act*; Zakon smenecny a sekovy*

electronic notifications in cases where legal acts and contracts in an electronic form are acceptable as well. There are three basic regimes concerning electronic notifications:

i. where the law requires no specific form of a contract, a simple electronic notification is acceptable provided it meets general requirements for a legal act (free will, serious intent, comprehensibility, and persons with legal capacity);

ii. where the law requires a written form of a contract, an electronic notification containing an advanced electronic signature (see bellow) is acceptable;

iii. where the law requires a special qualified form of a contract (handwritten or with the signature certified by a public notary), an electronic notification is legally irrelevant and it can only be considered an invitation but not an offer or acceptance.

Czech contractual law distinguishes between (a) notifications that form an offer or acceptance of a contract and (b) other notifications that serve to inform parties. The former are considered elements of a contract and for this reason have to meet the requirements particular to a certain type of contract. The latter can be informal, unless the law explicitly states otherwise.

Parties' consensus on the content of a contract is a prerequisite for forming any contract. To form a valid contract, the offering party has to make a valid offer and the accepting party has to make a valid acceptance. This acceptance has to be delivered to the offering party in due time. The accepting party's silence does not mean consent and does not substitute acceptance. A party that receives an offer in the form of an electronic notification need not actively reject it. If it fails to reply, the offer will automatically cease to be valid within a reasonable period of time. This rule is additionally explicitly specified for consumer contracts in Section 53 of the Civil Code. Moreover, the consumer is neither required to return unsolicited goods nor to inform the provider of the goods.

There is no requirement for a previous explicit consensus of parties on the electronic form of a notification, but the parties can rule out the electronic form. Any reservation or proposition of changes contained in the acceptance means a rejection of the offer and constitutes a new offer. Therefore, when a form of a contract is explicitly required, the accepting party has to agree with this requirement without any reservations otherwise the contract is rejected. Additionally, in commercial contracts, one of the parties can reserve the right not to use an electronic form (Section 44 of the Civil Code; Section 272 of the Commercial Code*; see above*).

As to advanced electronic signatures, the receiver of an electronic notification containing an advanced electronic signature needs to have a technical device for decoding. Without the device, the receiver would be unable to read electronic notifications and advanced electronic signatures, as a result of which the legal act would be incomprehensible and void (Section 37 of the Civil Code).[357]

Czech law has no explicit provisions for electronic registered mail. Instead, it has implemented a framework for electronic signatures that can be attached to any electronic data message, including electronic mail. The Electronic Signature Act, which implements the eSignature Directive, provides for the framework and defines terms such

[357] (Cermak, wwwITpravo, http://www.itpravo.cz/index.shtml?x=114821)

as "electronic signature", "advanced electronic signature, "certification", and "certification service provider".

Czech law has the following requirements for advanced electronic signatures, in accordance with the eSignature Directive: advanced electronic signatures (i) have to be uniquely linked to signatories, (ii) have to be capable of identifying signatories, (iii) have to be created and linked to the data to which they relate and use means that signatories can control, and (iv) have to be linked to the data to which they relate in such a manner that any subsequent changes to the data are detectable (Section 2 of the Electronic Signature Act).

Any person can obtain the certificate enabling an advanced electronic signature from a qualified service provider. There are currently three qualified service providers registered in the Czech Republic: the First Certificate Authority[358]; the Czech Post[359]; and eIdentity[360]. Additionally, the Electronic Signature Act provides for an electronic mark, which is similar to the advanced electronic signature and which can be linked not only to individuals but also to entities or public offices.[361]

There is no requirement for a previous explicit consensus of parties on the acceptability of the electronic mail containing attached electronic signature. The parties can, however, rule out its acceptability, and the receiver needs a technical device for decoding (see above).

Czech law has not implemented any generic framework for electronic archiving. However, specific regulation exists in relation to the register of dematerialized securities, the register of electronic tax documents, the obligatory storable form of distant consumer contracts, and the archiving of certain publicly important documents in the original paper form[362].

We are not aware of any published Czech jurisprudence explicitly acknowledging the acceptability of electronic documents regarding contract law. We are aware of a Supreme Court ruling stating that a notification send by facsimile with the intention of terminating an employment relationship is not valid because it does not meet the requirement that it should be given in writing[363]. There is also a Supreme Court ruling acknowledging that a submission to a criminal court by facsimile should be taken into account.[364] A number of criminal courts have also acknowledged that certain crimes can by committed by means of the Internet, email or other computer means. Generally, Czech jurisprudence dealing with the electronic form of documents is limited.

Czech doctrine explicitly acknowledges the acceptability of electronic documents as equivalent to traditional written documents, if the electronic documents contain an advanced electronic signature. Section 40 of the Civil Code provides for (i) supplementing of a signature with technical tools where it is "usual" and (ii) keeping the written form of documents by electronic means if it is possible to fixate documents and

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[358] *Prvni certifikacni autorita*

[359] *Ceska posta*

[360] http://www.eidentity.cz/

[361] Ministry of Informatics; (http://www.micr.cz/scripts/detail.php?id=1433)

[362] 499/2004 Archiving Act; *Zakon o archivnictvi*

[363] Cdo 2708/2000

[364] Rns T 579/2004

identify parties. Some authors even consider an advanced electronic signature to offer a higher degree of certainty than the traditional handwritten signature.[365]

There are some authors who consider even a simple electronic email, signed by means of a keyboard and containing no advanced electronic signature, equivalent to a traditional written document.[366] This opinion cannot be considered a majority opinion of Czech jurisprudence.

Finally, doctrine agrees that electronic documents cannot supplement the traditional written documents where law requires a special qualified form of documents.

B.1.2. Transposition of the eCommerce directive

Czech law has implemented eCommerce directive 2000/31/EC, mainly in the Certain Information Society Services Act[367]. It provides for the liability of service providers for transmission (mere conduit), hosting, caching, and unsolicited commercial communication. It exempts service providers from the obligation to monitor the information they transmit or store and from the obligation to seek actively facts or circumstances that indicate illegal activities. Other laws have also been amended in connection with the transposition of the eCommerce Directive, but only to a limited extent.[368]

So far, these laws have not dealt with Section 9 of the eCommerce Directive. They have brought no new regulation of contracts to be entered into by electronic means. Czech legal provisions on forming contracts by electronic means have remained intact by the transposition. Still, these provisions generally enable a majority of contracts to be entered into using electronic means. The fact that the Certain Information Society Services Act and the other new laws contain no regulation that would resemble Section 9 of the eCommerce Directive does not prevent parties from forming and accepting electronic contracts.

The scope of the Certain Information Society Services Act is defined differently than the scope of the eCommerce Directive. In accordance with EC law, Section 1 of the Certain Information Society Services Act regulates the liability and rights and duties of persons that provide information society services and engage in commercial communication. For this reason, the Certain Information Society Services Act is not limited to certain contract types but the scope defined by the subject matter.

Czech law stipulates formal requirements in an electronic context in the general Civil Code provisions on legal acts and contracts. Where Czech law requires a written form, Section 40 of the Civil Code provides that legal acts may be made by electronic means and signatures provided through technical devices. These devices are specified in the Electronic Signature Act in accordance with the eSignature Directive (see above).

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[365] Svestka, J. a kol., Obcansky zakonik, Komentar, C.H.Beck, Prague 2004; page 242

[366] Frimmel, Itpravo, http://www.itpravo.cz/index.shtml?x=62154

[367] 480/2004 Act; *Zakon o nekterych sluzbach informacni spolecnosti*

[368] http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:72000L0031:CS:NOT

B.2 Administrative documents

Czech law has implemented specific legislation regarding the use of electronic documents in administrative procedures. It regulates information systems of the public administration, electronic communication of private persons with the public administration bodies, and internal communication of public administration bodies. The Public Administration Information Systems Act[369] sets out a general legal framework. Particular laws, including the Administrative Procedure Code[370], have been amended and now include provisions enabling electronic communication. However, the legal regime is different for particular offices of public administration and courts.

The Public Administration Information Systems Act provides for the general conception of the information systems, technical standards (further specified by secondary legislation), security measures, supervision of the Ministry of Informatics, and sanctions for breaches of law. The Act has recently been significantly amended and now provides for a Public Administration Portal[371], which is to become the single access point for electronic communication of persons with the public administration. The Act further provides for the delivery of (electronic) data messages. Any person is entitled to communicate with a public office by means of an electronic data message via the Portal, but only if the communication complies with the specific laws applicable to particular public offices (see below). The communication via the Portal requires an advanced electronic signature or an electronic mark certified by the registered authority. The Portal also gives access to official publications of certain bulletins of administrative decisions and directives.[372]

Section 9 of the Public Administration Information Systems Act provides for the issuance of certified outputs from the public administration information systems. These outputs (containing an advanced electronic signature or an electronic mark) are considered official public documents. This means that information contained in such documents is presumed correct and can be used as evidence (Section 134 of the Civil Procedure Act). Section 9 of the Public Administration Information Systems Act applies on particular public administration offices depending on provisions of specific laws.

Among the offices that allow electronic communication are the Real Estate Registry and the Commercial Register[373], which registers business organizations and other legal entities. Both offices provide database access and outputs in electronic form. Despite this, applications to the Real Estate Registry have to be submitted on paper. Real estate contracts, except leases, cannot have an electronic form. The Commercial Register allows electronic access to its database of organizations and will enable application and registration processes by electronic means as of 2007 (Section 33 of the Commercial Code). Communication with public administration offices by electronic means is now permitted under the Administrative Procedure Code. This Code applies to all public administration offices unless a special law states otherwise.

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[369] 365/2000 Act; *Zakon o informacnich systemech verejne spravy*

[370] 500/2004 Act; *Spravni rad*

[371] *Portal verejne spravy;* http://portal.gov.cz/

[372] Bulletin of the Czech Telecommunication Office; http://www.ctu.cz/main.php?pageid=17

[373] *Obchodni rejstrik*

Section 42 of the Civil Procedure Code provides for electronic communication with courts. Submissions, including lawsuits, can be submitted both electronically and on paper[374]. Despite this, Section 42 leaves room for interpretation and some judges argue that electronic submissions have to be supplemented by applications on paper within three days, otherwise they become void.

Czech law also deals with cases of obligatory communication with a public administration office. The Income Taxes Act[375] stipulates an obligation of a "payment intermediary" to provide certain facts electronically (Section 38fa).

As mentioned above, Czech law provides for both external and internal electronic communication of public offices. The Ministry of Informatics has prepared a draft law on public administration data exchange. The new law is to introduce a single set of rules for data exchanges between public administration files, registers, and other databases in electronic form. The law aims at unifying information stored in duplicate locations and allocating responsibility to ensure that the information is correct, binding, and up-to-date. This should enhance the legal regulation for data exchanges between public administration bodies and reduce the administrative burden placed on citizens and businesses.[376]

C. Specific business processes

The general contractual law regulation applies to most business processes and questions regarding forms of documents are similar to those described above. However, there are particular eCommerce processes that have a distinctive legal regime. These include distant selling contracts, dematerialized securities, bills of exchange, documentary credit, customs duties, electronic invoices, and electronic accounting. This part of the study briefly examines these specific legal regimes.

C.1 Consumer contracts and distant selling

Czech law has a distinctive regulation of consumer contracts and particularly distant selling. The regulation is contained in Section 52 to 65 of the Civil Code and resembles the 1997/7/EC directive. Consumer contracts are defined as any contracts between consumers and suppliers. "Consumers" are natural persons (individuals) or legal entities who, when forming and performing contracts, do not act in their commercial or other business capacity. "Suppliers" are natural persons or legal entities who, when forming and performing contracts, act in their commercial or other business capacity. Certain contracts are excluded from this regulation: contracts formed by means of automatic vending machines or automated commercial premises, contracts with telecommunications operators through the use of public phones, contracts for the construction and sale of immovable property or relating to other immovable property rights (except for rental), contracts formed at an auction, contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to

[374] an (informal) opinion of the Czech Constitutional Court

[375] 586/1992 Act; *Zakon o danich z prijmu*

[376] source: http://www.micr.cz/legislativa/default_en.htm

homes, residences, or workplaces by regular roundsmen, contracts for the provision of accommodation, transport, catering, or leisure services, where the supplier undertakes to provide these services on a specific date or within a specific period. Contracts for financial services and contracts for time-limited use of buildings are included into consumer contracts but have their own specific regime.

The regulation explicitly provides for a distant forming of consumer contracts. Parties need not be present to form a contract and may use letters, press advertisements, fax or e-mail messages, or the internet.

The supplier has to furnish the consumer with specific information within reasonable time before they form a distant consumer contract. This information includes the supplier's identification, the price of goods or services and the method of payment. The supplier has to furnish additional information (*e.g.* on guarantees) once a contract is formed.

The Civil Code allows parties to withdraw from a distant consumer contract without any penalties. The statutory period amounts to 14 days (or 3 months if a supplier fails to furnish the required information). The Civil Code regulation contains a more advantageous period for consumers than the EC directive.

If parties form a distant consumer contract electronically, the supplier has to provide the consumer with contract terms and conditions in a form that is capable of storing and reproduction.

The Civil Code affords consumers additional protection. Parties may not alter legal provisions on consumer contracts by agreement, the provisions apply regardless of choice of other than Czech law and consumer contracts are always interpreted in favour of consumers. Unfair clauses are prohibited from consumer contracts (unfair limitation of suppliers, liability for damages, limitation of guarantees, unilateral changes or other provisions advantageous for the supplier) and are voidable.

In sum, in comparison to general contractual law regulation, consumer contracts, and distant consumer contracts in particular, imply a specific regulation with a number of variations, which are in favour of consumers.

C.2 Dematerialized securities

Czech law enables certain types of securities to be kept in electronic form. The Capital Market Act[377] and the Securities Act[378] provide for an electronic register of dematerialized securities and content of the dematerialized securities. The unified electronic register is provided by the Prague Securities Centre. Special laws provide for dematerialized form of specific categories of securities, e.g. for shares, mutual fond certificates, and debentures that may be in a dematerialized form.

The Czech Republic's commercial practice generally recognizes the ICC document UCC-500, the documentary credit framework that was created by the International Chamber of Commerce, and took effect in 1994. In April 2002, a new Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation or "eUCP"

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[377] 256/2004 Act; *Zakon o kapitalovem trhu;* http://zakony-online.cz/?s34&q34=all

[378] 591/1992 Act; *Zakon o cennych papirech;* http://business.center.cz/business/pravo/zakony/cenne-papiry/

entered into force, as an extension to the UCC – 500. It should be noted that the eUCP applies only to the presentation of documentary letters of credit, and not to the issuing or advice procedure (which were already concluded electronically, even before the eUCP existed). Although the legal status of the eUCP is debatable, it is influential in commercial practice. In combination with the UCP, the eUCP intends to provide the necessary regulatory framework for the presentation of the electronic equivalents of paper documents under documentary letters of credit. The eUCP is applicable whenever the parties explicitly indicate so. In these cases, it takes precedence over the more general rules of the UCP.

C.3 Credit arrangements: Bills of exchange and documentary credit

C.3.1. Bills of exchange

Bills of exchange are a prime example of negotiable instruments and are used in business circles for various purposes. Originally, a bill of exchange was designed as a payment method but over time it has evolved into an instrument for debt collection, credit, and investment. In Czech law, bills of exchange are regulated by the Bills of Exchange and Cheques Act[379]. The Act strictly requires bills of exchange to be written on a paper writ (Section 2).

C.3.2. Documentary credit

The Czech Republic's commercial practice generally recognizes the ICC document UCC-500, the documentary credit framework that was created by the International Chamber of Commerce, and took effect in 1994. In April 2002, a new Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation or "eUCP" entered into force, as an extension to the UCC – 500. It should be noted that the eUCP applies only to the presentation of documentary letters of credit, and not to the issuing or advice procedure (which were already concluded electronically, even before the eUCP existed). Although the legal status of the eUCP is debatable, it is influential in commercial practice. In combination with the UCP, the eUCP intends to provide the necessary regulatory framework for the presentation of the electronic equivalents of paper documents under documentary letters of credit. The eUCP is applicable whenever the parties explicitly indicate so. In these cases, it takes precedence over the more general rules of the UCP.

C.4 Storage contracts

Storage contracts or warehousing contracts are not treated separately from other contracts under Czech contract law and so in theory can be concluded electronically.

[379] 191/1950 Act; *Zakon smenecny a sekovy*

C.5 Cross border trade formalities: customs declarations

The Czech Republic's legal regulation and practice enable a broad use of electronic means regarding custom duties and declarations. The Customs Act[380] provides for electronic customs declarations with an advanced electronic signature. The use of electronic declarations is on the rise. For example, 85% of transit custom declarations in the Czech Republic are now submitted electronically. Customs authorities broadly use electronic means for internal communication and for issuing decisions.

The Czech Republic participates in EC programs regarding electronic administration of customs, such as eCustoms[381] initiative. It currently uses electronic communication regarding Intrastat statistical system. It takes part in the ECVO system and the NTCS[382] system, which enables communication between information systems of particular member states. The Czech Republic decided not to use the DG TAXUD system for NTCS, but to develop its own system. Additionally, the "eVyvoz" initiative will connect the Export Control System and Automated Export System. It will be accessible electronically and include the use of an advanced electronic signature. Generally, the Czech Republic has a high standard of its electronic customs administration and cooperation with other EC countries. It has an ambition to introduce a complete electronic administration of customs.

C.6 Financial/fiscal management: electronic receipts of a tax and accounting

C.6.1. Electronic tax document

The Value Added Tax Act[383] provides for the possibility to issue tax documents electronically. Tax documents can be issued electronically with the previous consent of the receiver of any tax encumbered performance (Section 26). Section 27 further provides for a transfer of paper tax documents into an electronic form and for keeping of electronic documents. An electronic document may be kept in an electronic form if a method used for its transfer and keeping ensures authenticity of its the origin, content inviolability, and readability. Additionally, it has to contain an advanced electronic signature or a registered electronic mark certified by the qualified registered provider. If a taxpayer issues, accepts, or keeps electronic tax documents outside the Czech Republic, the taxpayer has to allow a Czech tax administrator free electronic access in real time to the electronic tax receipts and to the data verifying their authenticity and inviolability.

A tax return can generally be submitted to the relevant financial authorities electronically via the EPO system[384].

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[380] 13/1993 Act; *Celni zakon*

[381] http://europa.eu.int/comm/taxation_customs/resources/documents/masp_en.pdf

[382] Electronic data interchange system which was introduced as the transit declaration and is due to replace the traditional paper procedure in the Community as well as in the EFTA countries (Iceland, Norway, Switzerland)

[383] 345/2004 Act; *Zakon o dani z pridane hodnoty*

[384] Ministry of Finance; http://www.mfcr.cz/cps/rde/xchg/mfcr/hs.xsl/dc2_epo.html

C.6.2. Electronic accounting

The Accounting Act[385] reflects the amended versions of EC Directives 78/660/EC and 83/349/EC and EC Regulation 1606/2002. It provides for a framework of electronic accounting. Czech law enables to make and keep accounting records on paper or an electronic form. Accounting records have to be readable and enable storing for a given time. An advanced electronic signature can substitute a traditional signature. Czech law also provides for the possibility to transfer a paper document to an electronic one. Despite this, electronic accounting is still not common practice in the Czech Republic.

D. General assessment

D.1 Characteristics of Czech eCommerce Law

- Czech contractual law affords parties a fair amount of flexibility when forming contracts and proving legal relationships. Key provisions of both substantive and procedural law have been amended and several specific laws implemented to enable electronic communication, electronic contracts, and eCommerce in general. Czech law accommodates most eCommerce relationships.
- Czech law has implemented important EC Directives, such as the eCommerce and eSignature Directives.
- Czech law has implemented a broad legal framework covering the electronic form of administrative documents and communication with public administration offices. The law on electronic systems of public administration has been implemented and procedure laws significantly amended for this purpose. A complex law on internal electronic communication of public administration is being prepared. There is significant and developing practice of electronic communication concerning customs and tax administration.
- In most cases where an electronic form is acceptable, no specific communication is required for entering into contracts. Where a written form is required, Czech law allows electronic documents with an advanced electronic signature as an equivalent of documents signed on paper.

D.2 Main legal barriers to eBusiness

- Even if Czech law provides for an electronic signature and considers it sufficient for forming written contracts and engaging in official communication with public administration bodies, few individuals and business organizations possess an electronic signature certificate. This barrier exists not because of law but simply because only a limited number of eCommerce participants are properly equipped.

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[385] 563/1991 Act; *Zakon o ucetnictvi*

- Several categories of documents are disqualified from an electronic form. Where law requires a signature made by hand or a signature certified by a public notary, an electronic form of a document is never sufficient and a paper document is needed. Contracts for real estate transfers require signatures of parties on one single document and are excluded from any electronic form as well. Bills of exchange have to be strictly written on a paper writ.
- Even if laws and doctrine do recognize and accept electronic means and documents, public administration bodies and courts will probably need some time to become familiar with the matter to treat electronic documents equally with paper ones.

D.3 Main legal enablers to eBusiness

- eBusiness is generally enabled by (i) the flexibility of Czech contractual law and law of evidence, (ii) the number of explicit provisions and complex laws recognizing and accepting electronic documents and electronic communication, (iii) the complex law regulation of eSignature, and (iv) the complex law regulation of communication with public administration bodies.
- Doctrine accepts legal acts in an electronic form. Czech law has implemented the eSignature Directive and provides for a certified advanced electronic signature. An electronic document containing an advanced electronic signature is equal to a signed written document. Electronic documents (including e-mails) containing an advanced electronic signature can also be used for official and legally relevant communication with public offices.
- Czech law forms a suitable framework for eCommerce. Although it certainly does not eliminate all barriers, it has implemented most of the essential provisions of the relevant EC Directives and by and large it enables development of eCommerce relationships.

Denmark National Profile

A. General legal profile

Denmark is a constitutional monarchy, consisting of 13 Counties and 277 municipalities. From 1 January 2007 this structure will be superseded by a new structure with 5 regions and approx. 100 municipalities. The new structure will not affect legislative procedures, which in general are a federal matter.

The Danish legal system is placed somewhere between the civil and common law systems. No Civil Code or Commercial Code exists but a number of important contract law matters are regulated by Acts. This applies to sales of goods[386] and formation of contracts[387].

A number of legal eCommerce aspects are governed by these general acts but also to some extent through a number of specific laws and royal decrees.

Disputes regarding commercial relations are often dealt with by the Danish Maritime and Commercial Court[388] but may also be dealt with by the districts courts[389] for matters with a financial value of DKK 500.000,- or less (app. €70.000); or by the High Courts[390] for matters of higher value. Appeals against the decisions of the districts courts can be lodged with the Maritime and Commercial Court or the High Courts. The decisions of these courts can be lodged with the Danish Supreme Court[391]. Typically it is only possible to make one appeal. The Danish system of jurisprudence does not have any binding power of precedent, although decisions of the Supreme Court are highly authoritative and only very rarely disregarded.

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[386] Act on the sale of goods *(købeloven)*, Consolidation Act no. 237 of 28 March 2003. Available in English from http://www.sprog.asb.dk/sn/Danish%20Sale%20of%20Goods%20Act.pdf

[387] Act on contracts *(aftaleloven)*, Consolidation Act no. 781 of 26 August 1996. Available in English from http://www.sprog.asb.dk/sn/Danish%20Contracts%20Act.pdf

[388] *Sø- og Handelsretten*

[389] *Byretterne*

[390] *Landsretterne*

[391] *Højesteret*

B. eCommerce regulations

Most questions regarding the validity and recognition of electronic documents must be answered based on doctrine, at least in cases where legislation does not offer a clear rule. In this section, the main tenets of Danish doctrine regarding the legal value of electronic documents are briefly commented.

B.1 eCommerce contract law[392]

B.1.1. General principles

Danish law does not contain a generally accepted legal definition of an electronic document. The reason for this is that Danish law does not give any specific legal effect to electronic documents as such.

Formation of contracts is in general not based on any formal requirements under Danish law. A written document is normally not required. Danish contract law typically only demands that a consensus exists between the parties regarding the essential elements of a contract. Danish contract law is in other words based on the principle of autonomy of will. This flexibility applies equally to commercial contracts and civil contracts. In some situations consumer contracts are required to be in writing e.g. if a credit agreement is entered into between a consumer and a businessman. However non-compliance with the writing requirement will typically not lead to the invalidity of the agreement[393].

From this flexible approach follows that electronic contracts in general are given the same legal validity as paper contracts (and contracts entered into orally). Neither party is able to refuse to accept the agreement on the grounds that it is in electronic form. Consensus of the parties is in other words not a precondition to the legal acceptability of an electronic contract.

Even if the law does not require a written contract the parties will in practice need some kind of proof that an agreement has been entered into, as the burden of proof lies with the party who claims that an agreement exists. For this reason the parties will normally need a written document, either in paper form or electronic form.

The Danish evidence rules do not contain formal requirements[394]. All types of evidentiary tools, including electronic documents, may be produced in court and the courts are free

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[392] Sources: Mads Bryde Andersen, IT-retten, 2. udgave, 2005, 1051 p.; Ruth Nielsen, E-handelsret, 2. udgave, 2004, 417 p.; Susanne Karstoft, Elektronisk aftaleret, 2004, 125 p.

[393] Mads Bryde Andersen, IT-retten, p. 687.

[394] On evidentiary value of electronic documents see in general the report "Digitale dokumenters bevisværdi" published by the Danish IT-security Council, 1999. Available in Danish from http://www.videnskabsministeriet.dk/cgi-bin/doc-show.cgi?doc_id=10244&doc_type=37&leftmenu=2&topbar=none&topmenu=0

English summary available from http://www.videnskabsministeriet.dk/cgi-bin/doc-show.cgi?doc_id=13606&doc_type=37&leftmenu=2&topbar=none&topmenu=0

to assess the evidentiary value of such tools. The evidentiary assessment of the courts is in other words not bound by rules of law.

The main rule that Danish law in general grants the same validity to electronic documents as to paper documents applies not only to contracts but to documents in general. However there exist a number of provisions requiring a "written" document. From 2002-2005 a large "law modernising project"[395] has been carried though by the government to ensure that such formal requirements do not hinder the use of electronic documents except from the few situations where it has been considered necessary to require paper documents[396]. There exists no general provision under Danish law which indicates which contract types still need to be concluded on a paper document.

As for contracts and other documents, notifications are in general valid under Danish law irrespective of their form (electronic or non-electronic). This applies both in commercial and civil communication. The consensus of the parties is not a precondition to the legal acceptability of an electronic notice. However under Danish law a notification will have legal effect from the time when it is "received" by the receiving party. If the notification is send through a medium not used in prior communication between the parties the notification is not deemed "received" if the medium does not with a high degree of certainty ensures that the receiver will become aware of the notification[397]. If the notification is send to an email address which is commonly used by the receiver the notification will be deemed "received" and thereby legally valid. On the other hand if the notification is send to an email address not commonly used by the receiver the notification will not be deemed "received" unless specific circumstances indicate that the receiver will become aware of the email notification (e.g. because the receiver has used the email address in prior communication with the sender or because the email address is stated in a letterhead or the like). In this more indirect way the medium may make the notification invalid. It is however important to stress that in general, electronic notifications have the same legal validity as paper notifications.

A legal framework for sending electronic registered mails has not been implemented in Denmark.

No generic framework for the electronic archiving of documents of private parties has been implemented under Danish law. Such a framework has been established for certain documents and records of Government institutions. Such documents must be archived with the Danish States Archives[398] according to the Danish Archives Act[399]. The act does not provide the authorities with an obligation to use electronic archives but the authorities may chose to archive documents and records in electronic form. This is of special importance when the governmental authorities implement electronic file and document management systems. According to § 8, sec. 2 of the Act the authorities must make sure that electronic documents which have to be archived are kept in a way that makes archiving with the States Archives possible. This requirement has been further detailed in circular no. 24 of 8 March 2002 regarding notification and approval of

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[395] See http://www.e.gov.dk/offentlige_projekter/lovmodernisering/index.html (in Danish)

[396] The project was initiated base on recommendations given in report no. 1400, "e-signatur og formkrav i lovgivningen" drafted by a committee appointed by the Ministry of Justice.

[397] Mads Bryde Andersen, IT-retten, p. 812

[398] See www.sa.dk which includes an introduction to the rules in English.

[399] *Arkivloven*; Act no. 1050 of 17 December, 2002. Available in Danish from http://147.29.40.91/_SHOWF_A393870761/311&A20020105030REGL&0001&000001

electronic records and electronic file management systems[400]. According to § 5 of the circular such systems may not be used before they are approved by the States Archive.

B.1.2. Transposition of the eCommerce directive[401]

The eCommerce directive has been transposed in Danish law through the eCommerce Act[402].

In general the Act rather closely follows the eCommerce directive.

The scope of the Act is limited to services of the information society. Other types of services and contracts regulating other types of services are not covered by the Act. The act explicitly excludes the following areas from its scope: tax, data protection, competition law issues, the activities of notaries or equivalent professions to the extent they involve the exercise of public authority, the representation of clients in court, gambling activities which involve wagering a stake with monetary value in games of chance, including lottery and betting transactions, § 1, sec. 2.

According to article 9 of the eCommerce directive Member States shall ensure that their legal system allows contracts to be concluded by electronic means. As described under section B.1.1 this requirement is complied with under Danish law through the legal doctrine that agreements in general are legally valid irrespective of form. At the time of transposition of the eCommerce directive through the eCommerce Act the above mentioned law modernising project had been initiated. With reference to this project no provisions regarding electronic contracts in line with article 9 of the directive were included in the Act. Instead, unnecessary legal barriers should be removed in the law modernising project. For the same reason the eCommerce Act does not exclude specific types of contract.

The eCommerce Act does not specify requirements with regard to electronic signatures nor does it regulate the legal validity of electronic signatures. Electronic signatures are regulated through the E-signature Act[403]. The Act is a transposition of the eSignature directive (directive 1999/93) and closely follows the directive. The eSignature requirements laid down in the Act are similar to the requirement specified in the directive and its annexes. Most of the provisions of the Act contain security requirements and the act only to a limited extent regulates the legal effect of electronic signatures. § 13 of the Act reads as follows:

> *Legal provisions according to which electronic messages shall be provided with a signature shall be regarded as met if the message is provided with an*

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[400] *Cirkulære om anmeldelse og godkendelse af elektroniske journaler og elektroniske dokumenthåndteringssystemer;* Act no. 571 of 19 December 1985. Available in Danish from http://147.29.40.91/_SHOWF_A393870761/311&C20020002409REGL&0003&000001

[401] See Jacob Plesner Mathiasen, Niels Bo Jørgensen and Johan Schlüter, E-handelsloven, 2004, 297 p.

[402] *E-handelsloven*; Act no. 227 of 22 April 2002 on services in the information society, including certain aspects of electronic commerce. Available in Danish from http://147.29.40.91/_SHOWF_A393870761/311&A20020022730REGL&0002&000001

[403] *Lov om elektroniske signaturer;* Act no. 417 of 31 May 2000. Available in English from http://www.tst.dk/uk/legislation/bill229_del1.htm. See Henrik Udsen, Den digital signature – ansvarsspørgsmål, 2002, 294 p.

advanced electronic signature based on a qualified certificate and created by a secure signature-creation device. However, in the case of electronic messages to or from public authorities, this shall only apply if current legislation or provisions in pursuance thereof do not prescribe otherwise.

The provision is not easy to read and understand. The meaning of § 13 is that if an electronic signature may fulfil a signature requirement under law (meaning that a "signature" requirement may be fulfilled both by paper signatures and electronic signatures) a qualified electronic signature (an advanced electronic signature based on a qualified certificate and created by a secure signature-creation device) may *always* be used. With this approach a two step procedure is introduced. First one needs to decide whether a signature requirement may be fulfilled by electronic signature or only by paper signatures (depending on the purpose of the signature requirements this test will be based on the functional equivalence approach). If eSignatures may be used, one needs to decide which kind of electronic signatures may fulfil the requirement. In this second part of the test advanced electronic signatures will always *per se* fulfil the requirements.

The practical effect of the eSignature Act has been disappointing, as no advanced electronic signatures are being offered by certification providers in Denmark. One of the main obstacles has been the requirement for signature holders to meet up and identify themselves in person. Realising that few people would do this the Government initiated the establishing of another type of e-signature called OCES[404]. The OCES signature is a "light version" of the qualified electronic signature with the important difference that the holder of an OCES signature does not have to meet up and identify himself in person. As of today more than 600.000 OCES signatures have been issued. The OCES signature is widely supported by public authorities in their eGovernment solutions.

B.2 Administrative documents[405]

In 2001 the Danish Government introduced a large scale eGovernment project[406]. The above mentioned law modernising project is a subsection of the eGovernment project and includes both documents between private parties and administrative documents. This has led to several amendments in the law either specifying that administrative documents might be in electronic form or (if the purpose of the form requirement could not be met by an electronic document) only in paper form.

In addition to these changes of more specific provisions, a new provision § 32a, was inserted in the Administrative Act[407]. § 32a made it possible through administrative decrees to change rules on formal requirements if such rules were a barrier to the use of electronic communication. In this way it became possible to eliminate the legal barriers in a faster and more flexible way not having to go through the parliamentary process of adopting new legislation. In other words this provision allows easy adaptation of the existing legal framework.

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[404] See www.oces.dk

[405] See Peter Blume and Hans Christian Spies, Ret og digital forvaltning, 2005, 203 p.

[406] See www.e-gov.dk

[407] *Forvaltningsloven*; Act no. 571 of 19 December 1985. Available in Danish from http://147.29.40.91/_SHOWF_A393870761/311&A20020105030REGL&0001&000001

As part of the eGovernment project the so called eDay1 was launched in September 2003. With eDay1 Denmark – according to the eGovernment project organisation – became the first country in the world to introduce a general right for public authorities to communicate electronically. Since eDay1, all Danish state, regional and local government authorities have had the right to demand that non-sensitive communication with other authorities be exchanged electronically, and thus the right to refuse paper-based communication. This right does not apply to communication between authorities and citizens, who have the right to request paper communication. This initiative therefore facilitates the electronic exchange of information within the government.

In February 2005 eDay2 was launched. From this date all public authorities have committed themselves to establish a secure e-mailbox which enables confidential and secure e-mail communication with public authorities. Companies and citizens have a right to communicate electronically with public authorities through secure and confidential e-mail communication. This initiative mandates the acceptance of electronic documents by public administrations.

Another effect of eDay2 was that from 1 February 2005 all public authorities may only issue and accept invoices in electronic format. All companies doing business with public sector customers will thus have to handle electronic invoices. This requirement follows from the Decree on electronic invoicing with public authorities[408]. This initiative in other words mandates the use and acceptance of electronic invoices send from and to public authorities.

Another important initiative is the amendment of the Danish Registration of Title Deeds Act[409]. The proposed amendment act[410] will make it possible to make electronic registrations of title deeds. The amendment act is expected to be adopted by the Parliament in May 2006.

In addition to these initiatives local eGoverment initiatives have been launched by several public authorities. These initiatives include (among a number of others):

- Electronic tax files

  Companies and citizens may get access to and correct their tax information through the internet.

- Electronic VAT declarations and payments

  Companies may through the internet report incoming and outcoming VAT and pay VAT

- Electronic registration of companies

  Registration of companies and changes to company information (board members etc.) may be done through the internet.

- Electronic filing of trademark and patent applications

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[408] *Bekendtgørelse om elektronisk afregning med offentlige myndigheder;* Royal Decree no. 991 of 7 October 2004 available in Danish from http://www.oes.dk/graphics/Filbibliotek_OES/OFFENTLIG/Betaling/Elektronisk_fakturering/bekaendtalektroafregn.pdf

[409] *Tinglysningsloven;* Consolidation Act no. 158 of 9 March 2006. Available in Danish from http://147.29.40.91/_SHOWF_A393870761/311&A20060015829REGL&0005&000001

[410] Bill no. 199 of 31 March 2006. Available in Danish from http://www.folketinget.dk/?/samling/20051/MENU/00000002.htm

In general, new eGovernment initiatives keep being established to a wide extent also to the benefit of eCommerce and commercial entities.

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

Bills of exchange are regulated by the Bill of Exchange Act[411].

According to § 1 of the Act a bill of exchange must be signed by the issuing party. The rules on bills of exchange do not specify whether the document may be in electronic form. Nor does the wording of § 1 or the preparatory remarks to this provision clarify whether the signature may be in electronic form[412].

The assessment of whether electronic bills of exchange are allowed under the law must therefore be based on the general principles of electronic contracts further specified above in section B.1.1. From these general principles follow that the document will be accepted in electronic form unless the electronic version cannot serve the purpose of the form requirement (functional equivalence).

As demonstrated through the Bolero project and other projects it is possible to serve the purposes of negotiable documents through electronic systems. For this reason it must be concluded that the Bills of Exchange Act does not prohibit the use of electronic bills of exchange.

However no such systems are used by banks or other financial organisations in Denmark. The use of bills of exchange is partly made electronic. The request by the customer to the bank to issue a bill of exchange and the completion of the bill of exchange may e.g. take place in electronic form. However the bill of exchange itself needs to be in paper form. The lack of electronic bills of exchange does not seem to be caused by legal uncertainty but primarily due to lack of systems supporting electronic bills of exchange.

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[411] *Vekselloven*; Consolidation Act no. 559 of 25 August 1986. Available in Danish from http://147.29.40.91/_SHOWF_A393870761/311&A19860055929REGL&0006&000001

[412] The Act has not been amended since 1986 why it is not a surprise that the Act does deal with the questions of electronic documents.

C.1.2. Documentary credit

Documentary credit is not regulated by any statutory rules under Danish law.

The documentary credit is considered a three-party contract regulated by the general principles of contract law under Danish law.

Documentary credit may therefore as other types of contract not covered by statutory rules be concluded by any means and in any form the parties may agree upon.

Although the law does not create obstacles to the use of electronic documentary credit this instrument is not used in Denmark. A number of processes around the documentary credit may take place in electronic form (request for documentary credit, completion of document and messages to receiving bank) but the document itself needs to be in paper form. As of bills of exchange this does not seem to be caused by legal uncertainty but primarily due to lack of systems supporting electronic documentary credit.

It is possible that the eUCP could trigger the use of electronic documentary credit in the years to come.

C.2 Transportation of goods: Bills of Lading and Consignment note

C.2.1. Bills of lading[413]

The regulation of bills of lading under Danish law follows from chapter 13 of the Danish Maritime Act[414].

The rules regulating bills of lading in the Danish Maritime Act do not prohibit the use of electronic documents. On the contrary § 296, sec. 3 states that the signature of the conveyer on the bill of lading may be in mechanical or electronic form[415]. Although it is not specifically stated in the Act that the document itself may be in electronic form this follows as a premise when the signature may be in electronic form. This result also follows from the preparatory remarks to the Act which specifically states that a bill of lading does not have to in paper form but may be in electronic form[416].

This leads to the conclusion that electronic bills of lading are accepted under Danish law. In general such documents are considered to have the same legal effect as bills of lading in paper form[417].

Electronic bills are only used to a limited extent in Denmark for the time being. The main problem seems to be the lack of a system which is sufficiently trusted to process negotiable documents.

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[413] Source: Per Vestgaard, Transportret, chapter 5, sec. 4.2. The book has in a draft version served as reading materials at Aarhus University and is exptected to be published i August 2006.

[414] *Søloven;* Consolidation Act no. 538 of 15 June 2004. Available from http://147.29.40.91/_SHOWF_A393870761/311&A20040053829REGL&0007&000001

[415] The permission to sign the document electronically was included in the act in 1994.

[416] *Folketingstidende* 1993-94, tillæg A, sp. 4985 f.

[417] Per Vestergaard, Transportret, chapter 5, sec. 4.2.6.4

C.2.2. Consignment note

Carriage of goods by road is regulated through the CMR Act[418] which implements the CMR Convention[419].

According to § 5 of the Act the transport agreement is confirmed by a consignment note. However § 5 also states that the agreement will be valid even without a consignment note. The use of consignment notes is in other words not mandatory.

According to the Act a consignment note must be made out in three original copies signed by the sender and the carrier, § 6.

The rules on consignment notes do not specify whether the note may be in electronic form. Nor does the wording of § 6 or the preparatory remarks to this provision clarify whether the signature may be in electronic form[420].

The prevailing view seems to be that the act must be interpreted in a way which allows electronic consignment notes and electronic signatures[421].

The evidentiary value of an electronic consignment note will follow from the general evidence rules under Danish law, cf. section B.1.1.

Electronic consignment notes are commonly used e.g. by pocket scanners where the document will be signed with the use of a light pen.

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[418] *CMR-loven*; Consolidation Act no. 602 of 9 September 1986. Available in Danish from http://147.29.40.91/_SHOWF_A393870761/311&A19860060229REGL&0008&000001

[419] Convention on the contract for the international carriage of goods by road

[420] The Act has not been amended since 1986 why it is not a surprise that the Act does deal with the questions of electronic documents.

[421] Per Vestergaard, Transportret, chapter 4,sec. 3.1. See also Report on electronic registration of title deeds, report no. 1394 published by the Ministry of Justice.

C.3 Cross border trade formalities: customs declarations

The use of electronic customs declarations is specifically regulated in the Custom Processing Decree[422]. According to § 6, sec. 2 and § 41, sec. 2 custom declarations may be in electronic form (both for import and export declarations).

The use of electronic customs declaration was initiated in the mid 1990´s and today both import and export declarations can be filed electronically. In practice almost all customs declarations are in electronic form today.

The declarations are authenticated through the use of passwords given by the custom authorities to companies who request them. All companies may request such password and may request more passwords if more employees need their own password. For the time being the customs declarations system does not support use of electronic signatures.

There are no other electronic document types which are commonly used in completing the customs declarations.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

The use of electronic invoices are regulated in the VAT decree[423], § 45 which implements the eInvoicing directive (directive 2011/115).

According to § 45, sec. 1 electronic invoices may only be issued if the buyer has accepted to receive an electronic invoice and the authenticity and integrity of the electronic invoice is secured by electronic signature or EDI.

The provision of § 45 has caused a legal uncertainty in regard to the exchanging of a scanned image of an invoice by way of e-mail. If a scanned image (i.e. a PDF file) is considered an electronic invoice then the electronic exchange has to comply with the requirements for electronic invoices (acceptance from buyer and use of secured electronic signature or EDI as further specified below). No case law has dealt with this question. In this author's point of view a scanned invoice will most likely be considered an electronic invoice if it is not supplemented by a paper invoice (in which case the scanned invoice will be nothing more than an electronic copy of the paper invoice).

An electronic signature must be based on an advanced electronic signature (as defined in the E-signature Act) with a security level which as a minimum equals the security level of the OCES signature (see above). This requirement has led to some problems as the definition of an advanced electronic signature under the eSignature Act requires the signature holder to be a natural person. Following the wording of § 45 combined with the definition of an advanced electronic signature this means that electronic signatures

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[422] *Toldbehandlingsbekendtgørelsen*; Royal Decree on Custom Processing, Decree no. 992 of 19 October, 2005. Available in Danish from http://147.29.40.91/_SHOWF_B538552122/1354&B20050099205REGL&0001&000001

[423] *Momsbekendtgørelsen*; Royal Decree no. 1152 of 12 December 2003 on the VAT Act. Available in Danish form http://147.29.40.91/_SHOWF_A393870761/311&B20030115205REGL&0009&000001

issued to companies (rather than to separate employees of the company) may not be used to sign an electronic invoice. This has probably not been the intention and company eSignatures are to this author's knowledge accepted by the Danish tax authorities.

EDI may only be used upon existence of a prior agreement between the parties specifying the procedures of the data exchange.

Companies using electronic invoices are obliged to keep descriptions of the systems (including hardware and software descriptions) and the procedures. This also applies to contracts and certificates. Furthermore companies must keep the electronic invoices in their original form and format and in such a way that the authentication and integrity of the invoices are secured. Furthermore the electronic invoices must be protected against data loss. Accounting documents including electronic invoices must be kept for five years. This applies both to the sender and the receiver of the invoice. From these requirements, it follows that it is not sufficient to save a printed copy. Paper invoices may be saved either in their original paper form or as a digital copy.

All accounting records including electronically kept invoices and other electronic records must be stored within the borders of Denmark, § 12 of the Bookkeeping Act[424]. Only records for the current and last month may be kept outside[425]. However if the invoice concerns activities in another country the invoice may be kept in that country. In general this means that foreign companies must establish solutions to bring the records to Denmark typically every month.

According to § 45, sec. 7 of the decree other methods may be used for electronic invoices if such method is considered as secure as an electronic signature or EDI solution complying with the requirements laid down in § 45. Only application solutions similar to those used in home banking solutions have been put forward by authorities as equally safe. In practice this means that companies in most situations need an electronic signature to use electronic invoices. This has lead to some frustrations as companies cannot understand why they should invest in a secure signature infrastructure to save the cost of a stamp. However with the increasing widespread use of the OCES signature this might be a temporary problem.

Additional options allowed by the directive were largely disregarded: the advanced electronic signature need not be based on a qualified certificate or be created by a secure-signature-creation device and EDI need not be combined with a paper document.

The rules on electronic invoices in § 45 of the decree is supplemented by the above mentioned decree on electronic invoicing with public authorities[426] which mandates the use and acceptance of electronic invoices issued by and to public authorities.

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[424] *Bogføringsloven;* Act no. 1006 of 23 December 1998. Available in Danish from http://147.29.40.91/_SHOWF_A393870761/311&A19980100630REGL&0012&000001

[425] To a certain extent records may be kept in the other Nordic countries.

[426] Royal Decree no. 991 of 7 October 2004. Available in Danish from http://147.29.40.91/_SHOWF_A393870761/311&B20040099105REGL&0013&000001

C.4.2. Electronic accounting

The professional rules of accountants are laid down in the Accountancy Act[427]. The accountancy Act is however primarily a professions regulation deciding issues like the right to use the accountant title, supervision of accountants, registration of accountants etc.

Relevant rules to electronic accounting are on the other hand laid down in the Bookkeeping Act. According to § 6 of the Act accounting records must be arranged in a way that the records are not destroyed, changed or at the risk of being misused.

According to § 10 of the Act, the accounting records must be kept for 5 years in a safe way which makes it possible to get an independent and unambiguous access to the records. If the records are stored electronically it shall be possible to print the records in clear reading without any calculations or adaptations. Encryption of the records is allowed if the keeper of the records is in possession of the encryption key. If printing of the records requires the use of a specific version of a computer program the keeper of the records must be in possession of this version. There are no requirements to preserve the records in a specific format as long as it is possible to open the records.

If the above requirements are complied with accounting records may be kept electronically. Fully electronic accounting is allowed under Danish law and it is quite common to keep accounting records electronically both by preservation of registration of information in IT systems and by scanning of paper documents.

The annual accounts of a company are required to be deposited with the Danish Commerce and Companies Agency[428]. This follows from § 138 of the Annual Accounts Act[429].

According to § 155, sec. 2 of the Annual Accounts Act, annual accounts may be both in paper form and electronic form. According to the provision the annual accounts may be signed with a digital signature. It is possible to file the annual accounts with the Danish Commerce and Companies Agency through their website. This requires the use of an OCES electronic signature or a pin code provided by the Agency.

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[427] *Revisorloven;* Act no. 302 of 30 April 2003. Available from http://147.29.40.91/_SHOWF_A393870761/311&A20030030230REGL&0014&000001

[428] www.eogs.dk (also in English)

[429] *Årsregnskabsloven*; Act no. 196 of 23 March 2004. Available in Danish from http://147.29.40.91/_SHOWF_A393870761/311&A20040019629REGL&0015&000001

D. General assessment

D.1 Characteristics of Danish eCommerce Law

- The main characteristics of the Danish eCommerce law are the high degree of flexibility and what could be called a pragmatic approach to formalistic requirements like signature and writing requirements. This applies to both contract and evidence law, making form requirements the absolute exception both when it comes to formation of contracts and to the assessing of the evidentiary value of such contracts. In this way both the functional equivalence principle introduced with the UNICTRAL Model Law on Electronic Commerce and the similar principles laid down in the eCommerce directive (especially art. 9) and the eSignature directive (especially art. 5) are principles which are in line with well established contract law principles under Danish law. Illustratively Danish legislators found it unnecessary to include these two articles in the Danish adaptations of the directives.
- Another characteristic is the close connection between eCommerce law and eGovernment law. Many commercial transactions require communication with public authorities. If such communication makes it necessary to use paper documents the commercial transaction can only in part become digitalized even though the eCommerce rules allow the use of electronic documents. Thus the eCommerce law relies heavily on eGovernment initiatives. The most prominent example of this is the law modernising project described above which aimed at deleting legal barriers of electronic communication both in civil law and public law.
- Yet another characteristic is the influence from international regulations. UNCITRAL's Model Law on electronic commerce and the Convention on the Use of Electronic Communications in International Contracts have been included in the considerations of amendments to the Danish eCommerce regulation. It goes without saying that the EU directives have had the greatest influence on the Danish eCommerce law in this respect.

D.2 Main legal barriers to eBusiness

Looking at the main legal barriers to eBusiness three different aspects are worth pointing out.

- The first is the above mentioned influence from public regulation. Although the eCommerce regulation in itself does not hinder the use of electronic documents, the communication with public authorities might necessitate the use of paper documents. Not only because of form requirements in public law but perhaps mainly due to the administrative procedures of the public authority. Electronic registration of title deeds could be mentioned as an example. Even if the Registration of Title Deeds Act would be interpreted as allowing electronic registration, such registration would not be possible as the relevant authorities would not be able to receive title deeds in electronic form. Such procedures are of course established with the above amendment to the Act facilitating electronic

registrations. It must however be stressed that these administrative procedures to a large extent are being changed these years, making electronic communication with public authorities possible.

- The regulation of electronic signatures could also be mentioned. The law only contains specific regulation of legal validity of qualified electronic signatures. This type of signature is not used in Denmark. The legal validity of the signature which is used, the OCES signature, is in contrast not regulated by any general provisions. This may create some legal uncertainty as to the legal validity of the OCES signature. Furthermore Danish law has needlessly limited the use of advanced electronic signatures to natural persons, meaning that legal persons cannot be the holder of advanced electronic signatures. This has already created problems with regard to the signature requirements of the eInvoicing rules as explained above in section C.4.1.
- Lastly the way the above mentioned law modernising project has coped with the existing form requirements is not without weaknesses. Not all provisions containing form requirements have been reconsidered under the project. Two examples of this are the above mentioned Bill of Exchange Act and the CMR Act. As a result some legal uncertainty as to the legal validity of electronic documents remains. It could furthermore be an advantage if a general provision would be adopted in Danish law stating which general principles would decide whether an electronic document or electronic signature could fulfil a writing or signature requirement.

D.3 Main legal enablers to eBusiness

- The flexible approach to form requirements which apply under Danish law to both civil and commercial documents must be characterised as the main legal enabler to eBusiness in Denmark. As explained electronic documents will in general be legally valid and serve as evidence in court. At a more general level this generates legal trust in electronic communication.
- An important initiative has been the eGovernment project which has put focus on the administrative procedures and administrative documents as barriers to the use of electronic documents not only between public authorities but also in the communication public to private and private to private. Four important initiatives under this project have already been mentioned:
    i. The law modernising project (going through a large number of provisions with form requirements enabling the use of electronic communication to the largest possible extent)
    ii. eDay1 (granting public authorities the right to demand that non-sensitive communication with other authorities be exchanged electronically, and thus the right to refuse paper-based communication)
    iii. eDay2 (granting companies and citizens a right to communicate electronically with public authorities through secure and confidential e-mail communication and thereby mandating the acceptance of electronic documents by public administrations)
    iv. Use of electronic invoices with public authorities (mandates the use and acceptance of electronic invoices send from and to public authorities)

- Finally the establishing of the OCES signature should be mentioned. The OCES signature which was established at the initiative from the Government and which is strongly supported by public authorities is considered a corner stone to the success of eGovernment solutions. However the prevalence of electronic signatures through the OCES solution will also be a strong incentive to electronic communication in eCommerce transactions between private parties.
- Despite the legal barriers mentioned in section D.2 the above enablers make it fair to conclude that Danish eCommerce law in general seems to satisfy the requirements of business when it comes to the possibility of using electronic documents.

Estonia National Profile

A. General legal profile

The Republic of Estonia is a constitutional republic, consisting of 15 counties[430]. At the lower administrative level there are currently 227 sub-central government entities of which 33 are cities[431] and 194 rural municipalities[432].[433]

The Estonian legal system adheres to the continental European civil law tradition, and the basic structure of the Estonian civil law is similar to that of the Civil Code of Germany (*Bürgerliches Gesetzbuch*). Commerce and contract law is generally incorporated into the General Part of the Civil Code Act[434] and Law of Obligations Act[435]. Also, eCommerce is regulated at the national level through a number of specific laws adopted by the Parliament and regulations adopted under such laws.

Disputes regarding commercial relations are typically dealt with by the regular courts. As a result of reforms in 1993 and 2005, the Estonian court system was reorganised into a three-level court system, the first level being the trial courts[436], with a court of first appeal[437] on the second level, and a final court of appeal, the Supreme Court[438], on the highest level. In the first instance civil cases are heard either by a single judge or by a panel of three judges, whereas a panel of one judge and two laymen is formed to hear criminal cases. A single specialised administrative judge in a separate administrative court hears administrative cases. The Supreme Court is also the court of constitutional review. The parties of a contract are also free to choose arbitration for settlement of a dispute, e.g. in the Arbitration Court of the Estonian Chamber of Commerce and Industry[439].

According to the Estonian tradition of civil law, written legislation is the most important legal source. Court decisions are also considered important sources of law, but courts are not required to follow previous precedents even if it originates from a higher court in the judiciary system. This, however, does not apply to criminal procedural law, where the decisions of the Supreme Court are considered binding sources in issues which are not regulated by other sources of criminal procedural law but which arise in the application of law.

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[430] *Maakond*.

[431] *Linnad*

[432] *Vallad*

[433] Estonian regional administration is subject to reforms.

[434] *Tsiviilseadustiku üldosa seadus*, entered into force on 01.07.2002, last amendments entered into force on 01.01.2006; http://www.riigiteataja.ee/ert/act.jsp?id=687028

[435] *Võlaõigusseadus*, in force from 01.07.2002, last amendments entered into force on 01.01.2006; http://www.riigiteataja.ee/ert/act.jsp?id=751880

[436] *Maakohus*

[437] *Ringkonnakohus*

[438] *Riigikohus*

[439] www.koda.ee

B. eCommerce regulations

In this section, the main tenets of Estonian doctrine regarding electronic documents are briefly commented.

B.1 eCommerce contract law

B.1.1. General principles

The regulatory framework for all contracts including eCommerce ones is set out in General Part of the Civil Code Act[440] and Law of Obligations Act, which contains the basic principles of the Estonian Contract law (hereinafter the Estonian Contract Law).

Estonian Contract Law is based on autonomy of will. According to Estonian Contract Law, a contract is entered if consensus exists between the parties to the contract regarding the essential elements of the contract.

A transaction may be entered into in any format, i.e it may be entered into orally, in writing or in any other form if no required format is provided for the contract by law[441]. The General Part of the Civil Code Act provides for the following formats of a transaction (i) written format, (ii) format which can be reproduced in writing, (iii) electronic format, (iv) notarial authentication of transaction, and (v) notarial certification of transaction.

If the written format of a transaction is prescribed by law and/or agreed by the parties, the transaction document shall contain the hand-written signatures of the persons entering into the transaction. A mechanical signature is deemed to be equal to hand-written signature only if the mechanical signature is in common usage and the other party does not immediately require a hand-written signature. In the case of a written contract, written declarations of intention arising from the contract may be communicated also by other means which allow written reproduction of the declarations of intention. Written format of a transaction may be substituted by notarial certification or notarial authentication of the transaction.

A transaction in electronic form is also generally deemed to be equal to a transaction in written form. In order to comply with the requirements for the electronic format, a transaction shall:

- be entered into in a format enabling repeated reproduction; and

- contain the names of the persons entering into the transaction; and

- be electronically signed[442] by the persons entering into the transaction.

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[440] In Estonian: *Tsiviilseadustiku üldosa seadus*, entered into force on 01.07.2002, last amendments entered into force on 01.01.2006.

[441] For example sale and purchase of immovable requires notarised form.

[442] An electronic signature shall be given in a manner which allows the signature to be associated with the content of the transaction, the person entering into the transaction and the time of entry into the transaction. A digital signature is also an electronic signature. The procedure for attributing an electronic signature to a person and for giving electronic signatures is provided in

Also, if thus required by law, a transaction must be in a format which can be reproduced in writing. A format which can be reproduced in writing means that such transaction shall be entered into in a format enabling repeated written reproduction and shall contain the names of the persons entering into the transaction, but need not contain hand-written signatures. This applies for example to transactions via e-mail.

Estonian civil procedure law could be considered rather flexible when it comes to formalities. According to Section 229 of the Code of Civil Procedure[443], "evidence" in a civil matter is any information on the basis of which the court ascertains the existence or lack of facts on which the claims and objections of the parties and other participants in the proceeding are based. Evidence may be, inter alia, documentary evidence which can be in written or electronic format.

Neither Estonian legislation nor legal practice provide for a definition on "electronic document". However, the Estonian legislation provides in certain legal acts provisions on processing electronic and/or digital documents. For example the Code of Civil Procedure provides how electronic documents[444] should be filed with the court[445]. As of the beginning of the year 2006, it has been possible to order a notary to make a notarial authentication of a copy of a digital document[446].

Even though the term electronic document has not been defined in law, one could assume that in practice it is expected that an electronic document should provide the same qualities that are traditionally expected from a written document, i.e. that it is accessible (readable), difficult to alter and durable (at least for a certain period of time). We note that there is not yet any legal practice confirming the above approach of electronic document.

As provided above according to General Part of the Civil Code Act, a transaction can be in electronic form, which is generally considered equal to a transaction in written format. With entry into force of the Digital Signatures Act[447] it is also practically possible to make documents in electronic format. In practice, however, electronic documents (i.e. the ones equal to written format) are mostly used when communicating with public authorities and seldom in private civil transactions. It is becoming more and more common that documents (including evidence) are filed before the court in an electronic format. Also, natural persons are getting used to using digital signatures and filing

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the Digital Signature Act, in Estonian: *Digitaalallkirja Seadus*, entered into force on 15.12.2000, last amendments entered into force on: 08.01.2004. See: http://lex.andmevara.ee/estlex/kehtivad/AktTekst.jsp?id=35021

[443] In Estonian: *Tsiviilkohtumenetluse seadustik*, entered into force on 01.01.2006, last amendments entered into force on 04.02.2006; http://www.riigiteataja.ee/ert/act.jsp?id=782718

[444] Document according to the Estonian Code of Civil Procedure is a document which is recorded by way of photography, video, audio or other data recording, contains information on facts relevant to the adjudication of a matter and can be submitted in a court session in a perceptible form.

[445] According to Section 274 of the Estonian Code of Civil Procedure electronic document must be filed with the court in such electronic format that enables accessing as well as saving such document safely in the information technology system of the court.

[446] In practice this means that the notary scans a written document into a pdf or similar format and prepares the notarial certificate in a text processing program (eg. Microsoft Office Word) and signs the relevant notarial certificate digitally.

[447] In Estonian: *Digitaalallkirja seadus*, entered into force on: 15.12.2000, last amendments entered into force on: 8.01.2004.

documents to persons in public law in an electronic format. This, however, is also supported and related to the fact that Estonia has made electronic identity cards compulsory, stating that an Estonian citizen staying (residing) permanently in Estonia shall hold an identity card. Each identity card is provided with a certificate which enables, inter alia, digital identification and a certificate which enables digital signing.

As set out above, Estonian Contract Law is based on the principle of freedom of contract, thus the parties can validly conclude agreements in an electronic format. However, if pursuant to law or an agreement between the parties or at the request of one party, an agreement must be entered into in a specific format, the contract is not be deemed to have been entered into until the specified format is given to the contract[448].

Estonian legislation provides no specific provisions of electronic notification. However regarding amending and terminating of an agreement the Law of Obligations Act provides that if a contract is entered into in a specific format, amendment or termination of the contract need not be in such format unless the contract provides otherwise. Also, if a contract prescribes amendment or termination of the contract in a specific format, a party cannot rely on such condition of the contract if the other party could infer from the party's conduct that the party agreed to the amendment or termination of the contract in another format. The above does not apply to mandatory provisions set forth in law.

Estonia has neither implemented a framework for sending electronic registered mail nor implemented a generic framework for electronic archiving, except in relation to accounting.

B.1.2. Transposition of the eCommerce directive

The eCommerce directive has been transposed in the Estonian legislation through the Information Society Services Act[449].

The Article 9 of the Directive (formal requirements in an electronic context) is transposed into the Estonian legislation. General rules on concluding contracts by electronic means are set out in Section 80 of the General Part of the Civil Code Act, stating the conditions for the validity of an electronic format of an agreement[450].

In addition to the above, the Law of Obligations Act prescribes rules for contracts entered into through computer network, however in relation to a person engaging in economic or professional activities only. According to Section 62^1 of the Law of Obligations Act a person who enters into contracts through a computer network when selling goods or providing services shall make available to customers suitable and efficient technical means which are accessible and by which customers are able to identify and correct typing errors before transmitting their orders. Before transmission of

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[448] Section 11(2) of the Law of Obligations Act.

[449] In Estonian: *Infoühiskonna teenuse seadus*, entered into force on: 1.05.2004, last amendments entered into force on: 25.05.2006; http://www.riigiteataja.ee/ert/act.jsp?id=780289

[450] In order to comply with the requirements for the electronic format, a transaction shall (i) be entered into in a format enabling repeated reproduction and (ii) contain the names of the persons entering into the transaction and (iii) be electronically signed by the persons entering into the transaction. An electronic signature shall be given in a manner which allows the signature to be associated with the content of the transaction, the person entering into the transaction and the time of entry into the transaction. A digital signature is also an electronic signature.

an order the supplier shall notify the customer of (i) the technical stages involved in entering into the contract; (ii) whether the supplier will preserve the text of the contract after entry into the contract and whether the text will remain available to the customer; (iii) the technical means for identifying and correcting typing errors; (iv) the languages in which the contract may be entered into, and (v) the rules observed by the supplier, and the electronic means for examining the rules. Also, the supplier shall confirm receipt of an order immediately in electronic form. The provisions above do not apply if the contract is entered into by electronic mail or any other similar personal means of communication. The order and the confirmation of receipt of the order are deemed to have been received when the person to whom the order or confirmation is addressed has had the opportunity to examine it.

The terms of the contract, including the standard terms, shall be presented to the customer in a manner which enables them to be saved and reproduced.

Also, in business-to-business relationship the parties to the relevant transaction may derogate from the provisions set out in the Law of Obligations Act for contracts entered into through computer network.

B.2 Administrative documents

Estonian legislation proactively supports legally binding electronic communication with the pubic authorities.

The legal framework for giving greater flexibility in administrative processes is set out in the Digital Signatures Act, which states that in relations in public law, digital signatures shall be used pursuant to the Digital Signatures Act and legislation issued on the basis thereof. State and local government agencies, legal persons in public law, and persons in private law performing public law functions are required to provide access through the public data communication network to information concerning the possibilities and procedure for using digital signatures in communication with such agencies and persons.

In general Estonia is well known for its available e-services and solutions. For example it is possible to file tax and customs declarations electronically.

C. Specific business processes

In this section of the study, we will take a closer look at certain sections of the applicable Estonian legislation and legal and administrative practice. Specific examples of common document types will be examined to assess the validity and recognition of their electronic counterparts.

The section below is organised according to four stages in the electronic provision of goods on the European market. They comprise the credit arrangements, transportation and storage, cross border trade formalities and financial/fiscal management. As a preliminary note it should be pointed out that there is practically no court practice in Estonia with respect to the use of electronic documents in the areas described above.

C.1 Credit arrangements: Bills of exchange and Documentary credit

C.1.1. Bills of exchange

In Estonia bills of exchange are generally regulated by the Law of Obligations Act, as there is no specific regulation under Estonian law. It should be noted that in practice bills of exchange are seldom used, even in paper form. Obviously, no explicit rules on electronic bills of exchange exists.

However, following the general provisions cited above, an electronic bill of exchange would be allowed and legally valid under Estonian law, provided that the provisions set out in the General Part of the Civil Code Act stating the conditions for the validity of an electronic format are fulfilled.

C.1.2. Documentary credit

As in most European countries, there are no specific legal provisions for documentary credits in Estonia and the documentary credits are largely subject to the general rules of the Estonian Contract Law.

Consequently and as above, there is also no specific legal framework for electronic documentary credit agreements, and the documentary credit would be governed by the rules of the guarantee set forth in the Law of Obligations Act. According to the Law of Obligations Act, a person engaged in an economic or professional activity (the guarantor) may, by a contract, assume an obligation (guarantee) before an obligee, according to which the person undertakes to perform obligations arising from the guarantee[451]. It is presumed that the obligee consents to the guarantee.

There is no detailed regulation on the format of the documentary credits and the parties are free to agree to use any form. As a consequence, and provided the requirements set out for electronic formats in the General Part of the Civil Code Act are fulfilled, a documentary credit could be applied for and issued also in electronic format.

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[451] Section 155(1) of the Law of Obligations Act.

In practice guarantees are applied for and issued in written format.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

Bills of lading are regulated by the Law of Obligations Act, which sets out requirements for the content of bill of lading in Section 775[452].

The Law of Obligations Act does not specify that the bill of lading must be in writing, it only specifies that the sender shall issue and sign the bill of lading in three original copies, one of which shall be retained by the sender, one shall accompany the goods and one shall be handed to the carrier. At the request of the sender, the carrier shall sign the bill of lading, whereas the signatures may be replaced by a clip-mark.

Generally, and following the principles of Estonian contract law outlined above, the Estonian law does not prohibit electronic bills of lading, but in practice they are seldom if ever used.

C.2.1. Storage contracts[453]

Provisions on deposit contracts are set out in the Law of Obligations Act. By a deposit contract a person (the depositary) undertakes to safekeep a movable delivered to the depositary by another person (the depositor) and return it to the depositor upon termination of the deposit[454].

The Law of Obligations Act is silent with regard to the formal requirements of the storage contract; thus the parties are free to choose electronic storage contracts if they please. There is thus no barrier under Estonian law with regard to this type of contracts.

C.3 Cross border trade formalities: customs declarations

In Estonia the entire customs transit procedure from the beginning of the transit operation until the discharge of the customs procedure can be carried out by electronic means. The relevant legal act is Regulation No. 23.04.2004 of the Minister of Finances on Procedure of submitting declarations and information to the customs[455] and acts related thereto. According to the Regulation, in order to submit customs declaration electronically, the declarant must conclude a so called e-service agreement with the Estonian Customs and Tax Board, which will allow him to make declarations electronically in the future.

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[452] Section 775 of the Law of Obligations Act.

[453] Called Deposit agreement in Estonian Contract Law.

[454] Section 883 of the Estonian Law of Obligations Act.

[455] In Estonian: Tollile elektrooniliselt deklaratsioonide esitamise ja andmete edastamise kord, Rahandusministri 23. aprilli 2004. a määrus nr 93, entered into force on: 01.05.2004.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

The Estonian Value Added Tax Act[456] is generally in compliance with the Directive 2001/115/EC.

An invoice may be issued by electronic means if the other party has agreed to it. The legal status of electronic invoices is the same as invoices on paper. Also, the Value Added Tax Act does not require that the invoice is signed, thus formally complying with the provision of the Directive 2001/115/EC that the member states shall not request the signature on the invoice. Therefore, an electronic invoice may be issued without being obliged to sign it digitally.

Regarding electronic invoices there are no formal requirements set out in the Estonian legislation, which simplifies very much the sending of electronic invoices.

The Estonian legislation does not prescribe the technical terms and conditions for the storage of electronic invoices, nor does it expressly permit or prohibit storage of electronic invoices outside Estonia. Therefore it should be allowed to store electronic invoices outside Estonia, provided they are preserved and accessible as requested by law. Electronic invoices (like any other source documents) must be preserved for 7 years as of the end of the relevant financial year. It must be possible to reproduce electronic invoices in writing, i.e. the electronic invoices must be preserved in a format and on data media enabling written reproduction thereof.

C.4.2. Electronic accounting

The accounting procedures are governed by the Estonian Accounting Act[457].

The law generally allows carrying out the accounting in electronic form, however with certain reservations. If source documents[458] are kept electronically the accounting entity must ensure that it is possible to reproduce such source documents in writing (i.e. on

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[456] In Estonian: Käibemaksuseadus, entered into force on 01.05.2004, last amendments entered into force on: 01.01.2006.

[457] In Estonian: Raamatupidamise seadus, entered into force on: 01.12.2003, last amendments entered into force on: 01.12.2005.

[458] According to Section 7 (1) of the Accounting Act, an accounting source document is a document which certifies a business transaction and which contains the following information (i) the name and number of the document; (ii) the date of preparation of the document; (iii) the economic substance of the transaction; (iv) the figures relating to the transaction (quantity, price and total amount); (v) the names of the parties to the transaction; (vi) the addresses of the seats or places of residence of the parties to the transaction; (vii) the signature(s) certifying the business transaction, given by the person representing the accounting entity who records the business transaction in the accounts thereof; (viii) the number of the corresponding accounting entry.

paper). Generally, journals and ledgers[459] may be prepared and preserved on media enabling written reproduction, provided the authenticity of the information preserved thereon is ensured.

At the end of each financial year the accounting entity is required to prepare an annual report which consists of the annual accounts and the management report. The law does not explicitly prescribe that the annual report must be drafted and submitted in a paper form; however, it provides that the annual account shall be duly signed by the management board of the accounting entity[460]. In practice, annual reports are submitted to the Commercial register as paper documents, although this is more a matter of technical readiness than legal restriction.

D. General assessment

D.1 Characteristics of Estonian eCommerce Law

- Generally Estonia has adopted the general legal framework to enable the functioning of eCommerce. The main legal acts ensuring a fairly good platform for electronic commerce activities in Estonia are the General Part of the Civil Code Act, the Law of Obligations Act, the Digital Signatures Act and the Information Society Services Act.
- The development of eCommerce has been an Estonian priority over the last years. As of 2003 a number of ideas are being discussed and put into practice for improving the availability and usability of eCommerce (incl. digital signatures) in Estonia, e.g. eVoting, eTickets in public transportation, eGovernment and eHealth. As of the beginning of the year 2006 it has been possible for public notaries to provide digital notarial authentication. A possible future development could be that notarial acts will be carried out in Estonia without the need of the parties to physically appear at the notary's office.
- It is becoming more and more common that documents are filed with the public administration (including courts) in electronic format. Also, natural persons are getting more comfortable with using digital signatures and filing documents to persons in public law in an electronic format. This implies, inter alia, that there exists sufficient legal certainty as to the use of digital signatures in Estonia.
- One driving motor for e-commerce related developments in Estonia has also been the fact that Estonia has made eIdentity cards compulsory, stating that all Estonian citizens staying (residing) permanently in Estonia shall hold an identity card[461]. Each identity card includes a certificate which enables, inter alia, digital identification and a certificate which enables digital signing. Over 900.000 identity cards have been issued in Estonia, of which approximately 800.000 are actively used. The card, besides being a physical identification document,

[459] The accounting journals and ledgers are databases that include information of recorded business transactions in chronological order.

[460] Section 23 (1) of the Accounting Act.

[461] See also http://lex.andmevara.ee/estlex/kehtivad/AktTekst.jsp?id=35021 for the Estonian eID law.

provides advanced electronic functions that facilitate secure authentication and can be used to create legally binding digital signatures, in connection with nationwide eCommerce services.

D.2 Main legal barriers to eBusiness

- In fact, there are no substantial legal barriers to eBusiness, as the necessary legal acts have been adopted and successfully put into force.
- As a (practical, rather than legal) barrier to Estonian eBusiness, local opinion leaders refer to a lack of eBusiness related vision and sense of priority within current political forces.
- Also, there is a lack of local legal practise on interpreting eBusiness related provisions, which can be seen as a legal barrier to eBusiness development in Estonia.

D.3 Main legal enablers to eBusiness

- As described above, the Estonian flexibility with respect to the formal requirements of documents and the party autonomy as well as the possibility to communicate with public administrations through electronic means are the key factors for enabling the functioning of eBusiness in Estonia.
- Also, the laws adopted based on relevant European Directives present a workable framework for further eBusiness developments in Estonia.

Finland National Profile

A. General legal profile

Finland is a constitutional republic, consisting of six counties[462]. At a lower administrative level, Finland comprises 431 municipalities[463] of which 114 are towns[464].

The Finnish legal system is a part of the Nordic legal family. A typical feature of Finnish contract law is a certain fragmentation[465]. There is no comprehensive code dealing with the general principles of contract law and different types of contracts. Instead, there are a large number of separate acts that regulate the formation of contracts and different types of contracts. A lot of contract law principles can also be learned from court practice and academic literature.

Disputes regarding contractual relations are dealt with by the courts; district courts[466] as a first instance, courts of appeal[467] as a second instance and the Supreme Court[468] as a last instance. There is a separate court system for administrative matters, but otherwise district courts, courts of appeal and the Supreme Court deal with both civil and criminal matters. Therefore, there are no separate commercial courts in Finland. However, a number of commercial contract disputes are in practice resolved through arbitration.

B. E-Commerce regulations

In this section, the main tenets of Finnish doctrine regarding the legal value of electronic documents are briefly commented.

B.1 e-commerce contract law

B.1.1. General principles

The freedom of contract is a cornerstone of Finnish contract law. The principle of freedom of contract consists of several elements, one of them being the freedom from formalities: unless the law requires certain formalities (a typical example about statutory

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[462] In Finnish *Lääni.*

[463] In Finnish *Kunta.*

[464] In Finnish *Kaupunki.*

[465] Finnish legislation is generally accessible through www.finlex.fi/

[466] In Finnish *Käräjäoikeus.*

[467] In Finnish *Hovioikeus.*

[468] In Finnish *Korkein oikeus.*

formal requirements being the sale of real estate), binding contracts can be concluded in any form, including their offer and acceptance, which can also be given in any form. Therefore, there are no legal obstacles to the development of electronic trade[469] caused by excessive formal requirements of contract law. This applies to commercial contracts, and likewise to civil contracts.

In addition to substantive law, Finnish procedural law is also flexible when it comes to formalities. According to the Civil Procedure Code[470] (chapter 17 section 2) courts have a freedom to weigh the presented evidence. This means that electronic documents can be presented as evidence in the court proceedings and that the court will have a freedom to assess what kind of weight should be given to electronic evidence.

Finnish contract law is based on autonomy of will, rather than related formalities. The crucial element of any contract is the will of a party to be bound and the expression of that will to the other party. This so-called will theory is, however, to some extent limited by the trust theory according to which the recipient of the expression of the will must also be protected. Therefore the outwardly observable expression of the will is also a weighty consideration.[471]

The Act on Electronic Services and Communication in the Public Sector[472] (section 4) defines "electronic document" as "an electronic message relating to the lodging or to the consideration of a matter, or to the service of a decision." This definition is not necessarily very useful in the private sector. Some guidance for the private sector for the definition of electronic document, however, can be obtained from section 12 of the Act on Provision of Information Society Services[473] which says that "If a contract must be concluded in writing according to the law, this requirement is also met by an electronic contract with contents that cannot be unilaterally altered, and which remain accessible to the parties."

Legal recognition of electronic documents in general is recognized by the aforementioned section 12 of the Act on Provision of Information Society Services.

When it comes to restrictions to the acceptability of electronic documents, Section 12 also says that:

> *"If a contract must be concluded in writing according to the law, this requirement is also met by an electronic contract with contents that cannot be unilaterally altered, and which remains accessible to the parties. If a contract must be signed according to the law, the separate provisions on electronic signatures shall be applied. The provisions of this paragraph shall correspondingly apply to notifications and other measures by the parties relating to the contractual relations which according to the law must be in writing or signed.*

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[469] Hallituksen esitys (Government proposal) 194/2001, p. 12.

[470] In Finnish *Oikeudenkäymiskaari* (1734/4); see http://www.finlex.fi/fi/laki/ajantasa/1734/17340004

[471] Hemmo Mika, Sopimusoikeus I (1997), p. 15.

[472] In Finnish *Laki sähköisestä asioinnista viranomaistoiminnassa* (13/2003); http://www.finlex.fi/fi/laki/alkup/2003/20030013

[473] In Finnish *Laki tietoyhteiskunnan palvelujen tarjoamisesta* (458/2002); http://www.finlex.fi/fi/laki/ajantasa/2002/20020458

If a notification relating to a contract must be supplied verifiably according to the law, this requirement may also be met by such an electronic method with which it can be demonstrated that the recipient has received the notification.

The provisions of paragraphs 1 and 2 shall not be applied to a contract concerning a property deal or any other transfer of a property or a contract relating to family or estate law."

The requirement that it may not be possible to unilaterally alter a contract means that for example general conditions located on an internet page of one of the parties does not fulfil the requirements of section 12, since those conditions can be altered by the party who created the page.[474]

When entering into contract negotiations, parties may agree that the contract which is the subject of their negotiations shall be concluded in a certain form. This agreement on the form can be concluded in any form. If the parties desire to make compliance with the agreed form a precondition for a binding agreement, they should expressly agree to make it so. For example, should the parties deem it necessary, before entering into negotiations regarding an exclusive distributorship agreement (which can be validly agreed orally) the parties may agree that the binding agreement requires a written form. If the agreement on the form of future agreements does not indicate what the consequences of failure to fulfil the agreed formal requirements will be, there is a risk that such an agreement will be interpreted to be only concluded for the purpose of facilitating the proof of the contents of the contract.[475]

Since the general principle of Finnish contract law is freedom from formal requirements, the parties can generally validly conclude agreements in an electronic form, provided that the contract is not of a type which according to law must be done following a specific form.

A party to an electronic contract cannot afterwards successfully refuse to accept it, merely on the ground that it was concluded in an electronic form. If, however, the parties had agreed that the final contract, in order to be valid and binding, should be concluded in a written (paper) form, then it would be possible to argue afterwards that the agreement is not binding if the agreement was in fact concluded through e.g. email correspondence.

The Act on Provision of Information Society Services (section 12) already quoted above also provides an answer to the question of permissibility of electronic notifications: *"[…] The provisions of this paragraph shall correspondingly apply to notifications […]"*

An example of a notification subject to section 12 is e.g. the termination of a living premises agreement, which according to the Act on Lease of Living Premises[476] (section 54) must be done in writing, and which can therefore also be done electronically following the provisions of section 12.

A party could only reject an electronic notification if the parties had agreed earlier that notifications must be done (for example) in paper form. Otherwise, without additional formal requirements agreed by the parties, it would not be possible to reject electronic

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[474] Hallituksen esitys (Government proposal) 194/2001, p. 39; see http://www.eduskunta.fi/triphome/bin/utaveps.scr?%7BKEY%7D=HE+194%2F2001

[475] Mika Hemmo, Sopimusoikeus I (1997), p. 129-131.

[476] In Finnish *Laki asuinhuoneiston vuokrauksesta* (95/481); http://www.finlex.fi/fi/laki/smur/1995/19950481

notifications. Of course, it might be possible to reject notifications on other grounds, for example on the ground that the notification was sent to a wrong e-mail address.

If the termination of an agreement is not subject to any formal requirements, for example the termination of a distribution agreement, then the termination notice is not subject to section 12, and it would suffice for the terminating party to be able to prove that termination has taken place, in whatever form it may have taken.

The Act on Electronic Services and Communication in the Public Sector has not introduced an electronic registered mail[477] system.

Finland has not implemented a generic framework for electronic archiving.

Finnish case law regarding electronic trade is rare indeed. There do not seem to be any Supreme Court cases regarding electronic agreements. However, in Supreme Court case 2005:3 the Supreme Court addressed the issue of electronic notifications in court proceedings. In this matter, a party notified his dissatisfaction with a judgment by sending an email message to the email address of the district court, within the statutory time limit. However, due to a technical mistake the court's email server did not receive the mail on time. Because reliable evidence could be provided concerning the time of sending, the Supreme Court ruled that the notification should be accepted.

B.1.2. Transposition of the e-commerce directive

The eCommerce directive has been transposed into Finnish national law by the Act on Provision of Information Society Services. The rules related to distant commercial communications has however been implemented through a number of specific laws, like the Consumer Protection Act[478] and the Act on Unfair Activities in Business[479] which deal in detail with such issues.[480] Also the Act on the Protection of Privacy in Electronic Communications[481] must be taken into account.

A number of legal issues in Finland were already in accordance with the requirements of the eCommerce directive, even before the entry into force of the Act on Provision of Information Society Services. For example, there were (and still are) no license-, registration- or notification requirements which had to be abolished in accordance with the e-commerce directive.[482]

Regarding exclusions of the law's scope, according to section 4 of the Act on Provision of Information Society Services the act shall not, amongst others, apply to activities of notaries public and of similar professionals which rely on the use of public authority, or to lottery operations against payment. As already mentioned above, contracts

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[477] The legal department of the Finnish post had not heard of any provisions regarding electronic registered mail elsewhere in legislation.

[478] In Finnish *Kuluttajansuojalaki* (38/1978); http://www.finlex.fi/fi/laki/ajantasa/1978/19780038

[479] In Finnish *Laki sopimattomasta menettelystä elinkeinotoiminnassa* (1061/1978); http://www.finlex.fi/fi/laki/ajantasa/1978/19781061

[480] Hallituksen Esitys (Government proposal) 194/2001, p. 14.

[481] In Finnish Sähköisen viestinnän tietosuojalaki (516/2004); http://www.finlex.fi/fi/laki/ajantasa/2004/20040516

[482] Hallituksen Esitys (Government proposal) 194/2001, p. 19.

concerning a property deal or any other transfer of a property or a contracts relating to family or estate law cannot be concluded in electronic form.

Otherwise, the Finnish legal system has determined in the Act on Provision of Information Society Services (above mentioned section 12) how formal requirements can be fulfilled in an electronic context.

When it comes to specific requirements with regard to the use of electronic signatures, the relevant piece of legislation is the Act on Electronic Signatures[483]. The Act makes a distinction between electronic signatures and advanced electronic signatures. According to section 2 of the Act the electronic signature is defined as any data in electronic form which is attached to or logically associated with other electronic data and which serves as a method of authenticating the identity of the signatory. An advanced electronic signature in turn is defined as an electronic signature which is uniquely linked to the signatory, which is capable of identifying the signatory, which is created using means that the signatory can maintain under his sole control and which is linked to other electronic data in such a manner that any subsequent change of the data is detectable.

B.2 Administrative documents

When it comes to administrative documents, a specific law has been enacted, the Act on Electronic Services and Communication in the Public Sector. The objective of the Act is to streamline and enhance services and communication as well as to improve information security in the administration, in the courts and other judicial organs and in the enforcement authorities by promoting the use of electronic data transmission (section 1).

Regarding the scope of the Act (section 2), it applies to the lodging of administrative, judicial, prosecutional and enforcement matters, to the consideration and to the service of decisions of such matters by electronic means, unless otherwise provided by statute. The Act also applies, wherever appropriate, to other activities of the authorities.

Judicial matters include matters considered by general courts, administrative courts and special courts. Judicial matters also entail appeals in administrative matters, even when such appeals are considered by administrative authorities or other judicial organs. Furthermore, the Act applies to electronic services and communications in cases, where the consideration of an administrative matter has been assigned to someone other than a public authority, and when trial documents may be delivered to a person ordered by court to receive such documents.

The Act does not apply to preliminary investigations or police inquiries. Separate provisions apply to electronic services and communication in the Evangelical Lutheran Church of Finland.

The central part of the Act is section 9, which states that:

> *"In the lodging and consideration of a matter, the required written form is also met by an electronic document delivered to the authorities. If a signed document is required in the lodging or consideration of a matter, an electronic signature referred to in section 18 of the Act on electronic Signatures meets the requirements for signature.*

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[483] In Finnish *Laki sähköisestä allekirjoituksesta* (14/2003); http://www.finlex.fi/fi/laki/ajantasa/2003/20030014

An electronic document delivered to the authorities does not have to be signed if the document includes sender information and there is no uncertainty about the originality or integrity of the document. If an electronic document delivered to the authorities includes a clarification of the authority of an agent, the agent does not have to deliver a power of attorney. However, if there is uncertainty about the agent's authority or the scope of the authority, the authorities may order the agent to deliver a power of attorney."

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

In Finland bills of exchange are regulated by a specific Act on Bills of Exchange[484]. The latest amendments to the Act have been introduced in 1993, which in practice means that the Act does not acknowledge or explicitly regulate electronic bills of exchange.

Since the Act does not acknowledge electronic bill of exchange, it neither expressly allows nor expressly prohibits them. The assumption of the Act (section 1) is that bill of exchange is in writing. In addition, the signature of the drawer of the bill is required.

Even if Act on Bills of Exchange does not expressly regulate electronic bills of exchange, the aforementioned Act on Provision of Information Society Services together with the Act on Electronic Signatures seem to allow electronic bill of exchange.

Firstly, according to the above introduced section 12 of the Act on Provision of Information Society Services, if a contract must be concluded in writing according to the law, this requirement is also met by an electronic contract with contents that cannot be unilaterally altered, and which remain accessible to the parties. If a contract must be signed according to the law, the separate provisions on electronic signatures shall be applied.

Secondly, according to section 18 of Act on Electronic Signatures if the law requires that a signature be attached to a legal act, this requirement shall be fulfilled at least by an advanced signature based on a qualified certificate and created by means of a secure signature creation device.

Therefore, when it comes to written form and signature requirement of bills of exchange, Finnish legislation does seem to enable use of electronic bills of exchange.

In practice bills of exchange are not commonly used.[485]

Also, in practice one might expect endorsement of an electronic bill of exchange could cause some difficulties. Protesting an electronic bill of exchange could also cause some difficulties since according to the Act (section 90) the original bill of exchange is needed when it is protested.

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[484] In Finnish *Vekselilaki* (242/1932).

[485] Verified through telephone contacts with Nordea Bank, 13 June 2006.

C.1.2. Documentary credit

As in most European countries, there are no explicit laws regulating documentary credits in Finland. Documentary credit operations are subject to general principles of contract law, and, if so agreed, to ICC's Uniform Customs and Practice for Documentary Credits (UCP).

As was mentioned above, Finnish contract law has a starting point that binding agreements can be concluded in any form, unless law requires some formalities. Therefore, the Finnish legal system provides a good legal platform for use of electronic documents in letter of credit operations.

In Finland a documentary credit application can be done through electronic banking means. The correspondence between banks (for example issue of the documentary credit from issuing bank to advising / confirming bank) in documentary credit operations takes place in the form of SWIFT messages. In Finland banks may advise the beneficiary about issues regarding documentary credit in electronic means. As explained elsewhere in this report, electronic invoices and electronic bills of lading are a reality in Finland.

In practice, however, almost always the beneficiary has to present the required documents (invoices, bills of lading, insurance documents, certificates of origin, etc) in paper form. The reason for this state of things is usually the other (non-Finnish) party in documentary credit operations. Typically documentary credits are used in trade with various Asian, Middle Eastern, African and South American countries where electronic commerce is not necessarily as developed as in Finland.[486],[487]

C.2 Transportation of goods: Bills of Lading

Bills of lading are regulated by the Maritime Act[488], which sets detailed requirements for the contents of bills of lading (chapter 13, section 46). It is expressly said in the Act that the signature in the bill of lading can be made either mechanically or electronically.

In practice electronic bills of lading are used to some extent in Finland. Because of some data security risks, electronic bills of lading have not become the dominant form of bills of lading.

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[486] Telephone contacts with Nordea Bank, 13 June 2006.

[487] Of course there are exceptions, like Singapore.

[488] In Finnish *Merilaki* (674/1994); http://www.finlex.fi/fi/laki/ajantasa/1994/19940674

C.3 Cross border trade formalities: customs declarations

The system of filing electronic customs declarations has been implemented and made accessible to the end users in Finland.[489]

Customs declarations are often filed jointly with various other documents, and the question arises whether these documents might also be filed in electronic form. The relevant legal rule in this connection is the (above introduced) Act on Electronic Services and Communication in the Public Sector (section 9):

> *"[…] An electronic document delivered to the authorities does not have to be signed, if the document includes sender information and there is no uncertainty about the originality or integrity of the document. If an electronic document delivered to the authorities includes a clarification of the authority of the agent, the agent does not have to deliver a power of attorney. However, if there is uncertainty about the agent's authority or the scope of the authority, the authorities may order the agent to deliver a power of attorney."*

Accordingly, customs authorities would judge attached electronic documents with certain flexibility. If there is no reason to doubt the identity of the sender or originality of the electronic document, customs authorities should accept the application.[490]

It is also worth noticing that Finnish customs[491] has started a development project in order to enable a more comprehensive utilization of internet technology when dealing with customs authorities.[492]

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

The Finnish Value Add Tax Act[493] (section 209b) says that subject to the permission of the recipient an invoice may be delivered electronically.

There are no specific requirements for electronic invoices. It is also noteworthy that there are no requirements in Finland that invoices should be signed. In fact, the part of article 2 of the Council Directive 2001/115 which says that "Invoices may, however, be sent by other electronic means subject to acceptance by Member State(s) concerned" was introduced at the request of Finland.[494]

According to the Accounting Act[495] (chapter 2, section 9) the receipts of the financial year can be permanently stored in other European Union member state as an electronic copy,

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[489] http://www.tulli.fi/fi/06_Sahkoinen_asiointi/index.jsp

[490] Telephone interview with the legal department of Finnish Customs.

[491] In Finnish *Tulli.*

[492] http://www.tulli.fi/fi/06_Sahkoinen_asiointi/index.jsp

[493] In Finnish *Arvonlisäverolaki* (1993/1501); http://www.finlex.fi/fi/laki/ajantasa/1993/19931501

[494] Telephone interview with the Ministry of Finance official.

[495] In Finnish *Kirjanpitolaki* (1997/1336); http://www.finlex.fi/fi/laki/ajantasa/1997/19971336

provided that an online computer connection to them can be guaranteed and that the data can be converted into human readable written form.

According to the Accounting Act (Chapter 2, section 10) the receipts of the financial year must be maintained not less than six years calculated from the end of the year within which the financial year has ended. If the invoices were sent in electronic form, they can also be archived in electronic form.

C.4.2. Electronic accounting

According to chapter 3 section 8 of the Accounting Act, final accounts, the annual report, the list of books of accounts and species of receipts as well as information about the nature of their storage must be written into a bound or immediately after preparation of the annual accounts to be bound balance book, whose pages must be numbered.

Also, chapter 3 section 7 requires that documents mentioned in section 8 must be signed.

Those documents must therefore be in paper form. Therefore, Finnish legal system does not allow fully electronic accounting.

Regarding depositing annual accounts to the trade register, the Accounting Act (chapter 3 section 9) spells out obligation to submit annual accounts to the trade register. Amongst others, such obligation is set for all limited liability companies. Currently, annual accounts must be deposited in a paper form. The trade register does provide a model application form on its home page.[496]

Although electronic deposit is not possible at the moment, it is likely that it will be introduced within the next few years.[497]

D. General assessment

D.1 Characteristics of Finnish e-commerce Law

- The Finnish legal system seems to offer a fairly good platform for electronic commerce, since it places little emphasis on formalities: formal requirements in contract law are small in number; there are no requirements that invoices should be signed; there are no language laws which would say that agreements should be concluded in national languages (Finnish / Swedish). All of these features are of course unintended consequences of a legal tradition which was developed long before the launch of electronic commerce.
- But in addition to having created a general legal framework which is suitable for electronic commerce, public authorities actively support development in the field of information technology. A good example is that the previous government listed

[496] http://www.prh.fi/fi/tilinpaatokset/lomakkeet.html

[497] Telephone interview with trade register lawyer, 12 June 2006.

the development of a beneficial legal framework for information society, e-business and communications services as one of its main objectives.[498]

- A contract law system which places little weight on formalities, a pro-active approach of public authorities, together with the advanced information technology industry cluster, makes Finland a reasonably good environment for the development of e-commerce activities.

D.2 Main legal barriers to e-business

- Interoperability is a key concern, as development in many other countries may not be as advanced as in Finland. A good example of this is the aforementioned documentary credit operations, where the bottleneck to use of electronic trade documents is not in Finland. This together with the fact that Finland is a small country with a substantial amount of trade with foreign countries, very evidently means that Finnish companies are not able to fully exploit the existing legal and technical infrastructure to the full extent.
- The limited court practice regarding the interpretation of e-commerce laws could also prove to be a negative influence on the development of e-commerce practices, as it could leave the parties concerned uncertain with regard to their legal position in cases involving complex technical issues.
- Too strict consumer protection legislation may also be one possible legal barrier to e-business according to many of the persons interviewed for the purposes of this study.

D.3 Main legal enablers to e-business

- As said above, the Finnish legal environment is beneficial for the e-business and a lack of legal certainty / insufficient legal framework cannot be considered to be an obstacle for further development of e-business.
- Particularly the absence of burdensome formal requirements in contract law, the absence of requirements that invoices should be signed and a possibility to deliver unsigned electronic documents to the authorities considerably facilitate use of electronic means.
- Finland has also implemented the relevant European Union Directives; the eSignature directive (1999/93) through the Act on Electronic Signatures; and the eCommerce directive (2003/31) mainly through Act on Provision of Information Society Services. In addition, the Act on Electronic Services and Communications in the Public Sector makes it possible to communicate with public authorities through electronic means.

[498] Hallituksen Esitys (Government proposal) 17/2002, p. 4.

France National Profile

A. General legal profile

France is a Republic consisting of 25 regions[499] (including extra-metropolitan regions). At a lower administrative level, France comprises 100 provinces[500] and 36,680 municipalities[501]. France has a centralized government, although its regions, provinces and municipalities may derive benefits from the central government while maintaining a certain degree of autonomy.

Commerce and contract law regulation are generally incorporated into the Civil Code[502] and Code of Commerce[503], issued from the Napoleonic codification.

As a result, eCommerce is regulated through the Civil Code and a number of specific laws[504], ordinances[505] and decrees[506].

Disputes regarding civil contractual relations are typically handled by three different and complementary jurisdictions: the Proximity Judge[507], the District Court[508] and the Higher District Court[509]. The Proximity Judge[510] deals with matters with a financial value of €4.000 or less. The District Court[511] deals with matters with a financial value of € 10,000 or less and with consumer credits of a value of € 21,346.86 or less. The Higher District Court[512] deals with matters of higher value and matters relatives to real estate, family law, marital status and trademarks and patents. Disputes among merchants or concerning transactions governed by commercial law are dealt with by the Commercial Court[513]. Appeals against theses resolutions can be lodged with the Court of Appeal[514]. The Supreme Court[515] only hears points of law. The French system of jurisprudence does

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[499] *Régions*

[500] *Départements*

[501] *Communes*

[502] *Code Civil ;* http://www.legifrance.gouv.fr/WAspad/UnCode?code=CCIVILL0.rcv

[503] *Code de Commerce ;* http://www.legifrance.gouv.fr/WAspad/UnCode?code=CCOMMERL.rcv

[504] *Lois*

[505] *Ordonnances*

[506] *Décrets*

[507] *Juge de proximité*

[508] *Tribunal d'Instance*

[509] *Tribunal de Grande Instance*

[510] *Juge de proximité*

[511] *Tribunal d'Instance*

[512] *Tribunal de Grande Instance*

[513] *Tribunal de Commerce*

[514] *Cour d'Appel*

[515] *Cour de Cassation;* http://www.courdecassation.fr/

not have any binding power of precedent, although resolutions of the Supreme Court are highly authoritative and only very rarely disregarded.

B. eCommerce regulations

The last few years, the French legal system regarding means of proof and contracts has been deeply revised for its adaptation to the new requirements of commercial relations within an electronic environment, largely following the rules established by jurisprudence and the opinion of doctrine. In this section, the main tenets of French new regulation regarding the legal value of electronic documents will be briefly commented.

B.1 eCommerce contract law

B.1.1. General principles

Regarding the validity of electronic contracts, the French law has opted to follow the UNCITRAL recommendations on electronic commerce, agreed in 1996, based on the functional equivalence between written and electronic documents. This equivalence ruled by the model law focused on two aspects: relative to the document, the identification of the author and the guarantee of its integrity as a reliable process of creation and conservation; and relative to the signature, the imputability of the document to its author. This approach had already been maintained by French doctrine and jurisprudence since the eighties[516].

Barring certain more formal types of contracts, neither civil nor commercial law require the existence of a written document to form a valid contract, and both focus on consensus between parties regarding the essential elements of a contract. However, civil law limits the evidence which can be produced by the parties relative to contracts with a financial value of € 1,500 or higher[517] to written documents, confessions and sworn declarations[518]. The result of this provision is that disputes relative to the validity of a contract are generally about the possibility of submitting a proof of its existence. This has lead to a monopoly of written documents as a means of proof. Therefore, the principal issue for an effective use of electronic documents will depend on its ability to compete with written documents as a contractual means of proof.

In the past, the law did not specify paper as a mandatory carrier of a written document to be valid, but it focused on other qualities which this document should display in order to be accepted by the judge as valid evidence. In those cases, it has been mostly up to doctrine and jurisprudence to interpret legislation in conformity with the progresses of new technologies.

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[516] See Eric Caprioli, *Le juge et la preuve électronique*, www.caprioli-avocats.com, Juriscom.net, 2000, text presented to the Congress of Strasbourg, "Le commerce électronique : vers un nouveau droit", 8-9 octobre 1999.

[517] Decree n° 2004-836 of August, 20th, 2004, art. 56 amending decree n° 80-533 of July, 15, 1980 in application of Civil Code article 1341.

[518] Proofs admitted by Civil Code articles 1356 and following, 1361 and following are: documents, confession and sworn declaration.

French jurisprudence has been able to "absorb" new technologies into the scope of law, thus solving the problem of recognition of non written documents on the basis of the functional equivalence principle, requiring that a document display the qualities that traditionally may be expected from paper writings, regardless of its form. The Supreme Court[519] admitted in 1997, about the legal validity of a telecopy as written evidence, that a document could be immaterial and yet perfectly valid for proof. It acknowledged that a contract could be submitted on whatever carrier on condition that its integrity and imputability were respected. This implies that the document must be intelligible (i.e. the document must be readable and understandable for a human person, and not solely for a machine), difficult to alter (i.e. unchangeable to a significant degree) and durable (i.e. could be preserved for a certain period of time). Electronic documents have been admitted as written evidence on the same basis of paper-based document in a number of case law in matters of credit cards contracts.

As mentioned above, this evolution has been formally acknowledged within French legislation itself, through the transposition law[520] of the eSignature Directive, which has modified the Civil Code. Written evidence is now defined independently of the carrier. Article 1316 stipulates that "Documentary evidence, or evidence in writing, results from a sequence of letters, characters, figures or of any other signs or symbols having an intelligible meaning, whatever their medium and the ways and means of their transmission may be".

The only conditions required by an electronic document to be acknowledged as a written document consist of the possibility of identifying its author, and assuring its integrity over a certain period of time (art. 1316-1 Civ. Code). This implies that the conservation of the document must be active, that is to say, they must be adapted to the evolution of state-of-the-art technology (i.e. the level of security required for an encrypted document could be increased through the years) in order to provide the same guarantees when producing it in a trial than existed when it was created.

The identification of the author of a document is traditionally based on the existence of a signature. The use and legal validity of electronic signatures has been acknowledged in French jurisprudence since 1989[521], in the context of credit card contracts, when the Supreme Court deemed, with regard to the secret code, that this process presented the same guarantees as the written signature, which may be more limited than the secret code which is only known by the card owner. Nevertheless, French legislation only added this possibility in 2000. Following the enactment of the eSignature Directive, article 1316-4 establishes a presumption of validity of the electronic signatures which meet certain requirements (the secure signature)[522]. In other cases, the party who presents an electronic document signed with a non advanced electronic signature has to prove its reliability.

In French evidence law, paper-based documents have always had a monopoly. However, the acknowledgement of other means of proof with equal legal value could generate evidence conflicts which were not possible in the past. In order to solve this situation, the Law introduced the possibility that the parties reach an agreement relative to the

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[519] Resolution of Supreme Court, Commercial Chamber, December, 2nd, 1997.

[520] Law nº 2000-230 of March, 13th, 2000

[521] Supreme Court, Civ. 1st., Sté Crédicas, November, 8th 1989.

[522] Decree nº 2001-272 of March, 30th 2001, in application of Civil Code article 1316-4 and relative to electronic signature.

means of proof admitted in case of dispute. An evidence settlement allows parties to agree about the validity of certain means of proof and the contractual value of the documents they exchange, and therefore about the ways of conservation of such acts. This type of agreement has been admitted by the jurisprudence since 1989, and is frequently used by professionals and in credit card contracts. However, the Law does not provide the conditions of validity of such conventions and leaves the judge with the task of solving the problem of legal equivalence of contrary documents by means of the application of the principle of likelihood. Article 1316-2 (Civ. Code) stipulates that: "Where a statute has not fixed other principles, and failing a valid agreement to the contrary between the parties, the judge shall regulate the conflicts in matters of documentary evidence by determining by every means the most credible instrument, whatever its medium may be". This disposition gives a large power of appreciation to the judge for determining which type of proof must prevail, and deciding which is more likely to reflect reality.

The reform has been completed by the transposition law[523] of eCommerce directive. The equivalence of both types of documents has been extended to those which require a written document *ad validatem*. Article 1108-1 (Civ. Code) stipulates that: "Where a writing is required for the validity of a legal transaction, it may be established and stored in electronic form in the manner provided for in Articles 1316-1 and 1316-4 and, where an authentic instrument is required, in Article 1317, paragraph 2." The only contracts in which the paper-based document remains mandatory are: instruments under private signature relating to family law and successions, and instruments under private signature relating to suretyship or property charge, of commercial or non-commercial character, except where they are drawn up by a person for the needs of his occupation (article 1108-2).

A written document is required *ad validatem* by the legislation for the completion of the contract in order to protect the weaker party to the agreement. The problem of the functional equivalence was more complicated to solve when the law required not only a written document, but also a specific format of this document, such as a registered letter, removable voucher, or the creation of various originals documents. The transition from paper-base environment to an electronic one has recently been solved by an Ordinance[524] which includes the modalities of transposition to electronic documents of specific formats required for paper-based documents.

The third and last step in the modernisation of contractual law has consisted of the admission of the electronic documents for the issuing and storage of qualified documents. Two decrees regulate the use of electronic documents by clerks and bailiffs, as detailed below[525]. Article 1317 (Civ. Code) stipulates that: "An authentic instrument is

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[523] Law 2004-575, of June, 21st 2004 for the reliability in digital economy, (*Loi 2004-575, du 21 juin 2004 pour la confiance dans l'économie numérique).* See also http://www.foruminternet.org/publications/lire.phtml?id=734

[524] Ordinance nº 2005-674 of June, 16th, 2005, relative to the achievement of certain contractual formalities by electronic means (*Ordonnance relative à l'accomplissement de certaines formalités contractuelles par voie électronique*).

[525] Decree nº2005-973, of August, 10th 2005 amending decree nº71-941 of November, 26 1971 relative to acts issued by clerks and Decree 2005-972, of August,10th 2005 amending decree nº 56-222 of February, 29th 1956 in application of Ordinance of November, 2nd 1945 relative to bailives statutory *(Décret 2005-973 du 10 août 2005 modifiant le décret nº 71-941 du 26 novembre 1971 relatif aux actes établis par les notaires and Décret 2005-972 du 10 août modifiant le décret nº56-222 du 29 février 1956 ptis pour l'application de l'ordonnance du 2 novembre 1945 relative au statut des huissiers de justice*).

one which has been received by public officers empowered to draw up such instruments at the place where the instrument was written and with the requisite formalities. It may be drawn up on an electronic medium where it is established and stored in conditions fixed by decree in the *Conseil d'État*[526]."

Therefore, paper and electronic documents are conferred the same probative value and must receive the same treatment by a judge. Article 1616-3 of the Civil Code stipulates that: "An electronic-based writing has the same probative value as a paper-based writing".

Regarding commercial law, French legislation is extremely flexible. Article L-110 of the French Code of Commerce does not establish any limit to the evidence that can be produced in a trial. Commercial relations have proven themselves adaptive to the use of electronic documents as a means of proof with the same strength as paper-based documents, as in the use of evidence conventions to regulate their relations. As mentioned above, the most important judgment relative to the acknowledgement to electronic document as written evidence was issued by the commercial chamber of the Supreme Court about a telecopy (fax). The nature of commercial relations, which require a quick and easy exchange of documents, has resulted in an insistence on introducing electronic evidence easier and earlier than in civil relations. Therefore, in commercial affairs, electronic documents can be invoked as evidence in the same conditions as in civil matters.

In French law, notifications can only be done by an ordinary and registered letter, and by handing over through a clerk of court or by a bailiff. Notifications can not be sent purely by fax nor by email. However, as mentioned above, a new decree allows a bailiff the use of electronic documents. The first original must be created on a paper-based carrier and have to be handed over to the recipient. The second original can be created by electronic means and transmitted to the person who has requested the notification of the act by the same way of communication, if it guarantees its confidentiality, integrity, the identity of the originator and the recipient. The bailiff can also create a notification or an execution act on a paper carrier from a qualified electronic document. For the creation of qualified electronic documents, the bailiff has to use a secure electronic signature. Law allows the digitalization of an appendix created on a paper basis if the process guarantees its identical reproduction. The date can not be certified by a time-stamping process but has to be mentioned in letters in the electronic act itself before its signature by the bailiff. Its conservation must guarantee the integrity and the readability of the act, and the Law will limit the amount of time which can elapse before its delivery to the central authorities to be filed.

Therefore, despite the rigidity of the law about notifications, a first step to a larger use of electronic document in the judicial communications has been taken through the possibility of electronic notifications. It is to be expected that when the application decree relative to the conditions that registered emails have to meet in order to be equivalent to registered letters is passed (see below), they will be able to be used as valid notifications.

Unlike notifications, contractual communications have been largely opened to electronic documents through the transposition law of the E-commerce Directive and the application norms. They have introduced a special section in the Civil Code about electronic contracts, acknowledging the legal validity of electronic communications in a contractual process. The ordinance relative to the achievement of certain contractual

[526] http://www.conseil-etat.fr/

formalities by electronic means[527] has introduced a new article 1369-9 which recognizes the validity of the handing over of an electronic document if the recipient could acknowledge its reception and its content.

The parties can transmit contractual information by electronic means in order to conclude or execute contractual obligations but only if the other party has previously agreed to this form of notification. In the context of commercial relations, this condition is more flexible and the communication of the email address is a necessary but sufficient condition for the transmission of contractual information by this mean.

However, in order to determine with certainty the date of the shipment of products, a third party will be included into a process of time-stamping, which must meet certain conditions of reliability to be determined by decree, not published yet.

These dispositions do not require the sender to sign his emails but, as mentioned above, if the validity of the document is impugned, the party will have to prove the identification of the author, the integrity of the document and the imputability of the document to his author.

The law also recognises the possibility to send a registered email if it complies with certain legal conditions (Civ. Code, article 1369-8 and 1369-9), fixed by a decree not published yet. To be valid, the registered email must be sent by a third party through a process which permits to identify the third party, the sender, the recipient and the handing over. In contractual relations which involve a non professional party, the recipient must have agreed to such process of notification before the communication. The acknowledgment of receipt can be sent by electronic means. Additionally, the law made the validity of the communication conditional upon the acknowledgment of the letter by the recipient, and if the communication has to be read, the electronic handing over is considered as equivalent to the reading.

Following the principle of functional equivalence between paper-based documents and electronic documents present in all the regulation of electronic documents, the law has transposed the requirements of registered paper based-letters to an electronic environment: identification of the sender, guarantee of the identity of the receiver and of the handing over.

The lack of application decrees specifying the conditions for the validity of such communication is not an obstacle to recognize the same legal validity to ordinary and registered letters and emails on the condition that legal requirements for the validity of such communications in a paper-based environment are respected.

As mentioned above, French law does not consider a paper-based carrier as a condition of legal validity. Therefore, if the email meets the requirements of articles 1316-3 and 1316-1 Civ. Code, it can be valid as written evidence: identification of the sender, guarantee of the integrity of the act in the moment of its creation, reliability of the process which created the document, or the time-stamping.

The identification of the issuer may be done by any means, but the more common method will be the use of an electronic signature which has to be secured to benefit from the legal presumption. If an advanced electronic signature is not used, the reliability of the process will have to be proven. Nevertheless, many firms offer reliable processes, accredited through technical and legal audits, of electronic signatures even though they are not secure signatures. Moreover, as mentioned above, the parties may

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[527] *Ordonnance relative à l'accomplissement de certaines formalités contractuelles par voie électronique*; Ordinance nº 2005-674, of June, 16th 2005.

agree on an evidence agreement which acknowledges this type of communication between them. This kind of convention will avoid the required reply to registered emails by the parties from the moment it was admitted as communication system[528].

Although French legislation includes some provision regarding the archiving of electronic documents in some cases such as e-invoicing or qualified documents, it has not implemented a general framework relative to the conditions of filing in order to guarantee the possibility to present an electronic document as written evidence. This lack of development is an important issue because some provisions mandate the filing of some electronic documents (i.e. article L134-2 Consumer Code[529], which require the archiving of contracts concluded by electronic means with a value of € 120 or more). As long as theses modalities are not developed clearly, they will constitute a barrier to the effective application and use of electronic documents. A judge will always have the possibility to deny the validity of an electronic document as written evidence because it does not meet the requirement of reliability.

If eInvoicing archiving provisions can not be generalised because of the specific character of these type of documents, some other voluntary norms can serve to establish some general patterns. Therefore, we can refer to the Z42-013 AFNOR norm[530] and the CNIL consideration[531] relative to electronic archiving in corporations. The AFNOR norm has been criticized for its burdensome rules which render it little effective, but it supplies a whole group of specifications regarding the technical and organizational measures to be implemented in order to guarantee the archiving and the integrity of the electronic documents. The CNIL consideration is less technical and focuses on archiving from the perspective of the integrity of personal data, providing general guidelines for the filing.

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[528] See, Isabelle Renard, *Les emails recommandés ont-ils valeur légale ?*, Le Journal du net, 21 mars 2006.

[529] *Code de la Consommation;* http://www.legifrance.gouv.fr/WAspad/UnCode?code=CCONSOML.rcv

[530] AFNOR (French Normalization Association - *Association Française de Normalisation*), « Specifications relative to the computer-based systems conception and explotation in order to guarantee safeguarding and integrity of documents stored in these systems » (« *Spécifications relatives à la conception et à l'exploitation de systèmes informatiques en vue d'assurer la conservation et l'intégrité des documents stockés dans ces systèmes*"), published in 1999, july and revised in 2001, december.

[531] CNIL (Commission National de l'Informatique et des Libertés), Declaration nº 2005-213 od October, 11th 2005 in adoption of a recommendation relative to data protection electronic filing modalities, in private sector. (*Délibération n° 2005-213 du 11 octobre 2005 portant adoption d'une recommandation concernant les modalités d'archivage électronique, dans le secteur privé, de données à caractère personnel*).

B.1.2. Transposition of the eCommerce directive

The transposition of the e-commerce Directive into French legislation has enabled the regulation relative to distant commerce to evolve into the context of electronic commerce, from a consumer centric approach to a broader conception of electronic exchanges which include commercial relations. Until the entry into force of the Law for reliability in the digital economy[532], French legislation relative to distant contracting was regulated by the Civil Code and the Consumer Code[533]. Through the influence of the eCommerce directive, the scope of the legislation has evolved and applies to "economic activities by which a person offers or provides goods and services at a distance and by electronic means" (article 14). This new regulation would be applied to every contractual relation established through electronic means and would provide some specific and more flexible provisions with regard to professionals. It has integrated the same exclusions as those in the eCommerce directive (the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority, the representation of a client and defence of his interests before the courts, gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions).

The eCommerce Law and the Ordinance relative to the achievement of certain contractual formalities by electronic means[534] have established a brand new framework for electronic exchanges. Moreover it declares electronic documents admissible even when the documents are required for the validity of the document.

This Ordinance was supposed to extinguish the main legal obstacles relative to formalism for the development of electronic contracts in digital economy. In French Law, there are about 60 Codes and a series of non codified texts which acknowledge formal requirements (either for the purposes of evidence or validity), which is a great burden on the development of commercial exchanges. The formal requirements which have been translated to an electronic environment are: original, exemplary (art.1325 CC), registered letter, ordinary letter, date stamp, "back page" and removal form. The approach has been to transpose these requirements to an electronic equivalent on the basis of equivalent legal function, whatever the carrier of the document may be.

As mentioned above, registered letters are indispensable tools in the activities of an enterprise, and registered emails and the possibility of using electronic ones will certainly facilitate electronic communication and reduce the costs when the decree will be approved[535].

The Law only excludes from the scope of this regulation any private acts relative to family law and successions, private acts relative to personal and real estate guarantees,

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[532] Law 2004-575, of June, 21st 2004 for the reliability in digital economy, (*Loi 2004-575, du 21 juin 2004 pour la confiance dans l'économie numérique)*

[533] Marc lolivier, Preface of « *Le nouveau droit du commerce électronique* », Thibault Verbiest, Larcier, ed. LGDJ, 2004.

[534] *Ordonnance relative à l'accomplissement de certaines formalités contractuelles par voie électronique*; Ordinance n° 2005-674.

[535] *Eric A. Caprioli, Avocat à la Cour, Caprioli & Associés,* www.caprioli-avocats.com, *L'ordonnance n°2005-674 du 16 juin 2005 : un nouveau formalisme contractuel pour les échanges électronique, september 2005.*

either civil or commercial. Theses contracts have to be concluded on a paper-based document (art. 1108-2 Civil. Code).

On-line contracts are broadly open to commercial relations, although their regulation may differ from that for off-line contacts. A relative novelty in the legal responsibility system has to be mentioned, which was introduced by the eCommerce law with regard to remote contracts, and which could constitute an obstacle to undertaking this type of contractual process in commercial relations. Article 15 of the eCommerce law establishes a full responsibility of the service provider in the execution of the contract, even if part of the obligations have to be executed by third parties. The service provider can only be exonerated when he proves that the deficient execution is due to the service recipient, to an insurmountable and unforeseeable act of a third party, or to *force majeure*. The final result is an extension of the protection of the recipient of professional services but a disadvantage for the service provider who is contracting remotely, and who will have to answer in case the other implied parties (whose responsibility he will always be able to engage) fail to fulfil their part of the execution. Some jurisprudence has recognized the responsibility of an ISP for the impossibility to provide Internet access because of poor commercial relations with the carrier. The actual system of responsibility is less strict and based on due diligence or on fault.

B.2 Administrative documents

The increment of flexibility obtained through the dematerialization of written documents in the context of contractual law could be stopped by administrative burdens. The relations between the Public Administration and its users are usually considered as slow due to the enormous bureaucratic burden. The profusion of paper-based documents used to qualify these relations; therefore, the promotion of the use of electronic documents is aimed at giving more efficiency, transparency and an easier access, to relations between the Authorities and their user.

Yet, in the past decade, the law has established the possibility of electronic communication for invoices, declarations of exchange of goods in customs entry and, in wider sense, for every communication from a company to the administration when accepted on a contractual basis. However, it did not admit the use of electronic documents.

In order to guarantee a more flexible and efficient environment to French administrative users, the government created a first plan of action in 2002 with the aim of "giving a new impulse to the Information society" and created an Agency to take responsibility for the development of eAdminsitration (ADAE[536]). As a consequence of its work, a simplification law has been passed in 2004[537] and an Ordinance relative to electronic communications between users and administrative bodies[538] in 2005.

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[536] See also http://www.adele.gouv.fr/

[537] Law nº2004-1343 of Decembre, 9th 2004, of simplification of the law - *Loi n°2004-1343 du 9 décembre 2004, de simplification du droit*. See http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=FPPX0400010L

[538] Ordinance nº2005-1516, of Decembre, 8th 2005 relative to electronic exchanges between public agencies and users - *Ordonnance nº2005-1516 du 8 décembre 2005 relative aux échanges électronique entre les usagers et les autorités administratives.* See http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ECOX0500286R

The Ordinance establishes the equivalence between electronic and ordinary mail, the possibility of communicating with public administrations by electronic means, the creation of a special electronic space for users in order to send any required documentation, and the possibility for administrative bodies to use electronic signatures. The French Administration has developed a set of "teleprocesses" which allow citizens and companies to exchange documents by electronic means with the Administration in matters such as fiscal and social declarations, and creates a secured environment in order to fulfil some mandatory declarations online. For certain processes, such as the VAT declaration, some companies are required to use electronic declarations.

Some of the information related to Public Procurement can be sent to companies by electronic means, as well as the candidature and offers, through the use of electronic signatures[539]. Electronic public biddings might be organised by administrative bodies in order to purchase certain supplies.

France has begun a large process to allow the use of electronic documents between the administrative user and the administration, and among the public agencies in order to reduce bureaucracy, but for the moment, it remains limited to a select few types of declarations.

C. Specific business processes

In this section of the study, we will take a closer look at certain documents more specific to business relations in an international context. The hindrances related to the use of paper-based documents reduce the profitability and competitiveness of European companies. In many cases, it constitutes an economic barrier to the entry of SMEs in international commerce. The present section will assess this issue from a legal perspective.

C.1 Credit arrangements: Bills of exchange and documentary credit

Bills of exchange and documentary credits have been selected from commercial and negotiable documents because of their importance within international commerce. Moreover they offer certain legal characteristic which can hinder the use of electronic documents. The written form is demanded not only for a matter of evidence (*ad probationem*) but also for the legal validity of the document itself (*ad validatem*): the right of the owner is materialised by the document. The use of electronic documents is more debatable for documentary credit. In this operation where three parties interact (orderer, warrant, beneficiary), the warrant can only pay the beneficiary if he presents the required documents. The economic stakes, which impose such formalism, compel a strict rigidity in the application of the condition. The presentation of a copy or of a non-material document can be difficult to accept. In this section, we will briefly discuss the solutions given as to guarantee the use of electronic format as valid documents.

[539] Decree of April, 30th, 2002.

C.1.1. Bills of exchange

The bill of exchange is the most important example of negotiable instrument which is largely used in business relations, in first place as an instrument of transport, and then as an instrument of payment and credit. It certifies the existence of a debt in a short term. Its success is based mainly on its formalism and thus its reliability: the bill of exchange is a written document in which a list of mandatory mentions must appear (including the signature of the issuer), defined by article L-511 Commerce Code, as a necessary precondition to its legal validity. In this manner, the document shows a legal certainty about the reality of the obligation. The bill of exchange can be sold and the right can be transferred through an endorsement, in which the signature of the cedent must appear. The benefit of this formalism is the progressive independence gained by the document from the debt it represents: each signature is independent from the others in such a manner that the invalidity of one of them does not affect the other.

It is to be noted that even if French legislation does not mention the written form as a necessary requirement for the validity of the bill of exchange, jurisprudence has often associated the requirement of the signature to the existence of a paper-based document.

Its importance in business transactions and the existing burden due to this formalism was subject to a first attempt of reform in 1973 by the acknowledgement of the bill of exchange in the form of a magnetic stripe which has been denominated "*Lettre de change relevé*". This kind of bill of exchange is mainly used by the banking houses.

This mechanism permitted to issue the bill in a magnetic field and to eliminate all material documents. The main purpose of this system is the disappearance of the written form and the presence of the signature, and thus of all the guarantees acknowledged by the law to the owner in a traditional bill of exchange, because all the formalism is not complete. As a result, the bill is converted in a money order to the bank officer. This process does not allow the owner to endorse the letter and the bank can not take advantage from the guarantee of the transfer offered by a paper-based letter of exchange. Without the paper-based, signed document, there is no property transfer allowed, and the bank does not have any rights nor any guarantee about the debt discounted.

Jurisprudence does not go in the sense of a more flexible system, recognising only stamps as a valid signature. In a resolution of 1996[540], the commercial Chamber of Commerce of the Supreme Court did not agree to recognise a numeric code as a valid signature.

The last obstacle against the suitability of electronic documents as carrier for bill of exchange consists of the difficulty to assure the non-reproduction of an identical document in an electronic environment. The Commerce Code stipulates the possibility to make copies of the letter if it is not claimed to be created as a unique specimen. Each copy must contain the signature of the issuer and must be numbered; otherwise they will be considered as an original document (article L-511-72).

After the amendment to the Civil Code through the transposition of the eSignature and eCommerce directive, the legal problems have been solved. Therefore, there is no legal obstacle to use of electronic document as carrier of bill of exchange: the use of a secure-signature-creation-device, which implies the legal presumption of equality to a

[540] Supreme Court, Com. Ch., 26 novembre 1996.

traditional signature, permits fulfilment of all the mandatory mentions, and the possibility expressly acknowledged by Civ. Code article 1108-1 to use electronic documents when a written document is required *ad validatem* guarantees the disappearance of any remaining doubt jurisprudence might entertain to recognise electronic documents as written document. In order to solve this last problem regarding the originality of the documents created and transmitted, some companies already offer banks and its clients a secured platform where they may fulfil all the steps required for the creation and negotiation of the bills. The intervention of a third party might constitute a guarantee of reliability "lost" by the given up of paper-based documents.

C.1.2. Documentary credit

Documentary credit is a technique figured out by bank officers in order to introduce the necessary reliability in the execution of a commercial operation between two parties who, due to distance, lack information about each other. The seller would only agree to deliver the goods if the payment is guaranteed when loading, and the buyer would only agree to pay if he can be assured that the delivery is done according to the purchase order. The usual way to vouch for this is showing a bill of lading.

The article 2 of UCP issued by the ICC defines documentary credit as follows: any arrangement no matter how it is named or described, whereby a bank (the issuing bank), acting at the request and on the instructions of a customer (the applicant for the credit) is to make a payment to the order of a third party (the beneficiary), or is to pay or accept bills of exchange (drafts) drawn by the beneficiary; it also may authorize another bank to effect such payment, or to pay, accept or negotiate such bills of exchange (drafts).

In these situations, documentary credit plays a key role of minimizing the risks and thus, it facilitates international transactions: when parties perform the contract, the buyer's bank issues a documentary credit on behalf of the seller which will be paid when he shows the documents certifying that the goods have been dispatched. Once emitted, the documentary credit becomes independent of the commercial contract and the payment exclusively depends on the event that the seller shows the required documents. Only documentary or material fraud can break this rule. Therefore, in these transactions, documents constitute the core of the operation.

In France, documentary credit arrangements are governed through commercial practices and are not subject to any internal regulations but those established by the International Chamber of Commerce (ICC), universally admitted in international commerce and made applicable on a voluntary basis.

Through technological evolution, electronic means have been introduced into documentary credit engagement treatments: the interbank exchanges are done through the SWIFT system (based on EDI technology) used for funds transfers. But the core of the transaction, the presentation of the documents manipulated during the transaction, has been, up until a few years, purely fulfilled through paper-based document. Until the revision of the INCOTERMS it was impossible to submit documents on another carrier.

Documentary credit represents 40% of international bank transactions and could not remain out of the general evolution towards the dematerialization of documents in order to accelerate commercial relations. The ICC has amended its rules in order to adapt them to the electronic environment. This evolution culminated in the publication, in 2002, of the eUCP, a supplement to the 1993 UCP rules, regarding the submission of

electronic documents in the context of documentary credit agreements. The supplement allows submitting all documents which have to be produced at the bank in an electronic format.

It has to be pointed out that it is the first time that conventional rules anticipate the practice and, thus, the principle of technological neutrality has been strictly followed.

Therefore, there is no legal obstacle to the use of electronic documents in the documentary credit arrangements.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading[541]

Dematerialization of documents used in shipping transports is the main issue of the practitioner since two decades. This sector has been a precursor in international normalization of documents and in the development of EDI in order to reduce costs in the use of paper-based documents (estimated at 7% of the total cost). Some non-negotiable electronic documents have been developed by practice, such as the Data Freight Receipt and Express Cargo Bills.

The bill of lading, shipping instrument *par excellence*, is the traditional and negotiable instrument more widely used in practice. It has fulfilled three different uses:

- as receipt of the goods, the handing over of the document by the captain of the boat or his agent equals a legal presumption of receipt of the goods as described in the document;
- as proof of the transport contract, the bill is issued for the execution of the contract and defines the obligations of the parties;
- as a representative writ of the goods, the most original function of this instrument; it confers to its carrier a right to the goods, and selling the bill is equivalent to selling the goods.

In France, bills of lading are subject to the law relative to chartering and shipping transports[542], and its application decrees. French law is surely one of the less debatable: it integrates the disposal of 1924 Brussels Convention and does not require the bill of lading to be carried on a paper. This legal lack of provision combines perfectly with the liberty given to the parties to produce evidence of their rights and obligations when involved in a commercial relation in order to permit every type of carrier. Therefore, in French law, a written paper-based form is not a requirement *ad validatem*, but merely *ad probationem*.

However, the dematerialization of the bill of lading has been held up due to the requirement of the signature. At the moment of its creation, original documents have to be signed by the carrier or his representative. The signature is a formal condition for the validity of the bill and it is required *ad validatem*. This signature does not have to be by

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[541] Olivier Cachard, *Le connaissement électronique: du document au registre informatique – approche des difficultés liées à la dématérialisation*, lexmercatoria.net, 2001.

[542] *Loi sur les contrats d'affrètement et de transport maritimes*, Law nº66-420 of June, 18th 1966. See http://www.lexeek.com/droit/156-loi-contrats-affretement-et-transport-mar/

hand and other means such as stamps have been admitted. However, in the past, the Chamber of Commerce of the Supreme Court in matter of exchange endorsement has rejected the validity of a signature by telex[543]. The final result is that the signature has become inseparable from the paper. However, since the amendment of evidence law, a bill of lading signed by a secured electronic signature must be accepted as valid.

The second formal requirement concerns the original document and its non-reproduction in an identical form which presents, as mentioned above, some technical difficulties in an electronic environment. The French legislation states that each bill of lading is established in two original documents, one for the loader and the other for the captain. The original handed over to the loader is the instrument which can be negotiated and exchanged during the transport. The consignee will accept this original only and will compare it to the first original. And in case of conflicts between two valid originals, the party who presents the first as a valid bill will prevail over the others. The loss of the concept of uniqueness of an original document is inherent to the technology as the electronic document could be reproduced in as many identical copies as required.

On other hand, the use of EDI in bills of lading implied the segmentation of these documents in a subgroup of information. This kind of segmentation has raised the problem relative to the binding character of referenced documents. The jurisprudence has known two specific cases: the bill of lading in short form which does not reproduce the standard contractual clauses; and the bill of lading with charter-party. In both cases, jurisprudence does not accept the possibility to oppose the conditions which were not included in the bill to the other party. The bill of lading is supposed to contain the whole set of clauses and the parties can not simply refer to external documents.

Confronted with such obstacles presented by national laws for the use of electronic documents in shipping commerce, international organisations have offered some options.

The Comité Maritime International (CMI) adopted in 1990 11 model contractual rules for the parties who would want to use electronic exchange of data instead of a paper-based bill of lading. The problems of evidence resulting from the lack of a paper-based document are solved by an evidence agreement. No original is emitted and if a party requires a paper-based document, this would put an end to the electronic process.

The Bolero project, financed by the European Union, is based on these rules and creates a central register managed by a neutral authority (and not managed by a party as stipulated in CMI rules), the Bolero Association Limited. All the communications between the loader and the carrier are done through an electronic platform whose security is assured by a certification authority. The integrity of the electronic messages is assured by electronic signature. These procedures guarantee that only one person will be able to exercise his rights to the goods. Despite these advances, the BOLERO project does not seem to catch on with French shipping companies. Therefore it is not so much a problem of trust in electronic documents as a legal barrier which delays the use of electronic bills of lading.

[543] Supreme Court, Com. Ch., 26 novembre 1996.

C.2.2. Storage contracts[544]

International transactions require the production and exchange of different types of documents at every stage of the execution. Even if bills of lading are one of the most important, the final delivery of the items and their storage in warehouses before the final handing over supposes the exchange of a number of documents of equal importance.

Storage agreements are regulated in France by Commerce Code, Book V, Chapter II and require the issuing of a receipt and a warrant. A warrant is a commercial security which materializes the deposit of goods in bonded warehouses. It has to be issued through a document which includes a receipt attached to a security instrument, the warrant, containing the same wording as the receipt.

In order to guarantee the celerity and security of the transaction, the debt is incorporated into the document. Thus, all classic forms of debts negotiation associate celerity and security of the transfer to the incorporation of the right into the paper-based instrument.

The fact that a warrant represents the deposited goods does not mean that the document certifies a real right. The possessor owns the goods through the intermediary of the depositary. The warrant only materializes the obligation of the depositary to return the goods. Jurisprudence considers that the transfer of the receipt does not necessarily imply a transfer of property. The warrant only facilitates the transfer of the debt.

Therefore, the link between the negotiable instrument and its materialization on a paper-based document does not constitute a legal requirement but a guarantee of a secured and fast transfer of the debt. The handing over of the instrument is sufficient to transfer the debt and to confer to the owner such condition.

However, as was the case for the bill of lading, the handing over of paper-based documents can become impeding when the operation is relative to various instruments or must be done with celerity. The law requires the warrant to be attached to the receipt and contain the same mentions. However, article 1369-10 (Civ. Code) stipulates that when a written document is subject to special requirements of form, the electronic document must satisfy the same requirements. In this case, it can be assumed that the finality of the law is to assure the exact equivalence of the receipt and the warrant, as they can be negotiated separately. Moreover, article 1108-2 permits the issuing of instruments under private signature relating to suretyship or property charge, of commercial character when they are drawn up by a person for the needs of his occupation. As such, there should be no legal barrier for the use of electronic contracts in the conclusion of storage agreements. However, it remains to be seen if jurisprudence accepts this criterion.

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[544] Frédéric LEPLAT, *la transmission conventionnelle des créances*, Ph.D. thesis, Université Paris X Nanterre, 2001.

C.3 Cross border trade formalities: customs declarations

France has started the implementation of an electronic customs system with DELTA, a project which will permit a faster treatment and a reduction of the costs by the declarants. A new website has been created (PRODOU@NE) in order to permit on-line declarations in a secured environment. This system uses electronic signature to ensure secured communication.

Article 61 of the Customs Community Code which permits dematerialized customs entry has been transposed in French law by the Rectificative finance law of 2004 and amends article 95 of the Custom Code (*Code des Douanes*). This type of declaration could be done by computer-based processes since 1992, but it did not permit the use of electronic documents until the last reformation.

Moreover, this European project is completed by the interconnection of electronic national customs systems at a European level in order to create a common portal (NCTS-network). In the future, a good can be custom cleared in every European city regardless of where it is stored. Declarants only have to communicate their declarations to a unique authority and would not have to deal with each custom and other national authority, through a "One Shop Stop" arrangement. France has joined this network (which is locally referred to as NSTI), and all the paper-based documents (TC 20, 21, 22,…) will be replaced by electronic messages.

Following the European Union impulse, French customs are introducing more and more procedures based on electronic documents, and not only computer-based processes, as done in the past. Customs authorities are changing over electronic treatment of documents to treatment of electronics documents.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

Electronic invoicing has been a preoccupation for the French legislator since the past decade. Since 1991, companies can use electronics forms of invoicing through the EDI system[545], although only for national transactions. On condition of respecting certain requirements, these electronic invoices were considered as original specimen.

This limitation to internal transactions was an administrative burden for the effectiveness of the common market and EEA, and in other commercial transactions and with third countries. Globalization of the economy leads companies to deal with foreign countries and the obligation of presenting the VAT declaration in two different forms was an important burden to their activities.

The transposition of the eInvoicing directive through article 17 of the 2002 corrective finance law[546] which amended the General Tax Code[547] with regard to invoicing rules, and

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[545] Corrective Financial Law, 1990, article 47-I.

[546] *Loi de finance rectificative*

[547] *Code Général des Impôts,* http://lexinter.net/CGI/index.htm

the application Decrees nº2003-632[548] (mandatory mentions), nº2003-659[549] (conditions of creation and conservation of invoices sent by electronic means and secured by an electronic signature), and a decree of July, 18th, 2003 (conditions of creation and conservation of dematerialised invoices), has resolved this dichotomy, so that companies can now emit all their invoices by electronic means or by EDI. The only condition imposed by the legislation is the prior acceptance of this way of invoicing by the counterpart, either by contract, or by granting a reasonable period of time to ask for a paper-based invoice; and the prior notification of the use of such system of invoicing to the Administration.

The French legislation recognises only and exclusively two different modes of electronic invoicing: the "dematerialized" invoice (through the use of EDI processes) and the electronically signed invoice. Companies can opt for either one of them, on condition that the system guarantees the authenticity of the source and its integrity.

The invoices have to be archived for a period of 3 years (article L.169 Book of Fiscal procedures[550]), and the fiscal administration must be able to access these invoices on-line. The two modes of invoicing distinguish themselves by the condition of use.

The legislation does not require the issuer of an invoice with an electronic signature to use an advanced one. The signature must be exclusive of the signer, permit his identification, be created by any means controlled by him and guarantee the link with the invoices. Invoices are not required to be signed by secure signature creation devices. The recipient must verify the authenticity and integrity of the signature.

When the e-invoice has been created with an electronic signature, they must be archived in their original format, both for the recipient and the sender. Printing makes the invoice lose its legal validity and obstructs the company from deducting the VAT. If the invoice has been created through EDI, the information issued and received must be filed in their original format, included the non-mandatory mentions. It is not necessary to combine the electronic invoice with a paper document.

Following the provisions of the eInvoicing directive, the invoices can be stocked either in French territory or in a country which has signed a mutual assistance agreement with France which includes a right to access on-line, download and use the concerned data.

Invoices serve not only a fiscal function but also an accounting one. In cases where they contain general contractual standard clauses, an invoice could serve as evidence in a contractual relationship. In these cases, the option of using electronic documents requires the issuer to consider the whole legislation which could apply. Accounting law does not impose further formal requirements than the VAT legislation, but in order to produce an invoice in judicial proceedings, it might be useful to use an advanced

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[548] Decree nº2003-632, of July, 7th 2003 relative to invoicing requirements in VAT *; Décret n° 2003-632 du 7 juillet 2003 relatif aux obligations de facturation en matière de taxe sur la valeur ajoutée et modifiant l'annexe II au code général des impôts et la deuxième partie du livre des procédures fiscales.*

[549] Decree nº 2003-659 of July, 18th 2003 relative to invoincing requirements in VAT *; Décret nº2003-659 du 18 juillet 2003 relatif aux obligations de facturation en matière de taxe sur la valeur ajoutée et modifiant l'annexe III au code général des impôts et la deuxième partie du livre des procédures fiscales.*

[550] *Livre des procédures fiscales ;* see http://www.legifrance.gouv.fr/WAspad/UnCode?code=CGLIVPFL.rcv

electronic signature in order to benefit from the legal presumption of equivalence to a written document stipulated by the Civil Code.

C.4.2. Electronic accounting

With the development of accounting software, companies have largely introduced electronic systems in their accounting procedures. Fiscal administration has proven to be quite fast to regulate this type of accounting processes and since 1991 some specific control procedures have been established. Recently, the legislation has gone a step further by introducing the possibility of using electronic documents.

French legislation in matters of accounting are contained in various accounting and fiscal legislation (Fiscal procedures Book, Articles L13, L.47, L57, L74 and L.102B) whose interpretation has been summarized in an instruction of fiscal administration of 2006, January, 24th.[551]

The scope of the legislation refers to data controlled or treated by electronic processes for the constitution of accounting register or certification of every occurrence or situation transcribed in the books, registers, documents, piecework and declaration subject to control by the administration. This section will only focus on the use of electronic documents in accounting and will not refer to other enforceable rules only regarding computer-based processes.

The legislation transposes and adapts the existent accounting paper-based rules to an electronic environment and regards justificative documents (invoices, etc.) and accounting books.

Electronic documents can be created and archived in order to fulfil accounting obligations (like invoices) on the condition that they guarantee their durability and their precise date, and could be accessed in every format as a whole. They must be archived for a total period of six years: during the first period of three years they have to be archived in an electronic format, while during the last three years, there is no specific format imposed. The documentation regarding software must also be archived during the first three years. The printing of electronic documents renders them invalid for fiscal purposes.

The legislation requires companies to be able to:

- submit detailed documents, thorough and truthful, with regard to the creation, execution and exploitation and maintenance of its informatics system;
- secure the integrity of the documentation throughout the period of conservation;
- guarantee the monitoring of accounting data. Informatics documentation must be filed in its original format.

[551] Instruction 13 L-1-06, relative to control of computer-based accounting - *Instruction 13 L-1-06*, *relative au contrôle des comptatibilités informatisées.*

It has to be mentioned that AFNOR (the French association for normalization[552]) has published in 2004 a new certification for computer based accounting software which meets these legal requirements.

Accounting legislation has integrated the possibility of using electronic documents in every phase of the accounting process (creation of documents, filing, accounting books, communication to the administration) and thus there is no existing legal obstacle.

D. General assessment

D.1 Characteristics of French eCommerce Law

- Through the transposition of the eSignature and eCommerce directives, French contractual law has integrated the necessary elements to confer to electronic documents the legal validity required for legally secure business transactions. These modifications have brought up the opportunity to make contractual law evolve from the traditional consumer-centric approach and to a more global approach which also integrates professionals.
- The recognition of electronic documents by contractual law has followed a functional equivalence approach, as recommended by the UNCITRAL, and recognises them as valid written evidence on a same basis as paper-based documents. These provisions apply to every document required by the law, regardless of whether it is required for proof (*ad probationem*) or for the legal validity of the document (*ad validatem*). The only exceptions, when paper-based documents are required, are those allowed by the eCommerce directive.
- Recent decrees complete the new legal system and introduce the possibility of creating and archiving qualified documents in an electronic format. The final result is a total integration of electronic documents in French contractual law.
- As commerce legislation has always been very permissive regarding the form of contract conclusions and means of proof, commercial relations benefit fully from this reform. Moreover, an important part of the documents used in commercial transactions are issued through practice and regulated through international rules which have managed to evolve towards the use of electronics documents.

D.2 Main legal barriers to eBusiness

However, three significant hindrances remain for the widespread use of eBusiness in French Law.

- The more important consists of the lack of legal precision regarding conditions of electronic document archiving, made even more pressing when various provisions require electronic filing (e.g. electronic contracts concludes with a consumer with a value of €120 or more). Moreover, considering the significance of the modalities of archiving for the legal validity of an electronic document through time, this can compromise the effective use in commercial relations of such

[552] *Association Française de Normalisation:* http://www.afnor.fr/portail.asp

documents, which requires legal certainty. It will depend on the position of jurisprudence when evaluating the validity of such documents through time (notably their integrity). This issue can play a key role in the short term prevalence of electronic documents if legal requirements of archiving are not clearly established.

- The second issue regards the new full responsibility regime established by the eCommerce law in electronic transactions concluded on-line. The worsening of the situation of the service provider contracting on-line in comparison with the one who contracts off-line, could become a restraint to on-line contracting.
- The last issue remains in the scarce implementation of eAdministration and eProcedures. Even if noteworthy progress has been made in the last years in this field, much remains to be done in order to eliminate paper-based documents and operation. The relations with administration are still a wellspring of delays and lost of time for businesses.

D.3 Main legal enablers to eBusiness

- As mentioned above, the amendment of French contractual law, recognising the validity of electronic document as written document and of the eSignature has solved many formal hindrances for the use of electronic documents in business transactions. As a result, many usual commercial instruments such as the bill of lading or bill of exchange can be created in an electronic format. Moreover, eAdministration is becoming a reality through the recognition of the legal validity of electronic documents and the apparition of eProcedures which simplifies administrative declarations.
- The complete framework created by French legislation permits the development of eBusiness and leave an open door to further regulations and uses as in electronic notifications.
- It is to be expected that the market adapts and takes advantage in their commercial relations of these renovated contract rules. Already this can be observed in the emergence of new products based on electronic documents (secured platforms for the creation and negotiation of bills of exchange, registered emails, etc.). Doctrine and jurisprudence would have to assess the legal reality of electronic documents.

Germany National Profile

A. General legal profile

Germany is a federal republic, consisting of 16 states, called *Länder*. The legislative competences are split between the federal and the provincial level.

Commerce and contract law is a federal matter, which is generally incorporated into the Civil Code[553] and the Code of Commerce[554]. Regarding this, the BGB is the general law, which is valid for both private individuals and commercial transactions of merchants, as long as the Code of Commerce (HGB) does not provide special rules. Thus, the HGB is not a fully autonomous law for merchants but it provides special rules for certain issues. The general rules of the Civil Code (BGB) are applicable for the rest.[555]

As part of the civil law and the commercial law, eCommerce is also matter of the federal legislative competences. It is regulated by the general private and commercial law as well as by some specific rules especially for the range of eCommerce.

Disputes regarding commercial relations are typically dealt with by courts of the ordinary jurisdiction. For matters with a financial value up to € 5.000,- the local court[556] is the competent court, for matters of higher value the regional court – (Chamber for Commercial Matters)[557]. Appeals against the decisions of the *Amtsgericht* can be lodged with the *Landgericht,* and with the Appellate Court[558] for decisions of the *Landgericht – Kammer für Handelssachen*. The German system of jurisprudence does not have any binding power of precedent (except some special decisions of the Federal Constitutional Court[559], although decisions of the federal courts are highly authoritative and rarely disregarded.

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[553] *Bürgerliches Gesetzbuch, BGB;* http://www.gesetze-im-internet.de/bgb/index.html

[554] *Handelsgesetzbuch, HGB;* http://www.gesetze-im-internet.de/hgb/index.html

[555] *Roth* in Koller/Roth/Morck, Handelsgesetzbuch, 3rd ed., Munich 2002, Einl. Vor § 1, Rn. 3; *Brox*, Handels- und Wertpapierrecht, 17th ed., Munich 2004, p. 3.; *Bülow*, Handelsrecht, 5th ed., Heidelberg 2005, p. 1.

[556] *Amtsgericht*

[557] *Landgericht – Kammer für Handelssachen*

[558] *Oberlandesgericht, OLG*

[559] *Bundesverfassungsgericht;* http://www.bundesverfassungsgericht.de/

B. eCommerce regulations

During the last years, numerous reforms have adapted German civil and commercial law to meet the demands of electronic forms of communication and commerce. Due to the introduction of a number of new provisions, German (contract) law gives the market participants the opportunity to take advantage of the new possibilities of electronic communication (almost) without any disadvantages concerning the legal validity of electronic documents. In this section, the main tenets of German legislation regarding the legal value of electronic documents are briefly commented.

B.1 eCommerce contract law

B.1.1. General principles

Validity of contracts

In general, German contract law is very flexible regarding the validity of contracts. Barring some special types of contracts, there are no mandatory form requirements[560], the consensus between the parties about the essential elements of the contract is sufficient.[561] There is no requirement for a materialisation of the consensus, neither as a written nor as any other type of document. Thus, the conclusion of contracts using electronic documents is possible without any legal problems.[562] Generally said, German law is very flexible regarding the validity of electronic documents in contract law in civil as well as in commercial law.

Exceptions to the principle of absence of formal requirements in German contract law exist for certain contract types. The German Civil Code (which is also valid for commercial transactions) contains a number of special requirements as to the form. Traditionally, these were the mandatory written form (sec. 126 BGB)[563], the agreed written form (sec. 127 BGB), the notarisation (sec. 128 BGB)[564] and finally the

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[560] Brox, Allgemeiner Teil des BGB, 29. ed., Munich 2005, p. 149

[561] *Eckert* in Bamberger/Roth, BGB, Munich 2003, § 145 Rn. 2.

[562] *Eckert* in Bamberger Roth (Fn. 1), § 145 Rn. 2; *Mehrings* in Hoeren/Sieber, Handbuch Multimediarecht, 1999, Kap. 13.1, Rn. 22.; *Mehrings* MMR (Multimedia und Recht, Journal) 1998, 30, 31; *Kuhn*, Rechtshandlungen mittels EDV und Telekommunikation, 1991, p. 47 and following; *Köhler* AcP (Archiv für die civilistische Praxis, Journal) 182 (1982), 126 and following; *Heun* CR (Computer und Recht, Journal) 1994, 595-596; *Fritzsche/Malzer* DNotZ (Deutsche Notarzeitung, Journal) 1995, 3, 6; *Medicus*, Allgemeiner Teil des BGB, 2002, Rn. 256. (The conclusion of contracts is even possible using completely electronically made documents without any direct participation of a human being. Also these fully automatic documents can be ascribed to the will of the person who initiated the declaration. For further details see *Mehrings*, MMR 1998, p. 30 and following.)

[563] i.e. for the making of a receipt (sec. 368 BGB), the assignation notification (sec. 409 BGB), conclusion of a loan contract by consumers (sec. 492 BGB), cancellation of lease contracts (sec. 568 BGB), assumption of a surety (sec. 766 BGB).

[564] i.e. for contracts about (real) estate (sec. 311b BGB), conveyance of real estate (sec. 873 BGB).

certification by a notary public (sec. 129 BGB)[565]. The mandatory written form (and also the agreed written form), requires a document that is personally signed by its issuer. Due to the impossibility of personally signing, electronic Documents – with or without an electronic signature – do not fulfil these requirements (just as little as telegram[566] and fax[567]).[568] This fact constituted a considerable difficulty regarding the use of electronic means of communication.[569] Due to the implementation of the eCommerce directive (directive 2000/31/EC) and the eSignature directive (directive 1999/93/EC), the German legislator introduced two new provisions, sec. 126a and 126b BGB to meet the demands of electronic means of communication.[570]

One of the new provisions, sec. 126b BGB, introduces the new so called *Textform* to the German civil law. Unlike the written form in sec. 126 BGB, the *Textform* does not require either a physical document or a personal (handwritten) signature, which was the most serious obstacle for electronic commerce. Instead it requires only the issuing of the declaration either on a written document *or* in any other way. The only requirement is that the addressee is capable of making permanent reproductions of the declaration in a written form. Additionally, the name of the originator has to be mentioned and the end of the declaration has to be marked. Both requirements can be met at the same time i.e. by typing the sender's name below the text of an e-mail. The same applies for electronic documents on a storage device such as floppy disks, CD-ROMs and hard drives.[571] In order to abolish the former obstacles for electronic commerce, a number of provisions that required the written form were replaced by the requirement of the new *textform*.[572]

The second new provision, sec. 126a BGB, introduced the new *electronic form* to German contract law. In many cases where contract law still requires written documents, the written document can be replaced by electronic documents that fulfil the requirements of the *electronic form.*[573] However, there are still some exceptions for the use of electronic documents, i.e. for contracts about consumer credits,[574] the cancellation of employment contracts[575] and the declaration to put a guarantee.[576] The *electronic form* requires an electronic document with a *qualified* electronic signature, which has to meet the requirements of sec. 2 Nr. 2 ("advanced") and 3 ("qualified")

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[565] The requirement of the certification by a notary public is rarely to find in the practical application (i.e. Sec. 403, 411, 1035, 1154).
[566] Jurisdiction of the Federal Court of Justice (BGH), BGHZ 24, 301.
[567] BGHZ 121, 224.
[568] BGHZ 121, 224, 229 = NJW (Neue Juristische Wochenschrift, Journal) 1993, p. 1126-1127; Palandt/*Heinrichs*, Kommentar zum BGB, 65th ed., Munich 2006, § 126 Rn. 7; *Wendtland* in Bamberger/Roth (Fn. 561), § 126 Rn. 11; *Einsele* in Münchener Kommentar zum BGB (MüKo BGB), Band 1a, 4th ed., Munich 2004, § 126 Rn. 5.
[569] So auch *Boente/Riehm*, JURA (journal) 2001, 793, 794.
[570] Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr vom 13.07.2001, in Kraft getreten am 1.08.2001, BGBl I, S. 1542.
[571] Brox (Fn. 560), p. 150-151.
[572] Z.B. für Widderrufsrecht des Verbrauchers (sec. 312c, 355, 356, 357 BGB), Erklärungen im Mietrecht (sec. 554, 556a, 556b, 557b, 558a, 559b, 560 BGB), Unterrichtung des Verbrauchers beim Darlehensvertrag (sec. 493 BGB) and many more.
[573] Sec. 126 para 3 BGB.
[574] *Verbraucherdarlehensverträge;* Sec. 492 para 1 BGB, the motivation for this exception was obviously the consumer protection, see also *Möller/Wendehorst* in Bamberger/Roth (Fn. 561), § 492 Rn. 4.
[575] Sec. 623 BGB.
[576] Sec. 766 BGB.

Signaturgesetz[577] (Signature act). The Signaturgesetz contains the implementation of the eSignature directive, and the requirements for an advanced signature in German law correspond with Art. 2. Nr. 2 of the directive. An *advanced* signature is considered *qualified*, if it is based on a qualified certificate in terms of art. 2 No. 10 directive 1999/93/EC and if it is made with a secure-signature-creation device in terms of art. 2 No. 6 directive 1999/93/EG.

It is still being debated within German doctrine whether the use of electronic documents with a qualified electronic signature is valid without the consent of the contracting party or not. By the majority of commentators, the use of electronic documents (that meet the requirements of sec. 126a BGB) without the consent of the contracting party is considered invalid.[578] The consent can be declared explicitly or implicitly.[579] This opinion is based on the official motivations of the parliament. According to these, the electronic form shall only replace the written form if the parties agree.[580] The contracting party should not be forced to use the electronic form.

According to a different view, the electronic form can also replace the written form without the consent of the contracting party.[581] Anyway, if the contracting party does not provide receiving devices for electronic documents, the declaration is invalid, because the recipient has no possibility to take notice of the declaration.[582] If the recipient is able but not willing to receive electronic documents, he shall be obliged to inform the other party about this. Otherwise the electronic document shall be valid.[583] Up to now, German jurisdiction has not been in a position to decide whether or not the consent of the other party is a requirement for the validity of electronic documents instead of written documents. Facing this legal uncertainty, the sender of electronic documents should ask for the consent of the recipient if a written document is legally required.

In German commercial law, there are no special provisions regarding the legal validity of electronic documents. However, in some cases, the requirements as to form are more liberal than in civil law. The most important example is the declaration to put a guarantee.[584] While consumers and other individuals must declare their will to put a guarantee in a written document, an oral declaration (or *textform*) is sufficient for merchants.[585] Hence, in commercial law electronic documents (even without signature) can be used to put a guarantee.

Summary: Generally, there are no mandatory requirements as to form in German civil and commercial law. Hence, electronic documents are fully valid within legal relations. If the civil or commercial law exceptionally requires a written document, it can be replaced

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[577] Gesetz über Rahmenbedingungen für elektronische Signaturen, BGBl. I 2001, 876; http://www.gesetze-im-internet.de/sigg_2001/index.html

[578] *Heinrichs* in Palandt (Fn. 568), § 126a Rn. 6; *Marly* in Soergel, Bürgerliches Gesetzbuch, Vol. 2a, 13th ed., Fall 2002, § 126a Rn. 26; *Palm* in Erman, Bürgerliches Gesetzbuch, 11th ed., Münster 2004, § 126a Rn. 6; *Hertel* in Staudinger, Kommentar zum BGB, 2004, § 126a, Rn. 39; *Rossnagel*, NJW 2001, 1817, 1825.

[579] Rossnagel, NJW 2001, 1817, 1825.

[580] Bundestag (Federal Diet) printing 14/4987, p. 20.

[581] *Einsele* in MüKo BGB, § 126 Rn. 11; *Heinemann*, ZNotP (Zeitschrift für die Notarpraxis, Journal) 2002, 414, *Lorenz/Riehm*, Lehrbuch zum neuen Schuldrecht, Munich 2002, Rn. 22; *Boente/Riehm*, JURA 2001, 793, 795-796.

[582] *Lorenz/Riehm* (Fn. 581), Rn. 22; *Vehslage*, DB (Der Betrieb, journal) 2000, 1804; see also Bundestag printing 14/4987, p. 15.

[583] *Lorenz/Riehm* (Fn. 581), Rn. 22; *Boente/Riehm*, JURA 2001, 793, 795-796.

[584] Sec. 766 HGB (code of commerce)

[585] Reason for the different requirements as to form is the protection of individuals against precipitation.

by an electronic document with a qualified electronic signature. The sender of such electronic documents should ask for the consent of the recipient before using electronic documents. If the law requires the notarisation or the certification by a notary public, there is no possibility for the use of electronic documents.

Questions of proof

The validity of contracts according to substantive law is only one side of the picture. The other one is to prove the contract. Even if documents are not required for the legal validity of the contract, the use of documents is often recommended to prove the conclusion of a contract. The probative value of documents and other proofs follows the rules of the code of civil procedure[586]. These are applicable for litigations in civil as well as in commercial law. Regarding court procedure, there is no difference between civil and commercial law.

In general, the ZPO only allows a limited number of admissible evidence.[587] This principle is called *Strengbeweis* and is laid down in sec. 284 ZPO.[588] The following evidence is admissible in civil proceedings: visual inspection by the court,[589] witnesses,[590] experts,[591] documentary evidence[592] and interrogation of the parties.[593] The different evidences have different probative values. In general, German law recognizes the principle of free evaluation of evidence,[594] but there are some statutory exceptions. Especially for documents, the court must observe fixed rules of evidence.[595]

To evaluate the probative value of electronic documents, they have to be allocated to an admissible evidence. A reasonable decision can only be made between documentary evidence and visual inspection by the court.[596] For documents the ZPO provides rules of evidence[597] while the inspection by the court is matter to the free evaluation of evidence. After a long discussion within the doctrine[598] and different legislative activities,[599] sec. 371a ZPO now solves the problem: private electronic documents with a qualified electronic signature have the same probative value as documents, while other electronic documents are subjects to visual inspection by the court.

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[586] *Zivilprozessordnung*, ZPO; BGBl. 1950, 455, 512, 533; BGBl. 2006 I 431; http://www.gesetze-im-internet.de/zpo/index.html
[587] *Geimer* in Zöller, Zivilprozessordnung, 25. ed., Munich 2005, § 284 Rn. 1.
[588] See also *Foerste* in Musielak, Zivilprozessordnung, 4th ed., Munich 2005, § 284 Rn. 5.
[589] Sec. 371-372a ZPO
[590] Sec. 373-401 ZPO
[591] Sec. 402-414 ZPO
[592] Sec. 415-444 ZPO
[593] Sec. 445-455 ZPO
[594] Sec. 286 ZPO
[595] Sec. 415-418, 435, 438 ZPO.
[596] So auch *Ahrens*, Elektronische Dokumente und technische Aufzeichnungen als Beweismittel, in: Festschrift für Reinhold Germer zum 65. Geburtstag, Munich 2002, p. 1-14.
[597] Siehe oben Fn. 595.
[598] i.E. *Ahrens* (Fn. 596); *Baltzer*, Gedächtnisschrift für Rudolf Bruns, Munich 1980, p. 73, 79, 80; *Britz*, Urkundenbeweisrecht und Elektroniktechnologie, 1996; *Damrau* in Münchener Kommentar zur ZPO (MüKo ZPO), Munich 1992, § 371 Rn. 4; *Henkel*, JZ (Juristenzeitung, Journal) 1957, 148, 153; *Jäger/Kussel*, Der Beweiswert digital signierter Dokumente, in: Hoeren/Schüngel, Rechtsfragen der digitalen Signatur, 1999, p. 241, 256-257; *Rüßmann*, Moderne Elektroniktechnologie und Informationsbeschaffung im Zivilprozess, in: Schlosser (ed.), Die Informationsbeschaffung für den Zivilprozess, Veröffentlichungen der Wiss. Vereinigung für Internationales Verfahrensrecht, 1996, p. 137 and following.
[599] V.a. § 292a ZPO in der Fassung bis zum 1.4.2005.

As a consequence, the rules of evidence for documents are applicable to electronic documents with a qualified electronic signature. According to sec. 416 ZPO, these documents furnish evidence that the document was issued by the person who signed it. Anyway, the content itself is still matter to the free evaluation of evidence.[600] Other electronic documents (documents without an electronic signature) have a similar probative value. They are objects of the visual inspection by the court, sec. 371 ZPO. Evidence can be presented by transmitting the documents to the court or by handing over the data medium.[601] Unlike documents with a qualified electronic signature, the court is free to decide that the document was not issued by the person who signed it. Barring this fact, all electronic documents – with or without (qualified) electronic signature – have the same probative value.

Despite the legal acceptance of electronic documents, a generally accepted or even a statutory definition of an electronic document is still missing. Nevertheless, a lot of questions regarding this problem are not disputed anymore. Text documents that are transmitted by e-mail are electronic documents.[602] It does not matter whether the e-mail itself contains the text or if it is attached as a separate file. Files that contain text documents are also considered electronic documents if they are handed over on a data medium.[603] The question if electronic documents require certain file formats is still unsettled. The new Regulation about filing electronic documents with the federal court of justice[604] could give some indications. According to this regulation, electronic documents are only accepted if transmitted as attachments via e-mail. Plain e-mail-text and handing over the document on a data medium is excluded. These principles are valid for filing documents (i.e. actions and defences) with the court. For purposes of electronic commerce, they are probably too restrictive. There is no reason why i.e. plain e-mail text should not be accepted as an electronic document.

Regarding the admissible file formats, the provisions of the new regulation can give an indication, which formats everyone has to accept. The regulation accepts the following file formats: Adobe PDF (version 1.0 – 1.3), Microsoft Word 97 or 2000, Microsoft RTF version 1.0 - 1.6, HTML (viewable with IE 5.x) and XML (viewable with IE 5.x). This list can also be admitted as a standard for electronic legal and commercial relations. Perhaps the .txt format could be added.

German law does not know registered mail as a requirement for the legal validity of documents. Thus, there is no need for an electronic surrogate.

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[600] Jurisdiction of the federal court of justice (BGH): BGH NJW 1986, 3086; BGH WM (Wertpapiermitteilungen, journal) 1993, 1801.
[601] *Greger* in Zöller (Fn. 587), § 371 Rn. 3.
[602] *Leipold* in Stein/Jonas, Kommentar zur Zivilprozessordnung, 22nd ed., Tübingen 2005, § 130a, Rn. 3;
[603] Leipold in Stein/Jonas (Fn. 602), § 130a Rn. 4; *Greger* in Zöller (Fn. 587), § 126a Rn. 2.
[604] *Verordnung über die Einreichung elektronischer Dokumente beim Bundesgerichtshof*; Verordnung über den elektronischen Rechtsverkehr beim BGH vom 26.11.2001, BGBl. I 3225.

B.1.2. Transposition of the eCommerce directive

The eCommerce Directive (directive 2000/31/EC) is fully implemented into German law.[605] This did not occur by one „general" eCommerce act but by changing and adapting numerous provisions that were affected by the eCommerce directive. The provisions on liability of intermediary service providers (Art. 12-15 of the directive) were implemented as sec. 8-11 Tele Services Act[606], other provisions were changed in the Competition Law[607] and in the BGB. The most important section of the directive regarding contract law is art. 9. It was implemented into the Civil Code as sec. 126a and sec. 126b BGB. These provisions introduce two completely new requirements as to the form in German contract law. The new provisions have an impact on all types of contract, not only on contracts that are concluded over the internet. One must consider that a lot of contracts could be concluded online also before the implementation of the eCommerce directive. Due to the new provision of sec. 126a BGB, some contracts that had to be concluded in a written form can be concluded electronically by using a qualified electronic signature. Electronic contracts are only invalid where the law still mandatory requires written documents. In civil law this still exists for guarantees (sec. 766 BGB), and the assumption and acceptance of debts (sec. 780, 781 BGB). This requirements as to form are not applicable in commercial law, sec 350 HGB. The same applies to the purchasing of the right to use immovable properties on a timeshare basis (sec. 484 BGB), contracts about consumer credits (sec. 492 BGB) and the cancellation of labour contracts by the employer (sec. 623 BGB). All these provisions are applicable in civil law. They don't have an impact on commercial relations, because they envisage the protection of consumers or employees.

Electronic contracts are also excluded where the law requires the notarisation of documents, especially for contracts about real estate, sec. 311b BGB. Other contracts that are relevant in the eCommerce range do not require notarisation.[608]

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[605] Germany missed the timeline for implementation (17/01/2002). On 17/04/2002 the commission brought an action before the court of justice to have the infringement established. It was abated the 16/10/2002 (see 20th annual report on monitoring the application of community law, annex 4, available at http://europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/rapport_annuel/annexe4_en.pdf, p. 49).

[606] *Teledienstegesetz;* http://www.gesetze-im-internet.de/tdg/index.html

[607] *Gesetz gegen den unlauteren Wettbewerb;* http://www.gesetze-im-internet.de/uwg_2004/index.html

[608] This requirement can be found more often in family law and law of succession.

B.2 Administrative documents

In the range of administrative documents, German government and public administrations have arranged a number of programs to allow electronic communication for administrative purposes. The fiscal administration has led the way in this process. Business companies (as well as individuals) have the possibility to submit their annual tax declaration and numerous other declarations concerning taxes using electronic documents.[609] The legal basis therefore is provided by sec. 150 para 6 *Abgabenordnung*[610] (AO, general tax code) and by a regulation of the Federal Ministry of Finance.

Following suit, the fiscal administration and also other branches of the public administration provide the opportunity to use electronic documents. The general administrative law (the administrative procedures act[611]), which is applicable to all administrative proceedings, was revised to allow this. Like in contract law, administrative proceedings in general don't know legal requirements as to form, sec. 10 VwVfG. Nevertheless, over the past centuries the use of paper and written documents was all-dominant for administrative procedures. Since 1 February 2003 this paper era in German administration can be considered historical.[612] According to the new provision of sec. 3a VwVfG everyone has the possibility to communicate with the authorities via electronic means of communication.[613] Finally, the provision is inspired by European legislation. Sec. 3a VwVfG is based on the legal framework that was provided by the eCommerce and eSignature directive. Inspired by the provision of sec. 126a BGB the written form can be replaced by electronic documents with a qualified signature also in administrative proceedings.

However, the transmission of electronic documents is only legally accepted if the recipient is able to receive such documents. This rule aims to avoid that citizens are forced to receive electronic documents from the authorities on the one hand. On the other hand it protects the administration against forced modernisation that the public authorities cannot afford.[614] In general, companies show their willingness to receive electronic documents by printing their e-mail address on the head of a letter that is sent to the authorities. If they are still unwilling to receive such documents from the authorities, companies (and individuals) are obliged to give notice of this circumstance.[615]

Despite the general acceptance of electronic documents, citizens cannot demand electronic communication with the authorities. This still depends on the technical possibilities of the particular authority. Nevertheless, over the past years German authorities made great efforts to render electronic communication possible. The federal government spent 1.5 billion Euros only in the context of the eGovernment programme „Bund Online", to extend the infrastructure for electronic communication. Therefore, electronic communication with German authorities is widely accepted, both legally and practically.

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[609] I.e. the advance return for tax on purchases, the annual purchase, income and business tax declaration.
[610] See http://www.gesetze-im-internet.de/ao_1977/index.html

[611] *Verwaltungsverfahrensgesetz*, VwVfG; http://www.gesetze-im-internet.de/vwvfg/index.html

[612] *Drittes Verwaltungsverfahrensänderungsgesetz* (Third administrative procedure reform act) from 21/08/2002, entered in force 01/02/2003, BGBl. I, p. 3322.
[613] Detailed *Rossnagel*, NJW 2003, 469-475, who refers to this process as "revolution".
[614] *Rossnagel* NJW 2003, 469, 472.
[615] *Rossnagel* NJW 2003, 469, 473.

C. Specific business processes

In this section of the study, we will take a closer look at certain capita selecta of the applicable German legislation and legal and administrative practice. Specific examples of common document types will be examined to assess the validity and recognition of their electronic counterparts, along with an analysis explaining the (lack of) prevalence of any allowable electronic document types.

The section below is organised according to four stages in the electronic provision of goods on the European market. They comprise credit arrangements, transportation and storage, cross border trade formalities and financial/fiscal management.

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The bills of exchange are a historical creation by north-Italian traders in the middle of the 12th century. Designed historically as a payment method, aside they were mostly adopt as an instrument for debt collection, mainly if there's no underlying transaction, for example a delivery of goods.

Reminding their importance and reliability for international trade transactions, the first steps for an international legislation regarding the application of the bills of exchange by an Italian/German proposal in 1910 were started at the conference in Den Haag. Not unlike today, the typical problems of the settlement took place for over twenty years, when the conclusion of the Geneva Convention implemented a Uniform Law for Bills of Exchange and Promissory Notes in June 1930.

Since then German law of bills of exchange were governed by the Geneva Convention, the provisions regarding bills of exchange detailing the requirements of the document. Bills of exchange implicitly need to contain the signature of the drawer of the bill.

The German legislator of 1930 had pointed out the importance of strictly observing these requirements in Art. 1 No. 8 *WechselG*. Apart from the need of the signature by the drawer, the bill of exchange does not mandate by law the use of paper. Legal scholars do not discuss the facility of a signed bill without a written or paper form, although the German civil law accommodates e-commerce. In general, a bill of exchange in a non-written or non-paper form is possible by using the legal framework and the technical equipment of electronic signatures.

An obstacle for the situation of bills of exchange in a non-written form may be the clear and proper definition of the phrase "document"[616]: a document is generally defined as

[616] As used in Art. 1 No. 8 WechselG.

an embodied explanation in character.[617] Thus legal scholars generally accept that a bill of exchange must fixed in a written form.[618]

On the other hand the wording of the bill of lading-law does not require a written form, but only the signature by the drawer. Thus the bill of lading generally only needs the signing in a specific way, not the paper form. This could be an incorporation between the requirements of the bill of lading and the liabilities of the modern technical evolution.

With the legislator's adoption of the requirements of the eCommerce directive into a German legal framework in December 2000, electronic signatures and certification service providers should be able to introduce an assurgent and innovative system besides the existing requirements of form that impose in a general way a paper form.

When a drawer and the person to whom a bill is payable arrange the contract by using the sufficient electronic form under German law they do not violate the requirements of the bills of lading.

Another obstacle for the unorthodox idea of declaring a bill of lading via qualified electronic signatures is the specifics of the rules by making **copies or identical parts** of a set of it. In the first case, making copies[619] of a bill of lading are generally possible. Any holder is allowed to make them; an admission by the drawer is not necessary, even if the copy must be labelled as a copy of the original of the bill. On the other hand only the drawer is allowed to prepare identical parts[620] of a bill of lading. They must all be of the same type as the bill, mostly numbered. They are made in case of loss. Contrary to the identical part of the bill the copy is able for acceptance. Thus the drawer has to sign the original; otherwise there are as many bills as there are copies.

These typical and significant issues regarding the legal framework of the bills of lading may be a practical obstacle for using bills of landing via electronic documents. The parties to it normally would not increase the risk, certainly if they are not familiar with the other side. The medium of the bill of lading is still an instrument for minimising risks. In a practical view of this instrument, the parties could use an electronic method, but probably would not.

C.1.2. Documentary credit

If partners in a cross-border international transaction are unknown and/or unfamiliar with each other, they are often anxious about risking a deal because they are unable to assess either the financial behaviour or the credibility of their trade partner.

This fundamental problem can be resolved by the use of documentary credits. It is an instrument for minimisation of not only the risks in-between the partners of the deal but also about political and economical ventures, so it has a catalysing function.

Throughout the integration of the European Union and the long-time relationships with non-European partners the influence and application of the documentary credit, or

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[617] *Reichold* in: Thomas/Putzo, Zivilprozessordnung, 27th ed., Munich 2005, Vorbem. § 414 ZPO, Rn. 1.
[618] *Bülow*, Heidelberger Kommentar zum Wechselgesetz, Scheckgesetz und zu den Allgemeinen Geschäftsbedingungen, 3rd ed., Heidelberg 2000, Art. 1 WG, Rn. 2; *Baumbach/Hefermehl*, Wechselgesetz und Scheckgesetz, 22nd ed., Munich 2001, Art. 1 WG, Rn. 2.
[619] Art. 67 WG.
[620] Art. 64 WG.

internationally known as the letter of credit ("L/C") too, is less then in the 1950s. It is mainly adopted in branches like commodity trade and in the building industry, with a total value of up to € 50 billion or nearly 8 million documentary credits in total.[621]

In Germany, like in most of the other countries, there is no explicit legal framework, neither for documentary credit agreements nor for specific electronic letter of credit contracts.

Despite this, it must be noted that the framework for arranging an electronic letter of credit is a conventional material, much like the traditional documentary credits. By signing the Uniform Customs and Practices for Documentary Credits, UCP 500, in 1993, and additionally the new Supplement to the Uniform Customs and Practices for Documentary Credits for Electronic Presentation, eUCP, there is a functional skeleton in terms of general terms and conditions.[622]

Conventional materials like the eUCP are expressly accepted by the European Union. By adopting the Directive on a Community framework for electronic signatures[623] the European Union confirmed the liability of contracts between parties resulting from the usage of electronic signatures, which are based on voluntary agreements under private law between a specified number of participants. The freedom of parties to agree among themselves to the terms and conditions under which they accept electronically signed data should be respected to the extent allowed by national law; the legal effectiveness of electronic signatures used in such systems and their admissibility as evidence in legal proceedings should be recognised.[624]

The UCP 500 and the eUCP can only be considered part of the contract if the parties declare it to be so. Traders might be allowed to arrange these forms implicitly, whereas banks and similar financial institutes as the drawer of the letter of credit are in Germany in general regarded as traders.[625] This is why some parts of the legal scholars argue that the legal status of the eUCP is some sort of commercial custom, codified in German § 346 HGB. More reasonable is the assumption of the aforementioned classification as general terms and conditions. This results in the more practical view that parties of the letter of credit would do well to expressly sign in the application form that they will be using an electronic form, especially for jurisprudence reasons.

The parties are free in declaring a letter of credit in an electronic form. They just have to agree upon the applicability of the eUCP, thus also agreeing upon the applicability of the UCP 500, without expressly signing either.[626] The eUCP must be understood as an extension to the general requirements of a letter of credit by using the UCP 500. Thus parties are able to conclude an agreement which exclusively commits to the usage of the electronic form as equivalent to the traditional paper form, or to the mixed form of electronic documents in addition to documents in paper form.[627]

The provision of letters of credit via electronic media is essentially concerned with the replacement of documentary credits in the traditional paper form by an equally safe

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[621] *Claussen*, Bank- und Börsenrecht, 3rd ed., Munich 2003, p. 238.
[622] For the UCC 500 *BGH* WM 1960, 40; *Hopt* in Baumbach/Hopt, Handelsgesetzbuch, 32nd ed., Munich 2006, VI Bankgeschäfte (11), ERA, Rn. 6.
[623] Directive 1999/93/EC of the Euopean Parliament and the Council of 13 December 1999 on a Community framework for electronic signatures, Abl. L 13 of 19 January 2000, S. 12.
[624] Directive 1999/93/EC of the Euopean Parliament and the Council of 13 December 1999 on a Community framework for electronic signatures, Abl. L 13 of 19 January 2000, S. 12, cause 16.
[625] Sec. 1, 2 KWG.
[626] El.ERA 2 a, *Hopt* in Baumbach/Hopt (Fn. 622), ERA Anh el. ERA 2.
[627] El. ERA 1 a), 2 c), *Hopt* in Baumbach/Hopt (Fn. 622), ERA Anh el. ERA 2.

form. This is why the eUCP prescribes that the signature of the traditional paper form can be replaced only by an electronic signature. Furthermore the presentation of electronic documents is redefined in an extraordinary way: if the bank can not accept the presentation of the documents because of technical difficulties, the bank is considered to be closed, and the expiry date will be extended to the first following banking day on which it is able to receive an electronic record.

These special methods of resolution for possible technical problems resulting from the use of electronic documentary credit symbolize the incorporation of the technical evolution combined with a maximum of safety and routine.

Nevertheless, form a practical point of view, declaring a letter of credit with at least partially electronic documents is slower then thought.

A first reason may be the economic advantage. As shown above, parties of branches like commodity trade and the building industry that are not familiar with each other, would like to minimize the potential risks in suffering a financial loss. This is why people use the formalized structure of the documentary credits: it is simple and accepted worldwide. By combining paper and electronic forms a new element of risk is introduced into a potentially risky relationship. Normally the parties will not prefer a new and in their opinion uncertain element, even though the usage of electronic signatures is officially licensed. Until jurisprudence has answered if electronic letter of credits are as safe as the traditional paper counterpart people will probably use the paper form.

This includes such unanswered themes as the interpretation of uncertain and open meanings like the "receiving of electronic documents": an electronic document is considered to be received when it "enters the information system of the applicable recipient in a form capable of being accepted by that system". There might be a difference to the liability of reading. Even if the recipient has received the documents successfully, it is important for all parties concerned to be able to prove the reading in general. Yet it is still unclear if a non-readable document is equal to a hidden document. For the latter one, there is a special legal framework with individual legal consequences.

An estimation of the short-term legal framework, the eUCP entered into force on 1 April 2002, it will take a few more years, a consistent, perennial jurisdiction and some confidence of the parties hereto before electronic practices can develop.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

In order to become familiar with the legal structure of bills of lading, it is necessary to glance the economic reality first. Traditionally bills of lading are used by shipping companies; the application for truckage companies is of secondary importance.

The German legal system for bills of lading is subdivided into two sections. There are bills of lading for inland waterway transportation, which are subjected to book 4, chapter 4, §§ 407 – 452d of the German Code of Commerce (HGB), the legal framework about transportation charges. Apart from this, there are also provisions for maritime traffic, which are to be found in §§ 642 – 657 of the German Code of Commerce (HGB).

In both provisions a definition of a bill of lading is missing. According to most of the legal scholars it is a security paper, which is issued by the carrier at the shipper's request. It

establishes the reception of the goods which will be transported. The carrier is only committed to hand out the goods against the bills of lading.

The German law does not define the form of the bills of lading. The provisions only adopt the requirement of signing by the carrier. Copies of the signature of the carrier like stamps or prints are allowed by law.[628]

With regard to the discussion if a traditional signature on a written paper form could be replaced by an electronic signature, corresponding to the bills of exchange (in general it would be possible), and similar to the situation of documentary credit, a more specific framework exists. The Comité Maritime International (CMI)[629] drafted a general framework of rules which can be applied to electronic bills of lading, known as the "CMI Rules on Electronic Bills of Lading."[630]

Conventional material like the CMI is expressly accepted by the European Union. By adopting the Directive on a Community framework for electronic signatures[631] the European Union confirmed the liability of contracts between parties using electronic signatures, which are based on voluntary agreements under private law between a specified number of participants. The freedom of parties to agree among themselves to the terms and conditions under which they accept electronically signed data should be respected to the extent allowed by national law; the legal effectiveness of electronic signatures used in such systems and their admissibility as evidence in legal proceedings should be recognised.[632]

By explicitly declaring the applicability of the CMI Rules on Electronic Bills of Lading, the carrier, upon receiving the goods from the shipper, shall give notice of the receipt of the goods to the shipper by a message at the electronic address specified by the shipper. The safety of the delivery and the verification of the parties of the bill of lading are maintained by the use of a private key. "Private key" means any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree to for securing the authenticity and integrity of a transmission. The private key must be separate and distinct from any means used to identify the contract of carriage, and any security password or identification used to access the computer network. It is this key that performs the essential function of the bill of lading: it demonstrates that the owner of the key is indeed entitled to the cargo. Should the shipper wish to designate a new recipient, then he can do so by contacting the transporter, and notifying him that the cargo is to be delivered to a new key holder. The transporter can then issue a new electronic key to the new holder of the electronic bill, at which point the old key is rendered invalid.

While parties in shipping companies are able to declare electronic data equivalent to written documents by using the CMI Rules on Electronic Bills of Lading, parties in inland waterway transportation are outside the scope of the CMI. Questionable is if parties in inland waterway transportation are able to use electronic documents for their own business. German legal scholars are of the opinion that electronic signatures are in

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[628] Sec. 444 I 2 HGB.
[629] http://www.comitemaritime.org/home.htm.
[630] See under http://www.comitemaritime.org/cmidocs/rulesebla.html.
[631] Directive 1999/93/EC of the Euopean Parliament and the Council of 13 December 1999 on a Community framework for electronic signatures, Abl. L 13 of 19 January 2000, p. 12.
[632] Directive 1999/93/EC of the Euopean Parliament and the Council of 13 December 1999 on a Community framework for electronic signatures, Abl. L 13 of 19 January 2000, p. 12, cause 16.

general equal to written signatures, although electronic forms may be refused because of the liability involved in the possibility of making several copies of it.[633]

Despite this, people are safe in making a deal by using electronic signatures when they arrange this with the aid of the Bolero system.[634] The Bolero project is the most recent attempt towards creating an electronic alternative for the paper bill of lading. In 1997 research was carried out in eighteen commercially significant jurisdictions, including Germany.

The legal function is the agreements entered into between the users of the system and Bolero and the users of Bolero amongst themselves which is based on the Bolero Rule Book.

It is the carrier who creates the bill of lading, which will contain information such as description, weight, name of shipper etc. This is information normally found in a paper bill of lading. This would be sent electronically to Bolero, where after verifying the carrier's digital signature the document is sent to the shipper.

Corresponding to the CMI Rules, the Bolero system is therefore based on a contractual relationship, and not on legislation. Contrary to the CMI Rules, the Bolero system does not require the conclusion of a new contract for each new bill of lading. This is why it can be said that the Bolero system gets its practical function by exchanging of different types of electronic records, along with a central registry that contains the details for each transaction.

The fact that German legal system about the bills of lading neither allows nor forbids the usage of electronic bills of lading may be an additional cause for the uncertainty of agreeing to bills of lading in an electronic form. Despite this, parties are generally allowed to conduct their business transactions via electronic bills of lading.

C.2.2. Storage contracts

Where goods are traded there they must also typically be stored at least for a short duration. This applies to all areas which are reliant on warehouses and where it is not possible to deliver just-in-time, especially of course in international trade. People who are unfamiliar with each other would only deal with respect to goods which are stored in another country if they are sure about the legal validity and recognition. Thus they rely on proven documents and a legal system which guarantees the cross-country trade in a safe manner.

Traditionally the warehouse keeper fills out a paper storage contract which he signs and hands out to the legitimated owner. The exact procedure depends on whether the storage document is an order storage contract, a bearer storage document or a registered storage contract. Normally warehouse keepers issue storage contracts at the order of a certain beneficiary.

Despite the understandable expectations of safety, international trade needs flexibility too. This aim is obtainable by using electronic storage contracts.

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[633] *Koller*, Transportrecht, 5th ed., Munich 2004, § 444 HGB, Rz. 5; *Ramming*, VersR (Versicherungsrecht, journal) 2002, 539, 540.
[634] *Graf v. Bernstorff*, RIW (Recht der Internationalen Wirtschaft, journal) 2001, 505

As shown in the remarks about the bills of exchange there are suitable provisions for storage contracts in general as well. German law elaborates specific provisions in §§ 467 – 475h of the German Code of Commerce (HGB). The storage contract itself is detailed in § 475 c. It requires the storer to issue a document which is signed by him. Similar to bills of exchange, a specific paper form not required, so there is no reason to deny legal validity to storage contracts concluded electronically.

Thus it is now possibly for the parties to conclude storage contracts either in written or in electronic forms.

C.3 Cross border trade formalities: customs declarations

Also in the range of customs, and especially within customs declarations, electronic documents are widely accepted in Germany. This possibility is already provided by Art. 61 of the Community Customs Code (CCC)[635], which allows customs declarations that are made "using a data-processing technique where provided for by provisions laid down in accordance with the committee procedure or where authorized by the customs authorities." The provisions mentioned in Art. 61 CCC, particularly the implementation regulation for the CCC,[636] gives European customs authorities the opportunity to accept electronic customs declarations instead of written documents. The provision establishes the EDI standard for the data transmission. According to Art. 4b the authorities establish a standard how the written signature is replaced by an electronic equivalent.

German custom authorities have taken the opportunity to replace the written custom procedure by an electronic procedure in a large scale. The requirements for the electronic customs declaration are laid down in a special administrative regulation of the federal ministry of finance. The competence to establish the requirements is given to the federal ministry of finance by art. 8a Customs Regulation.[637] Therefore, participation in the electronic customs declaration procedure requires the prior registration at a notified body. After the written registration, the participant receives a so called *Beteiligten-Identifikation-Nummer* – BIN (Participant Identification Number). The BIN replaces the written signature. [638]

Some electronic customs declarations can be transmitted via a usual web browser (such as MS Internet Explorer or Mozilla Firefox). Unlimited access to the electronic customs declaration procedure is only provided if the company uses special software. This software must correspond with the EDI based ATLAS system, which is used by the custom authorities. The communication interfaces of the ATLAS system are published by the custom administration. There are numerous different software solutions that communicate with the ATLAS interface.[639]

The ATLAS data interchange is based on the UN/EDIFACT format via the X.400 or FTAM protocol.

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[635] Regulation 2913/92/EEC.
[636] Regulation 2454/93/EEC.
[637] *Zollverordnung* ; BGBl. I, 1993, 2449; 1994, 162.
[638] Information provided by the federal ministry of Finance at http://www.zoll.de/b0_zoll_und_steuern/a0_zoelle/c0_zollanmeldung/d10_atlas/d0_teilnvoraus/index.html.
[639] i.e. ZOLAS or VERA/J by the dbh company, http://www.dbh.de

Actually the electronic customs declaration is limited to declarations concerning importation and transit of goods. Already 90 % of all declarations in this range are transmitted electronically. Export is still excluded from the electronic procedure. A pilot project beginning in August 2006 will extend the ATLAS procedure on the export of goods.[640] Electronic customs declaration shall completely replace its paper based counterpart in 2008.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

An invoice is the settlement of the remuneration for a delivery or an activity, which is issued by the provider to the beneficiary. In commercial intercourse invoices are used as accounting vouchers. Traditionally invoices are known only in a paper form because of the correspondence to the definition of a document. A document was defined as a paper or written form of documentation of cogitations. As a consequence, for a long time there was no need for a legal framework for electronic invoicing; traders were rendered an invoice only by using paper form.

Via the e-Invoicing directive[641] this situation was changed. It attempted to harmonise the applicable legislation in the Member States, most notably in the field of Value Added Tax (VAT). The aspired result was the general acceptance of electronic invoices for VAT-administration purposes, thus providing a significant stimulus to the use of e-invoicing in general.

In the German legal system the provisions of the e-Invoicing directive were adopted in § 14, § 14b UStG. As required by the European directive, the German law now allows electronic invoicing under the conditions imposed by the directive. Nevertheless, German law allows only qualified electronic signatures and thus the German requirements surpass the European ones,[642] as the directive only requires an advanced electronic signature. Some legal scholars criticised the insecurity of advanced electronic signatures in contrast to the qualified ones.[643] German law now is something in between: with the entry into force of the new rules regarding VAT on 1 January 2004, parties are allowed to invoice electronically by using a qualified electronic signature without accreditation.[644]

Contrary to earlier German provisions, the explicit consideration requires that the origin and the integrity of the content are guaranteed by the electronic signature, § 14 III UStG.[645]

In general, parties to contracts are allowed to invoice electronically through electronic signatures or by using electronic data interchange (EDI). These alternatives to the paper form are only acceptable when the trade partner accepts this implicitly or explicitly, § 14

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[640] Software solutions for the ATLAS based export are already available, i.e. FRRED by Burr Logistiksysteme, http://www.burrbw.de/produkte/atlas/atlas.html
[641] Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax, Official Journal L 15, 17/01/2002 P. 24
[642] *Zeuner,* in:Bunjes/Geist, UStG, § 14 UStG, Rn. 20.
[643] *Weber*, Der Betrieb 2004, 337, 338.
[644] *Zeuner,* in:Bunjes/Geist, UStG, § 14 UStG, Rn. 21.
[645] *Zeuner,* in:Bunjes/Geist, UStG, § 14 UStG, Rn. 24.

I 2 UStG. For EDI it is also necessary that the parties warrant that they comply with the recommendation of the European Union.[646] Another possibility is to invoice via Electronic Bill Presentation and Payment (EBPP). This format means the electronic invoicing by using the internet via TCP/IP. In relation to EDI the EBPP-procedures show a smaller degree of formalisation. The advantage of this system might be in lower costs and in the scope of business-to-business (B2B) as well as business-to-consumer (B2C).[647]

Electronic invoices may be stored throughout the Union, provided that the taxable person notifies the administration, § 14b III UStG, and that the invoices can be accessed electronically from Germany. Storage outside of the Union is not permitted at all.

Electronic invoices must be archived in their original form, which means that only the original electronic document including all data regarding its authenticity and its integrity can be archived, and that it is thus not sufficient to save a printed copy. By contrast, invoices which were received in paper form may be saved either in their original paper form or as a digital copy. If a digital copy is made, the technology used must guarantee the authenticity of its origin and the integrity of its contents. Thus, German law is flexible with regard to electronic archiving of invoices.

The storage period has been fixed at ten years both for the recipient and for the sender of the invoice, § 14b I 1 UStG. The bills have to be readable for the period of storage, § 14b I 2 UStG. For electronic documents it is necessary that financial offices are able to use the document by accessing them online, § 14b IV 2 UStG. The liability of loading the documents for the financial offices is not restricted to the German national territory. This is necessary because of the possibility of the firms to choose the location for the storage of the electronic documents.[648]

From a practical view most commercial undertakings find fault with the opportunity of electronic invoicing in general. Because of the provision of needing a qualified electronic signature, most of them are of the opinion that there is no economical advantage to the technical evolution. Thus public administrations are faced with the additional challenge of installing besides the legal framework of electronic invoicing an application framework as well.

C.4.2. Electronic accounting

This section will evoke the major principles of German accountancy legislation. To what extent does German legislation permit the use of electronic documents for accounting purposes?

The fundamental German regulation concerning accounting has been incorporated as the third book (sec. 238-342e) into the code of commerce – *Handelsgesetzbuch* (HGB) by the Accounting Act[649]. According to these provisions, merchants and (incorporated) trading companies are obliged to organise their accountancy according to the *Generally Accepted Accounting Principles*. Within these principles, companies are allowed to use accountancy software and store the books on an electronic data storage unit.[650] One of

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[646] Commission Recommendation 94/820/EG of 19 October 1994 relating to the legal aspects of electronic data interchange, Office Journal L 338, 28/12/1994, P. 98.
[647] Groß/Georgius, in: http://www.elektronische-steuerpruefung.de/faqs/gross_georgius_2.htm.
[648] *Zeuner,* in:Bunjes/Geist, UStG, § 14b UStG, Rn. 19.
[649] *Bilanzierungsrichtliniengesetz;* BGBl. 1985 I, p. 2355.
[650] Sec. 239 para 4 HGB.

the main contents of the Generally Accepted Accounting Principles is, like in Belgian law, the immutability (or unchangeability) of accountancy documents.[651] Some software products meet this requirement. If enterprises use these software products, they are legally allowed to manage the biggest part of their accountancy electronically. If the enterprise is obliged to present their books, it still can be forced to print out the documents.[652]

There are still some general exceptions to the use of electronic accounting. For some important kinds of documents, German accounting law still requires paper documents. Particularly, the opening balance and the annual accounts require a personal signature, sec. 245 HGB. It cannot be replaced by a qualified electronic signature.

For storage purposes, sec. 257 HGB requires the books to be kept safe for a period of ten years (for some documents a shorter period of 6 years is required), starting on the first January of the year following the date of closure. Except of the opening balance and the annual accounts, all documents can be kept in electronic form, sec. 257 para. 3 HGB.

Similar to Belgian legislation, German accountancy law requires the periodic deposit of an incorporated company's annual account with the competent authorities, a role that has been allocated to the *Handelsregister* (commercial register). Most Federal States (*Bundesländer*) already allow online access to the commercial registers. There are two different software solutions,[653] which are both accessible via internet browsers. However, the electronic deposit of the annual accounts is still impossible. A draft law,[654] which will probably be put into force within 2007, will provide the possibility for the electronic deposit of the annual accounts with the commercial register. The personal signature on the annual accounts will be replaced by a qualified electronic signature. According to this draft, the commercial register will be kept completely electronically. A still unsolved problem is the participation of certified public accountants, which is required in some cases. Certified public accountants use an official seal to confirm the correctness of the annual account. Until today, there is no electronic equivalent for this electronic seal.[655]

With the new law concerning the electronic commercial register, full electronic accountancy should be possible.

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[651] Sec. 239 para 4 sentence 2 HGB.
[652] Sec. 261 HGB.
[653] RegisSTAR and AUREG, further information available (also in English and French) at http://www.handelsregister.de/index.html?Sprache=englisch
[654] Electronic commercial and company register law, *Elektronisches Handels- und Unternehmensregistergesetz*, EHUG. The governmental draft is available at http://www.jura.uni-augsburg.de/prof/moellers/materialien/materialdateien/040_deutsche_gesetzgebungsgeschichte/ehug/ehug_pdfs/02_rege_ehug_2005_12_14.pdf
[655] For further information on this issue see the statements of the chamber of certified public accountants at http://wpk.de/pdf/WPK-Stellungnahme_06-10-2005.pdf, http://wpk.de/pdf/wpk-stellungnahme_21-07-2005.pdf and http://wpk.de/pdf/WPK-Stellungnahme_15-11-2005.pdf.

D. General assessment

D.1 Characteristics of German eCommerce Law

- German commerce law always offered trade partners a great amount of flexibility in arranging methods of contract conclusion. Due to the principle of free evaluation of evidence the same applies for evidence of commercial relationships. Thus, the eCommerce directive and its implementation into German law was no revolution to commercial relationships but it moderately adapted civil law to the circumstances of the electronic era.
- For some documents, the German legal framework still requires written paper documents, especially for contracts regarding real estate. Apart from these, there is a great acceptance of electronic documents, at least from a legal point of view. Similarly, in cases where contract partners attach a specific value to the document itself (as is the case e.g. for documentary credit), the use of electronic documents is possible. The factual acceptance of these electronic solutions instead of paper documents still is increasable.
- Although technological solutions are perfectly capable of emulating the traditional paper environments, no single standard or platform is often available and familiar to all parties involved. As a result, traditional paper documents are still very common, but the use of electronic documents is rising.
- Like in other western industrialised countries, international regulations played a unifying role, as has been observed e.g. through the eUCP and the CMI Rules on Electronic Bills of Lading. While these rules typically do not provide a technical framework for contracting partners, they do provide a measure of legal certainty, provided the partners choose to declare such regulations applicable to their situation.

D.2 Main legal barriers to eBusiness

- Most legal barriers to eBusiness have been removed over the past years. Especially in the range of administrative documents, German authorities have made great efforts to allow electronic communication.
- Nevertheless, some administrative demands can only be met by the use of traditional paper documents. Primarily accounting regulations are still suitable to keep companies from organising a purely electronic business. With the new Electronic commercial and company register law (*Elektronisches Handels- und Unternehmensregistergesetz*, EHUG)[656], these barriers to eCommerce shall be removed by introducing a fully electronic commercial register.
- In the administration as well as in private companies a main barrier to electronic business is the lack of technical capacities on the one and the lack of personal acceptance of electronic communication (especially by older people) on the other hand. It is only a matter of time until these barriers will disappear.

[656] See fn. 654.

D.3 Main legal enablers to eBusiness

- As noted above, German commercial legislation allows trade partners a good deal of flexibility, by allowing them to regulate among themselves which methods of contract conclusion they deem to be acceptable. This existing framework has been amended by additional regulations, often inspired by European directives, including the eCommerce and eSignatures directives, as well as several consumer protection directives, resulting in a fairly complete picture.
- While the direct impact of the eCommerce directive on German civil and commercial law was not "revolutionary", the indirect impact of the eSignature and eCommerce directives on German administration was massive. The parliament has taken the European guidelines as a role model for the modernisation of German administrative proceedings. Companies are allowed to handle almost 100 % of the administrative duties electronically. Some special regulations concerning tax and customs introduce the use of certain standards in order to replace written documents. These special regulations will be completed by the electronic commercial register law in 2007. Where special technical standards are missing, the German legal framework makes use of the European inspired (qualified) electronic signature.
- While German civil and commercial law as well as law of civil proceedings has always been very flexible towards the needs of electronic commerce, the most important improvements has been made in the range of administration. This development has already reached an advanced stage and will be finished within the next years. Hence, the German legal system provides a well prepared framework for the needs of electronic businesses.

Greece National Profile

A. General legal profile

Greece is a presidential parliamentary republic as follows from Article 1 (1) of the Constitution. The Greek system of government is based on fundamental principles such as popular sovereignty, equality, personal and political freedom, division of powers, a multi-party political system, and an independent judiciary[657].

Legislative authority is exercised by both the legislative and the executive branch. In particular, legislation is enacted by the Parliament, but also by the executive branch acting under authorization by law (delegated legislation). The most significant form of delegated legislation is the presidential decree (hence P.D.), which is based on statutory authorisation and is issued on a ministerial proposal. This type of legislation is often used particularly for the implementation of European Directives, since it is a convenient and quick way of enacting law.

Commerce and contract law are governed mainly by the provisions of the Civil Code[658] and Code of Commerce[659]. The Civil Code was drafted in 1945 on the basis of existing codes, mainly of the German Civil Code, whereas the Commercial Code was enacted in 1828, adopting the Napoleonic Code of Commerce[660]. Commercial operations are also regulated by specific laws and legal provisions. In particular, eCommerce in Greece is regulated by the specific decrees implementing the relevant EU-Directives and by the general legal provisions of civil and commercial law.

Disputes regarding commercial relations are typically dealt with by the Justice of the Peace[661] for matters with a financial value of € 12,000 or less; or by one-member[662] for matters with a value of € 80,000, and multi-member district Courts[663] for matters of higher value.

Appeals against the decisions of the Justice of the Peace can be lodged with the multi-member district Court, and with the Court of Appeal[664] for decisions of the one-member or multi-member Courts. Applications for cassation are filled with the Supreme Court[665], but the grounds for review are limited to violation of rules of substantive law or of specific rules of procedure (Art. 559, 561 (1) Civil Procedure Code). Court decisions do

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[657] See P. Dagtoglou, in : K.D.Kerameus/P.J. Kozyris (eds.), *Introduction to Greek Law*, Kluwer/Sakkoulas,1988, p. 21.

[658] Αστικός Κώδικας

[659] Εμπορικός Κώδικας

[660] See N. Deloukas, in : K.D.Kerameus/P.J. Kozyris (eds.), *Commercial Law,* op. cit., p. 153 et seq.

[661] Ειρηνοδικεία, eirinodikeia

[662] Μονομελή Πρωτοδικεία, monomeli protodikeia

[663] Πολυμελή Πρωτοδικεία, polimeli protodikeia

[664] Εφετείο, Efeteio

[665] Άρειος Πάγος, Areios Pagos

not have any binding power, although decisions of the Supreme Court play an important role in the interpretation of law and cannot be ignored by lower courts.

B. eCommerce regulations

The issues concerning the validity and recognition of electronic documents have been discussed intensively among legal scholars in Greece that seek to find answers to emerging legal problems before the adoption of specific legislation. In this section, the main conclusions of the Greek doctrine regarding the legal value of electronic documents are briefly presented.

B.1 eCommerce contract law[666]

B.1.1. General principles

The Greek legal system allows more flexibility in the formation and proof of commercial contracts than for civil contracts[667]. An essential characteristic of commercial law is informality, with the exception of commercial papers, such as bills of exchange, promissory notes and checks, which require certain formalities. There is also a facilitation of proof regarding evidence, since the court can hear witnesses in commercial disputes (Article 394 (1) lit. d Code of Civil Procedure), although generally, contracts and other juridical acts should be in writing and testimony is not allowed for contracts with a financial value of more than € 5,869.40 (Article 393 Code of Civil Procedure)[668].

Furthermore, the Greek legal system places a lot of value on the principle of autonomy of will. According to the Civil Code, juridical acts must be executed in a certain form only when the law expressly requires so (Article 158), or when the parties have provided so (Article 159)[669]. Hence, contracts are informal and in practice, the main issue at stake is whether electronic documents are valid as legal means of evidence.

The definition of an electronic document is originally given by legal doctrine. Accordingly, an electronic document is considered as a set of data records in the hard disk of a PC, which are processed by the central processing unit and represented according to the commands of a computer program in a readable manner on the computer's screen or on

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[666] See D. Maniotis, *Electronic Transactions,* in: Cyberlaw in Hellas, Kluwer Law International 2005, p. 159 et seq; I. Iglezakis, *The legal framework of electronic commerce*, Sakkoulas eds 2003 (in Greek), p. 127 et seq.; E. Alexandridou, *The law of electronic commerce – Greek and Community law*, Sakkoulas eds 2004 (in Greek), p. 37 et seq.; G. Georgiadis, *Contract formation on the Internet*, 2003, (in Greek), passim; D. Maniotis, *The electronic formation of contracts and the liability of third parties responsible for the authenticity of the electronic document*, 2003 (in Greek), passim.

[667] See, e.g. I. Iglezakis, *Legal issues in electronic data interchange* (EDI), EEmpD 1997, p. 247 (in Greek).

[668] See N. Deloukas, op. cit.; Kerameus, *Judicial Organization and Civil Procedure*, in: K.D.Kerameus/P.J. Kozyris (eds.), op. cit., p. 252.

[669] See S. Symeonides, *The General Principles of the Civil Law*, in: K.D.Kerameus/P.J. Kozyris (eds.), op. cit., p. 59.

the printer attached to it[670]. It is generally held that an electronic document does not constitute the elements of written documents under the Code of Civil Procedure, mainly because of the lack of the element of constancy in its incorporation in a durable material. It cannot also be subject to direct [or tangible] evidence (as it is suggested by one doctrinal opinion), but it is an intermediate form, which has been equated by the legislator to private documents, according to Art. 444 par. 3 of Civil Procedure Code, which states that among others, 'mechanical portrayals' are considered as documents, and this because of the proximity of electronic documents to private documents[671].

This definition has also been adopted by jurisprudence[672]. However, there is no legislative definition of the electronic document, even in the implementation act of the eCommerce Directive, i.e. P.D. 131/2003, with the exception of the Penal Code. Article 13 lit. c of the Penal Code[673] states that: "a document is also any means used by a computer or a computer memory, in an electronic, magnetic or other manner, for recording, storage, production or reproduction of data that cannot be directly read, as well as any magnetic, electronic or other material, on which information, image, symbol or sound is recorded, individually or in combination with each other, provided that these means and materials are destined or are capable of proving facts which have legal significance". However, this definition is confined by the scope of application of penal provisions and is not suitable, in general, for application in electronic contracts, although it can be used as an interpretation standard in hard cases.

The jurisprudence of Greek courts has been confronted on some occasions with problems posed by electronic transactions, such as the evidential value of bankbooks. Regarding the legal validity of bankbooks as means of evidence, the court of Areios Pagos held that the bankbook contains computer representations of the initial money deposit as well as subsequent money deposits or withdrawals, which are recorded by the bank's PC. Even if it does not bear a hand-written signature of the qualified bank employee, the bankbook is equated to a private document, according to the provision of Art. 444 par. 3 Code of Civil Procedure. Consequently, it constitutes conclusive evidence for the facts or the things it refers to (by way of a mechanical portrayal), the submission of rebuttal evidence being allowed[674].

Furthermore, in a case regarding the probative effect of e-mail messages, a court has ruled that the use of an e-mail address (through its inclusion in an electronic message) which can be attributed uniquely to one person constitutes evidence as to the identity of the issuer[675]. As a result, the mechanical representation of the electronic message in a document satisfies the concept of the private document, which has probative weight on the part of the issuer, according to Article 444 (3) Code of Civil Procedure. Consequently, the legally ratified copy (e.g., by an attorney) of the electronic message

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[670] See S. Koussoulis, *Contemporary Types of Written Transaction*, 1992, pp. 138-142 (in Greek).

[671] See op. cit.

[672] Athens Single-Member Court of First Instance 1327/2001, RHDI 2002, p. 531 (=Diki 2001, 457) et seq.; Athens Single-Member Court of First Instance 1963/2004, DiMEE 2004, p. 404 et seq.; Athens Single-Member Court of First Instance 6302/2004 (unpublished).

[673] This provision was introduced by Article 2 of Law 1805/1988.

[674] Areios Pagos 54/1993, published in Ελληνική Δικαιοσύνη [Elliniki Dikaiosyni - HellDni] [1993] 600; see also Areios Pagos 1623/1995, published in HellDni [1998] 133; Athens Court of Appeal 1807/1997, published in HellDni [1998] 201; Athens Court of Appeal 807/2000, published in DEE [2000] 522.

[675] Athens Single-Member Court of First Instance 1327/2001, op. cit.

sent that is saved on the hard disk of the recipient's PC constitutes conclusive evidence because of the fact that Greek jurisprudence holds that the declaration of will in it originates from the issuer – sender of that message. As it is evident, the representation of an electronic document in a paper document is regarded as a mechanical portrayal and not the electronic document itself[676], which is a set of digital information that represents text or other information[677].

According to this jurisprudence, electronic messages can have legal validity as means of evidence, provided that the proof of their genuineness is provided, in accordance with Art. 445 Code of Civil Procedure. This condition can be satisfied insofar as the confirmation of the issuer of an electronic document can be attainted by means that are functionally equivalent to a handwritten signature, such as the electronic signature and, more or less, the certificate attached to it.

With the introduction of specific rules concerning the legal validity of electronic signatures in 2001, more clear rules have been adopted by the law. It is now explicitly provided that, where an electronic document bears an 'advanced' or 'digital' signature, it is of equal validity with a document bearing a handwritten signature[678]. In particular, Article 3 (1) P.D. 150/2001 states that advanced signatures, which are based on a qualified certificate and which are created by a secure creation device, are equal in their effect, i.e. legal validity and probative effect, to handwritten signatures in paper documents.

Also documents with simple electronic signatures, i.e. signatures that do not fulfil the criteria defined above, are not denied legal effectiveness and admissibility as evidence (Article 3 (2) P.D. 150/2001).

The validity of electronic contracts is mainly established, however, by the enabling principle, i.e. Art. 8 (1) P.D. 131/2003, which transposes the eCommerce Directive. This refers to the aforementioned provisions and states that without prejudice to Decree 150/2001 "on electronic signatures", the conclusion of contracts by electronic means is permitted. According to legal doctrine, this provision means that an electronic document will have the same legal validity and probative effect as private documents, provided that such documents have advanced electronic signatures, which are based on a qualified certificate and are created by a secure-signature-creation device[679].

The same Article provides in Para. 2 for an exemption for certain types of contracts and in particular for contracts that create or transfer rights in real estate (i), contracts requiring by law the involvement of courts, public authorities or professions exercising

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[676] Cf. Tentes in: Kerameus/Kondylis/Nikas, *Commentary on Code of Civil Procedure* [Κεραμέως/Κονδύλη/Νίκα, Ερμηνεία ΚΠολΔ] [2000,] Art. 444, nr. 5, p. 799, who supports the view that the hard disk of a computer is a mechanical portrayal.

[677] Cf. Reed, *Internet Law – Text and Materials,* 2000, pp. 154-155.

[678] See Maniotis, *Electronic Transactions*, in: Cyberlaw in Hellas, op. cit., p. 159 et seq.; Iglezakis, *Regulation of electronic Signatures,* in: Cyberlaw in Hellas, op. cit., p. 178 et seq.

[679] See I. Iglezakis, *e-Commerce directive – The Greek response,* CLSR 2005, 43; in more detail see Iglezakis, *The legal framework of eCommerce*, op. cit.,p. 139 et seq.; Georgiadis, *Contract formation on the Internet*, op. cit., p. 204 et seq.

public authority (ii), and contracts governed by family law or by the law of succession (iii)[680].

In accordance with Article 8 (2) P.D. 131/2003, an electronic contract is not admissible as far as it concerns the creation or transfer of rights in real estate, and this includes ownership, servitudes (e.g. usufruct) and mortgage[681]. This exemption is compatible with the Greek legal system, since the creation and transfer of rights in real estate requires that certain formalities must be observed. So, the conveyance of the ownership on immovables requires an agreement between the owner and the transferee that the ownership is transferred for a lawful cause, this agreement should be made in notarial form and be recorded in the conveyance records in the district where the immovable is located (Article 1033 Civil Code)[682]. Servitudes are created either by a juridical act or by acquisitive prescription (Article 1121), and mortgages are created on the basis of a title which may be the law, a judicial decision or the will of a private person (Article 1260, 1261 Civil Code), which is incorporated in a notary act (article 1266).

In the field of law of succession and family law, there are juridical acts (not contracts, as the P.D. 131/2003 inaccurately states) that must be concluded in writing or require the involvement of courts. To begin with, a will may be either concluded on a written document by the testator himself or be made before the notary as a public will. Family law juridical acts may require the involvement of courts, such as the divorce and the adoption, while others require a notarial act, e.g. the recognition of a child.

Furthermore, there are certain formalities dealing with the recording of specific acts in the conveyance records (Articles 1192 to 1208 Civil Code)[683]. Such acts regarding an immovable and their recording takes place in the conveyance records in the district where the immovable is located. Such acts include *inter vivos* juridical acts, including gifts *mortis causa*, by which real rights in immovables are established, transferred or cancelled; adjudications of real rights in immovables; partitions of immovables; non-appealable judicial decisions mandating declarations of will for real juridical acts concerning immovables; and non-appealable judicial decisions recognising ownership or other real rights on an immovable, obtained by acquisitive prescription. In addition, other acts that must be recorded in the conveyance records are the acceptance of heritage (Article 1193) and lease contracts for a term of more than nine years (Article 1208). Since the conveyance records are not yet held by electronic means, it seems that electronic documents cannot be valid where recordation is mandatory by law.

The legal validity of electronic documents can also be subject of an agreement between the parties in a contract. According to legal doctrine, the parties can agree on a specific form of a contract that may also be a document bearing a (simple) electronic signature[684], as it is deduced by Article 159 of Civil Code[685]. This possibility is regarding all

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[680] It should be noted that there is no exemption relating to contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession, as the eCommerce Directive provides.

[681] It is notable that in Greece, the number of real rights is limited. The real rights that a person may have are ownership, personal and predial servitudes, pledge and mortgage (Article 973 of Civil Code).

[682] See also Symeonidis, op. cit. p. 109.

[683] See Symeonidis, op. cit. pp. 111-112.

[684] This is so, because an advanced electronic signature is equated by the law, as mentioned above, with a handwritten signature.

[685] See K. Christodoulou, *Electronic Documents and Electronic Contract* (in Greek), 2001, p. 187.

kinds of contracts, civil and commercial, and it may facilitate a lot the conclusion of electronic contracts.

Particularly in commercial transactions, although such agreements do not have probative effect, since procedural agreements are not valid under Greek law, they can be subject of proof by testimony, as already mentioned above (Article 394 lit. d Code of Civil Procedure).

There are no specific legal provisions concerning electronic notifications in Greek law. However, jurisprudence has solved this issue, for it recognises electronic messages (without electronic signature), as already mentioned, as private documents[686]. Furthermore, except for contracts regarding real estate, most types of contracts are as a rule informal, and there is no precondition that they bear a handwritten signature. However, since there are no specific rules for electronic notifications, the consensus of both parties seems necessary for the legal acceptability of an electronic notice.

Likewise, there is no legal framework concerning electronic registered mail, although such services are actually offered by Internet Providers. Similarly, there is no framework for the electronic archiving of electronic or paper documents.

After the transposition of the eCommerce Directive, some of these issues have been addressed by legislation, but only in the scope of application of the Directive. In particular, it is provided that the service provider is under obligation to inform the recipient of the service whether or not the concluded contract will be filed by him and whether it will be accessible (Article 9 of PD 131/2003). This obligation presupposes the existence of an archiving system, although this is not made more specific.

Regarding the placing of the order, it is stated that in cases where the recipient of the service places his order through technological means, the service provider has to acknowledge the receipt of the order without undue delay and by electronic means (Article 10 of PD 131/2003). This provision may be interpreted as a secondary obligation of parties in electronic transactions to accept notifications and reply with confirmations.

B.1.2. Transposition of the eCommerce directive

The eCommerce Directive has been transposed with the P.D. no. 131/2003, which entered into force retroactively on 17.1.2002[687]. As it is well known, the Directive enables the electronic conclusion of contracts and lays down information requirements and obligations of the service provider, which facilitate the formation of contracts by electronic means. It is noteworthy that since the provisions on electronic contracts have been introduced in the aforementioned Decree (Articles 8 to 10), no modification of the

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[686] Op. cit. (Note 9). It is notable that the Athens Single-Member court in its No 1963/2004 decision has held that the invitation of the members of a union to an assembly, which was send by e-mail, constitutes conclusive evidence for the fact that the declaration of will in it originates from the issuer – sender of that message.

[687] Presidential Decree No 131/2003 – Transposition of Directive 2000/31 of the European Parliament and the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*Προεδρικό Διάταγμα υπ΄ αριθ. 131/2003 - Προσαρμογή στην Οδηγία 2000/31 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου σχετικά με ορισμένες πτυχές των υπηρεσιών της κοινωνίας της πληροφορίας, ιδίως του ηλεκτρονικού εμπορίου, στην εσωτερική αγορά*), Government Gazette A, Nr. 116 of 16.5.2003.

Civil Code and the Code of Civil Procedure has taken place. Therefore, according to our view, this type of transposition of the Directive is hindering the visibility of these provisions and jeopardizing the unity of the law of contracts[688].

The field of application of the provisions of PD 131/2003 concerning electronic contracts is determined by the general provisions of the Decree. In particular, the regulations on electronic types apply to services of the information society[689]. Exempted are contracts that create or transfer rights in real estate, contracts requiring by law the involvement of courts, public authorities or professions exercising public authority, and contracts governed by family law or by the law of succession (Article 8 (2)), as well as contracts which are regarding gambling activities, agreements or practices governed by cartel law and activities of notaries and equivalent professions, etc. (Article 20).

The transposition of the eCommerce Directive resulted in gaps in the areas not covered by the field of application of the Decree. For those types of electronic contracts (e.g. auctions) the issue of their legal validity still remains open. And also, the types of contracts which create or transfer rights in real estate and those that require the involvement of courts, public authorities or professions exercising public authority (e.g. public notaries), are excluded from the application of the decree.

The Decree does not specify any formal requirements regarding electronic contracts. As mentioned above, it states that without prejudice to Decree 150/2001 "on electronic signatures", the conclusion of contracts by electronic means is permitted. This means that contracts concluded by electronic means are not subjected to any formal requirements and that merely the provisions for electronic signatures are decisive for their legal validity and probative effect.

The requirements for electronic signatures are defined in P.D. 150/2001, which transposes the EU-Directive 1999/93. According to Article 3 of the Decree, an advanced signature based on a qualified certificate and created by a secure creation device is equivalent to a handwritten signature in terms of material and procedural law. And furthermore, the legal effect and admissibility as evidence of the electronic signature is not denied for the sole reason that any of these conditions should be missing[690]. In this context, advanced electronic signatures can be used for all types of contracts, with the exemptions provided in Article 8 (2) of P.D. 131/2003. Simple electronic signatures, i.e. electronic signatures lacking the prerequisites of the advanced electronic signatures, can be used in contracts, which are not required to have a handwritten signature, e.g. sale contracts of movables.

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[688] See in particular, Iglezakis, *The legal framework of e-commerce*, op. cit., p. 49.

[689] According to Article 1a of the Decree, information society services means any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of a service, in the sense of Art. 2 (2) of P.D. 39/2001 adopting EU-Directives 98/34 and 98/48.

[690] See S. Stavridou, *Greek Law on E-Signatures,* CRi 2001, 155; Iglezakis, *Regulation of Electronic Signatures*, in: Cyberlaw in Hellas, op. cit., p. 178.

B.2 Administrative documents

The Greek legislator has put a lot of effort to adjust administration to the information age. Even before the adoption of the eSignature Directive, Law 2672/1998 established specific provisions concerning electronic communication in administration procedures. This Law enables exchange of documents through fax and e-mail between public services, legal persons of public law and organisations of local administration, and between them and private persons, legal persons or groups of persons (Article 14). Exempted are only: a) confidential or restricted access documents, b) documents containing sensitive personal data, c) applications, bids and supporting documents in procedures for hiring personnel, in contract awarding, d) documents that must be submitted in original or in a certified copy and e) proofs of payment.

Under authorisation of Law 2672/1998, P.D. 342/2002 was issued, which describes the use of electronic communication for administrative purposes in greater detail. The Decree provides that decisions and certificates can be communicated through e-mail from public services, legal persons of public law or organisations of local administration to private or legal persons, provided that they bear a digital signature (Article 1(1)), i.e., an advanced electronic signature as this term is defined in PD 150/2001. The same applies regarding opinions, copies of proceedings, proposals and reports which are communicated through e-mail from public services, legal persons of public law or organisations of local administration to private or legal persons.

A 'digital' or 'advanced' electronic signature is not required in cases where the communication of documents does not have any legal consequences or is not linked to the exercise of rights. This is the case where subject of such communication are questions, circulars, advices, studies, statistical data, requests for information and replies thereto (Article 2 of P.D. 342/2002).

It is notable that according to administrative law doctrine, administrative acts can take the form of a document issued by a computer[691] or of a message that is communicated by electronic means, such as telegram, teletex, telefax, or e-mail (Article 14 of Law 2672/1998 and also Article 22 of Law 2539/1997, Article 10 (6) of Law 3230/2004, and P.D. 150/2001, 342/2002)[692]. With Law 3242/2004 (Article 8) it has been established that all administrative procedures concerning the issuance of an individual administrative act from the public sector, in the sense of Article 14 (1) of Law 2190/1994, which provides that certificates or other documents are issued that certify facts, elements or legal relationships, can be concluded by electronic means also, and in particular by advanced information systems providing interconnectivity.

In practice, the fields where electronic communication with administration authorities is very widely used are the financial and the social security sector. Tax declarations and VAT declarations[693] are completed online, as well as payment of social security dues from employers, etc.[694]. Furthermore, electronic means are used for the exchange of documents and information between public services, as well as for the purposes of

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[691] See Council of State 804/1971, 1178/1971, 1246/1971, 1426/1979).

[692] See A. Tachos, *Greek Administrative Law*, 2005 (in Greek), p. 609; Th. Panagos, *The electronic administrative document - Creation and management*, NoB 2006 (in Greek), p. 11 et seq.

[693] See www.taxisnet.gr.

[694] So, e.g. the Social Security Institute (IKA) provides electronic services to employers; see http://www.ika.gr/gr/infopages/yphr/home.cfm.

Citizen's Information Centres[695], which undertake all contacts with the public administration, in order to assist citizens in the issuance of documents, filing applications, etc.[696]

C. Specific business processes

In this section of the study, we will take a closer look at certain capita selecta of the applicable Greek legislation and legal and administrative practice. Specific examples of common document types will be examined to assess the validity and recognition of their electronic counterparts, along with an analysis explaining the (lack of) prevalence of any allowable electronic document types.

The section below is organised according to five stages in the electronic provision of goods on the European market. They comprise the introduction of goods on the market, credit arrangements, transportation and storage, cross border trade formalities and financial/fiscal management.

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The bill of exchange is a commercial paper with several quite interesting features. It is a document containing a payment order, by virtue of which the issuer orders another person (the payer) to pay a sum of money at a certain time in a certain place to the payee or to his order. It must contain the denomination 'bill of exchange' and certain elements (Article 1 of Law 5325/1932)[697]. It is notable that the bill does not function anymore as a means of payment, but as a means of providing credit, and as such its use is very common in Greece.

The bill of exchange must be in writing, which means that it should bear the handwritten signature of the issuer and the payer. This obligation is not as much an obstacle for the conclusion of bills of exchange by electronic means as theoretical considerations.

In more particular, the bill of exchange can be concluded in an electronic form, provided that there is proof of their genuineness, in accordance with Art. 445 Code of Civil Procedure. This is possible by using means that are functionally equivalent to a handwritten signature, such as the electronic signature. However, since it is concluded in electronic form between parties that are physically at the same location, the provisions of PD 131/2003 on eCommerce can not apply directly.

Another formal requirement was the obligation that the bill of exchange bears a stamp depending on the amount of the debt, but this has been recently abrogated. Bills of

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[695] ΚΕΝΤΡΑ ΕΞΥΠΗΡΕΤΗΣΗΣ ΠΟΛΙΤΩΝ - Kentra Exipitretissis Politon – ΚΕΡ; http://www.kep.gov.gr/default.asp

[696] See Iglezakis, *General Introduction*, in: Cyberlaw in Hellas, op. cit., p. 25.

[697] See Deloukas, op. cit., p. 156 et seq.; A. Kiantou-Pampouki, *Law of Commercial Papers*, 1997, p. 79 et seq.

exchange are now concluded on plain paper, containing only the mandatory statements and signatures. This also facilitates the conclusion of electronic bills.

However, in theory commercial papers are documents embodying a private right in such a way that possession of the document is necessary for the exercise of that right. Particularly, a bill of exchange is an *ad solemnitatem* commercial paper[698], and therefore, no limitations from the type and content of the required form are – theoretically – acceptable. In such commercial papers the prescribed form is absolute and any deviation from the type and content of the required form is in contradiction with the concept of *ad solemnitatem* commercial papers[699].

Certainly, the need to modernize law in order to meet the challenges of the information society necessitate a shift from the theoretical assumption concerning the nature of ad *solemnitatem* commercial papers. The formality of commercial papers seems to lose its significance today, and this is recognised particularly as far as stock market shares are concerned[700]. Law 1806/1988 as amended by Laws 1892/1990 and 1969/1991 provides that shares are deposited with a deposit certificate company, so that the close connection between the right that is embodied in the document and the document loses its importance.

Nonetheless, for the realization of the electronic bill, practical problems dealing with the circulation of the bill must also be solved. It is proposed that a trusted third party should be involved in the process, assuming the role of a clearinghouse, and that possession of the paper document could be replaced by asking the third party to transfer control over a bill from one account to another[701].

C.1.2. Documentary credit[702]

In Greece, a special form of documentary credit is regulated by the law. In more particular, by virtue of Articles 25 το 34 of Law Decree of 17th July 1923[703], a particular concept was introduced, the guaranteed bank credit[704], i.e. the written undertaking by a société anonyme (credit provider), which agrees upon with another person (debtor) to open credit for the benefit of a third party (beneficiary), thereby accepting to pay the amount of credit to the third person by deliverance of a bill of lading (or a deposit or pawn certificate), which is issued or endorsed in the name or to order of the bank or simply handed over to it. Once the credit provider pays the amount of credit to the right holder, it is entitled to collect it from the debtor, to whom it will hand over the bill of lading.

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[698] See A. Kiantou-Pampouki, op. cit, p. 8 et seq.

[699] See S. Kousoulis, *The Electronic Bill of Lading: Related Issues in Greek Law*, RHDI 1994, p.280; Iglezakis, *Legal issues in electronic data interchange*, op. cit., p. 247 et seq.

[700] See A. Kiantou-Pampouki, op. cit, p. 68 et seq.

[701] See the report for Belgium.

[702] See S. Psichomanis, *Documentary Credit (Η πίστωση έναντι εγγράφων)*, 2001.

[703] Νομοθετικό Διάταγμα της 17ης Ιουλίου 1923

[704] τραπεζική ενέγγυος πίστωσις

The rules on the guaranteed bank credit have influenced the legal treatment of the documentary credit, but also the ICC Uniform Customs and Practice For Documentary Credits play an important role[705]. The Greek Banking Institutes have acceded to the aforementioned Rules in the UCP 500 version, which are therefore applied in practice. The legal status of the Rules is, however, controversial; according to legal doctrine, they are not regarded as custom or lex mercatoria, and they can only be valid as standard contract terms[706].

Regarding the legal relationship between the buyer (assignor) and the bank, on one hand, there is no requirement for conclusion of the contract in writing, so that the contract can be concluded also by electronic means[707]. The condition is that there is evidence for the fact that the message originates from a particular person and non-repudiation is ensured, and this can be satisfied by an electronic signature with a certificate, particularly by an advanced electronic signature.

On the other hand, between the bank and the seller (beneficiary) the rules relating to the 'delegation' of claims[708] of articles 876 et seq. of the Civil Code are applied, and therefore, the contract must be concluded in writing. However, in practice banking institutes transmit their promise to the beneficiary not in writing, but by electronic means (faxes, telex, and of course, e-mail)[709]. This practice is not in conformity with the law, and as a result legal doctrine is suggesting the application of the exemption in Article 874 of the Civil Code relating to debit and credit account[710].

This issue would be solved if we could apply the regulations relating to electronic contracts, but it is questionable whether such an agreement could fall within the field of application of the eCommerce act (PD 131/2003), due to the narrow definition of services of the information society. Undoubtedly, this would be the case where parties are not physically present and the contract is concluded at a distance.

The new Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (eUCP) is of eminent importance, since it provides a framework for documentary credit in the electronic environment.

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[705] See S. Psichomanis, op. cit., p. 2.

[706] See S. Psichomanis, op. cit., pp. 96 - 105.

[707] See S. Psichomanis, op. cit., pp. 128-129.

[708] έκταξη

[709] See S. Psichomanis, op. cit., p. 158 et seq.

[710] αλληλόχρεο λογαριασμό

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

In contrast to bills of exchanges, bills of lading pose no particular problems concerning formal requirements for their validity. In theory, a bill of lading is defined as a representative tile of merchandise received on the basis of a contract of carriage and functions by circulating from hand to hand, thus becoming negotiable and facilitating trading on the loaded or carried merchandise[711].

A bill of lading is a causal and declaratory commercial paper and its characteristic is that there is no independence of the right that it embodies from the underlying relationship. It embodies a right which has already been created in the context of the basic relationship. Therefore, the lack of formality violates the validity of the bill, but it does not invalidate its substance, so that the handwritten signature can be replaced with other substitutes which ensure the functions of the signature, such as the electronic signature[712].

Appropriate regulations are included in the Rules on the electronic bill of lading of the International Maritime Committee, which have been well received from the legal doctrine in Greece[713]. Problems resulting from the transfer of the electronic bill of lading are dealt with by new initiatives, such as the Bolero system[714].

C.2.1. Storage contracts

The storage of goods is regulated by specific legal provisions and in more particular, by Law Decree 3077/1954 on general warehouses[715]which provides for a licence granted by public authorities for the exercise of an undertaking relating to safekeeping and conservation of merchandise ('warehouse')[716]. The warehouseman issues warehouse receipts concerning the goods received for storage, which are delivered to the person who deposits the goods or to whose account they are deposited[717].

As regards the legal characterization of the storage contract, this is regarded as a deposit agreement on remuneration[718]. Consequently, articles 822 to 833 of the Civil Code apply additional to the provisions of Decree 3077/1954.

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[711] See Kousoulis, *The Electronic Bill of Lading*, op. cit., p. 277.

[712] See Kousoulis, *The Electronic Bill of Lading*, op. cit., p. 280 et seq.; Iglezakis, *Legal issues in electronic data interchange*, op. cit., p. 248.

[713] Cf. A. Kiantou-Pampouki, *Issues from the electronic bill of lading*, in: 7th Pan-Hellenic Congress of Commercial Law, 1998, (in Greek) p.155 et seq.

[714] See Th. Nikaki, *Electronic bill of lading: Brief presentation of the 'Bolero' - Bill of Lading Electronic Registry Organization*, EpiskED 2003, p. 704-719 (in Greek).

[715] Ν.Δ. 3077/1954 «Περί γενικών Αποθηκών»

[716] See Th. Liakopoulos, *General Commercial Law*, (3rd ed.) 1998, p. 108 (in Greek).

[717] See Deloukas, op. cit., p. 163.

[718] αμειβόμενη παρακαταθήκη

In more particular, the warehouse issues two titles; the deposit certificate[719], which embodies ownership titles on the stored goods and serves for proving and transferring such ownership by endorsing the certificate; and the pawn certificate[720], which serves for constituting or transferring a pawn on the stored goods by endorsing the instrument.

These two forms of warehouse receipts are declarative and causal commercial titles, as the bill of lading also is[721]. Similarly, the provisions of the Civil Code relating to the deposit agreement do not provide that the contract must be in writing. As a result, there is no legal barrier for the use of electronic contracts in the conclusion of such agreements. The only issue that arises, concerns the endorsement of the deposit certificate, which poses similar problems with those concerning the transfer of the bill of lading. Again, a solution to this problem would be the intervention of trusted third party in the procedure.

C.3 Cross border trade formalities: customs declarations

Greece applies the regulations of the Community Customs Code, i.e. Council Regulation (EEC) No 2913/92, supplemented by Commission Regulation (EC) No 2787/2000 amending Regulation (EEC) No 2454/93, and the Commission Regulation No 3665/93. Also the provisions of the Greek Customs Code[722] are relevant.

An integrated information system[723] is already set up, which allows the filling of electronic customs declarations[724]. The electronic filing of customs declarations is foreseen in the Community Customs Code (art. 61, 77) and also in the new national Customs Code that is about to be enacted. Specific administrative procedures apply for the electronic filing of confirmations, such as the directive Nr. T 3384/244/A0019 of 21.7.2003 issued by the Ministry of Economics –Department of Customs.

In practice, the submission of electronic declarations takes place by the deposition of a disc with the Customs, which contains the documents (declaration of goods, form of vehicle arrival, administrative document, imports, exports, provision, declaration of Community/Common transportation, declaration of special consumption tax, attached administrative document) in electronic form. The filing of declarations can not take place online, but this possibility will soon be provided. Furthermore, it should be noted that the documents which are filled, are registered in a network system (ICISnet)[725].

As it is evident, it is crucial to amend existing rules and in particular, the Greek Customs Code, in order to regulate the use of electronic documents in customs declaration.

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[719] αποθετήριο

[720] ενεχυρόγραφο

[721] Condition for the validity of the warehouse receipt is that the goods have been delivered indeed for storage in the warehouse, i.e., that they are in the possession of the warehouse and not the beneficiary of the title. As regards the validity of the endorsement, condition for its validity is also that the goods are in possession of the warehouse; see Liakopoulos, op. cit, p. 109.

[722] The Customs Code has been ratified by Law 2960/2001, Government Gazette A, Nr. 265.

[723] Ολοκληρωμένο Πληροφορικό Σύστημα Τελωνείων – Ο.Π.Σ.Τ.

[724] See http://www.gsis.gr/teloneia/main_teloneia.html

[725] See https://webtax.gsis.gr/taxisnet/telon/index.jsp

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

The e-Invoicing Directive[726] was transposed in Greek law by the Law 3193/2003, which modified the Code of Accounting Records and Fiscal Elements[727]. With this amendment, it is possible for taxable persons to transmit invoices to their clients by electronic means and to store the invoices that they issue or receive by electronic means[728]. In accordance with Article 18a (15) of the Code, transmission and storage of invoices "by electronic means" shall mean transmission or making available to the recipient and storage using electronic equipment for processing (including digital compression) and storage of data, and employing wires, radio transmission, optical technologies or other electromagnetic means. These provisions entered into force on 1 January 2004.

Prerequisite for the valid transmission of invoices by electronic means is, firstly, that the customer accepts this transmission (Art. 18a (5) of the Code). And further, the authenticity of the origin and integrity of the contents is guaranteed either by means of an advanced electronic signature as defined in P.D. 150/2001 or by means of electronic data interchange (EDI) as defined in Article 2 of Commission Recommendation 1994/820/EC of 19 October 1994, when the agreement relating to the exchange provides for the use of procedures guaranteeing the authenticity of the origin and integrity of the data. Particularly in EDI transactions inside the Community or involving a third country a short document in paper is necessary, containing at least the data of the contracting parties and the total amount of the transaction, unless copies of the invoices are stored (Art. 18a (6)).

According to these provisions, the taxable persons have the possibility to store all the invoices issued by himself, by his customer or, in his name and on his behalf (Art. 18a (8))). The taxable person can decide the place of storage provide that he makes the invoices or information stored available to the competent authorities. In case the place of storage is outside Greece, the taxable person must notify the competent Fiscal Authority, prior to the storage, of the place of storage and of every change of it (Article 18a (9)).

By way of exception, the taxable person must store the invoices in paper and in the territory of the country: i) when the storage does not take place by electronic means guaranteeing full on-line access to the data concerned, or ii) when the storage it takes place in a country in which no legal instrument exists relating to mutual assistance similar in scope to that of Law 1402/1983 and 1914/1990 (mutual assistance for the collection of dues) or of EC-Regulation 218/92.

The authenticity of the origin and integrity of the content of the invoices, as well as their readability, must be guaranteed throughout the storage period (Art. 18a (12)), which is set for six years from the expiration of the fiscal year to which they refer (art. 21 (2)).

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[726] Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax; *Official Journal L 015 , 17/01/2002 P. 0024 – 0028.*

[727] P.D. 186/1992, Government Gazette A, Nr. 84.

[728] See E. Pilingou, *Electronic Invoicing*, Synigoros 2004 (in Greek), p. 262.

When invoices are stored or transmitted by electronic means, the data guaranteeing the authenticity of the origin and integrity of the content must also be stored and no modification is not allowed (Art. 18a (13)). It is also important to note that according to Art. 18a (14), when a taxable person stores invoices which he issues or receives by an electronic means guaranteeing on-line access to the data and when the place of storage is in a Member State other than that in which he is established, the competent authorities in the Member State in which he is established shall have a right to access by electronic means, download and use these invoices as far as this is required for control purposes.

C.4.2. Electronic accounting

The Code of Accounting Records and Fiscal Elements, which was enacted in 1977, has been amended as early as 1992, in order to adjust itself to technological evolution. The new Code, which has been subjected to numerous modifications until recently, provides for the electronic bookkeeping and for the electronic issuing of invoices and other fiscal elements. The Code allows full electronic accounting, but the taxable person must print the accounting records, various i.e. calendars, warehouse books, etc., within certain deadlines.

The taxable person who uses a computer for bookkeeping is obliged to keep on the premises a detailed manual on the software he uses in Greek language, which must comply fully with the requirements of the Code; he must make available to the Tax Authorities competent trained staff to operate the software, and allow controls on his computer files; and, finally, he must store the accounting records until they are printed out, as well as the manual for the software he employs.

The Greek legislation requires the periodic deposit of a company's annual account with the competent authorities, i.e. the Department of Companies in the Ministry of Development, which proceeds to its publishing in the Government Gazette[729]. An electronic deposit is not allowed.

D. General assessment

D.1 Characteristics of Greek eCommerce Law

- As a rule, Greek law allows for flexibility in commercial transactions. This is seen as a major advantage for the development of eCommerce, but this development depends also on other factors, as it is the confidence of consumers and the familiarity of citizens with ICTs. The insufficient penetration of Internet in the population seems to be at the moment the main hurdle for the development of eCommerce.
- Regarding electronic documents, legal doctrine and the jurisprudence that relied on it have shown a great interest towards and recognised the probative value of electronic documents, while the validity of electronic documents does not pose any major problems. The implementation of the eCommerce Directive is

[729] This obligation concerns sociétés anonymes and limited liability companies.

facilitating the recognition of electronic documents, since electronic documents bearing an advanced electronic signature are recognised as equivalent to paper documents and can be used where a handwritten signature is required.

- Certainly, electronic documents cannot be used where formal requirements are prescribed. The lack of an electronic cadastre, which is currently being developed, but its development will take several years, is preventing the use of electronic documents for contracts relating to real property. Regarding commercial contracts, there are certain types of commercial papers where the right is embodied in the paper document, so that it seems difficult to replace the latter with an electronic document.
- The development of electronic transactions and the diffusion of technology would be a catalyst that would bring forward eCommerce. In addition, international rules may also play a great role in the development of common practices and of contractual agreements.

D.2 Main legal barriers to eBusiness

- The main legal barriers to eBusiness are the administrative hurdles and the formal requirements for certain types of contracts that still exist.
- Although administrative law is open to new technological concepts and is adjusting to technological changes, the public administration is slow to adopt new technologies. There still are certain regulations that require commercial undertakings to use paper-based procedures, although accounting regulations have long allowed electronic bookkeeping.
- Furthermore, formal requirements still remain for certain types of contracts, as mentioned above. However, it is not just the existence of exemptions from the field of application of the transposition act of the eCommerce Directive, but also the abstract character and the lack of specification of the provisions on electronic contracts, which presents a barrier to eBusiness. It is notable that regarding eSignatures, the National Telecommunications and Post Commission has issued a series of decisions establishing a framework for the accreditation of certification service providers, for voluntary accreditation and the control of secure signature-creation devices and crypto products[730].
- Finally, it can also be noted that the transposition of the eCommerce Directive in Greece defines a consumer as a physical person, whereas all other Greek transpositions of earlier Directives related to consumer protection (Directives 87/577/EEC, 93/13/EEC, 87/102/EEC as amended, 97/7/EC) have adopted a broader definition of the consumer which includes legal persons, by derogation to the European provisions. This means that in Greece, the general provisions of consumer protection also include legal persons that fall under the above definition and are not limited to physical persons.
- Moreover, the distance sales Directive 97/7/EC, incorporated in Greece as article 4 of the law 2251/1994, that provides some very important rules in relation to the formation of a contract when contracting with a consumer at a distance, uses

[730] See http://www.eett.gr/eng_pages/index2n.htm

the aforementioned broader definition of a consumer. This clearly contradicts the more specific e-commerce legislation (PD 131/2003), which also includes significant provisions linked to the formation of e-contracts with consumers, where the definition is restricted to physical persons only.

- Thus, the above derogation could cause some problems in relation to the legal status and mutual recognition of electronic documents, since the Greek general consumer protection rules are more stringent than the ones deriving from the European legislation. In addition, the inconsistency between the legal provisions covering distance sales contracts, which include e-commerce contracts, and the e-commerce Directive (article 4 of the law 2251/1994 and PD 131/2003) poses barriers to the cohesive regulation of electronic contract formation in Greece.

D.3 Main legal enablers to eBusiness

- Greek commercial legislation allows for flexibility, as it is already mentioned. The implementation of European Directives has facilitated electronic transactions, although in other areas the legislator has delayed a lot (e.g. in the telecommunications sector) to transpose the Directives. The existing framework, plus the regulations on neighbour areas (consumer protection, data protection etc.), allows the development of eBusiness.
- The implementation of the eCommerce Directive, in particular, is recognising electronic documents as equivalent to paper documents, with some exceptions, and so no questions may be posed regarding their validity and probative effect. Unfortunately, this legislation is recent and it has not applied in judicial practice (as far as I know!).
- Moreover, it seems appropriate to provide for specific rules enabling the use of electronic documents in specific areas, such as documentary credit, etc. Similar rules have been already introduced, for instance, as regards stock market titles, where there is more pressure for the introduction of technological solutions.

Hungary National Profile

A. General legal profile

The Republic of Hungary (*Magyar Köztársaság*) is a parliamentary democracy. Hungary is a unified – non-federal – state. The main administrative units are 19 counties[731], 20 urban cities[732] and a capital city (Budapest).

The Constitution was enacted on 18 August 1949 and became effective on 20 August 1949. During the past 6 decades the Constitution was revised and amended several times, including with regard to accession to the EU (1 May 2004).

Commerce and contract law is a centrally governed matter, which is generally incorporated into the:

- Civil Code[733],
- Act on Business Companies[734]; and
- Act on the Register of Companies, Public Company Information and Court Registration Proceedings[735]
- Act on Commerce[736]

The company and commercial law is currently undergoing strong reform. New codes are being enacted by the National Assembly and will come into force in 1st July.

For historical reasons both civil law and commercial law are under strong German-Austrian influence.

eCommerce is also regulated at the national level, through a number of specific acts and government decrees[737].

Disputes regarding commercial relations are typically dealt with by the Local Court[738] for matters with a financial value of HUF 5,000,000 (approx. 20,000€) or less; or by the County Court[739] for matters of higher value. Appeals against the decisions of the Local

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[731] *Megye*

[732] *Megyei város*

[733] *Polgári Törvénykönyv;* conventional short form: *Ptk*. The present Ptk. is the Act IV of 1959. Came into force on 1st May 1960.

[734] *Társasági törvény,* conventional short form: *Gt*. The present Gt. is the Act CXLIV of 1997, which will be in force until 30th June 2006. The new Gt. is the Act IV of 2006, which will come into force in 1st July 2006.

[735] *Cégnyilvántartásról, a cégnyilvánosságról és a bírósági cégeljárásról szóló törvény,* conventional short form: *Ctv*. The present Ctv. is the Act CXLV of 1997, which will be in force until 30th June 2006. The new Ctv. is the Act V of 2006, which will come into force in 1st July 2006.

[736] *Kerekedelmi törvény*; Act CLXIV of 2005 on Commerce will come into force 1st June 2006.

[737] *Kormányrendelet*

[738] *Városi bíróság*

[739] *Megyei bíróság*

Court can be lodged with the County Court, with the Regional Appeal Court[740] against the decisions of the County Court, or in certain cases the Supreme Court[741]. The Hungarian system of jurisprudence does not have any binding power of precedent, although certain decisions of the Supreme Court are highly authoritative and only very rarely disregarded.

B. eCommerce regulations

B.1 eCommerce contract law

B.1.1. General principles

Regarding the validity of electronic contracts, Hungarian law is – as a general rule – quite flexible. The general principle for contracting both in civil law and in commercial law is the freedom of formalities. Barring certain more formal types of contracts[742], Hungarian contract law typically only demands that a consensus exists between parties regarding the essential elements of a contract; a written document is not typically required. According to the general principles of civil law the intent to conclude a contract can be expressed either verbally or in writing or by conduct that implies such intent.[743]

Both in civil and in commercial cases, proof is often dependant on the existence of a written document[744], without the law emphatically indicating whether or not this document may be electronic. In those cases, it is mostly up to doctrine and jurisprudence to fill the gap.

Autonomy of will is a general principle of contractual relations both in civil law and in commercial law. This autonomy comprises several freedoms:

- *Freedom of contracting:* Both parties are entitled to determine whether they should conclude a contract or not.
- *Freedom to choose the party*: The legal entity is free to choose the other contracting subject.
- *Freedom to choose the form of contract:* The parties are entitled to choose the type and/or form of contract. Certain common types of contracts are identified and regulated by the Civil Code, such as e.g. buying and selling, leasing, deposit, etc. However the parties are free to develop and conclude any a-typical contract which would be the most convenient for their particular interests.

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[740] *Ítélőtábla*

[741] *Legfelsőbb bíróság*

[742] Such as e.g. the sale of real estate; company contract.

[743] See: Civil Code, Section 216.

[744] See art. 1341 Civ. Code: in civil relations, written contracts are required as proof for any commitment with a value of 375 EUR or higher.

- *Freedom to determine the content of contract:* The parties are entitled to determine and specify the provisions of contract[745].

The notion of electronic document was defined in the Act XXXV of 2001 on Electronic Signatures (hereinafter referred as: AES). This basic Act of electronic literacy was promulgated on 12 June 2001. Since then the Act has been amended several times. The amendments have also affected the definitions contained therein.

The original version of AES comprised three correlative definitions; *electronic document, electronic communication* and *electronic statement*.

- '*Electronic document*' means data processed by electronic means and which contains an electronic signature.
- *'Electronic communication*' means an electronic document whose purpose is to communicate a written text, and which contains any other data solely if such data are closely associated with the text, i.e. for identification (e.g. header) or for better understanding (e.g. chart).
- *'Electronic statement*' means an electronic communication which contains a declaration or approval of a declaration, or a commitment to abide by a declaration.[746]

This distinction above, which was unknown by the EU directive on electronic signatures[747], often caused vagueness in judiciary practice, so the legislator has amended the definitions on 19 July 2004. 'Electronic communication' and 'electronic statement' are no longer mentioned in the Act and the definition of 'electronic document' is changed as follows:

- '*Electronic document*' means data processed by electronic means.[748]

The new definition of electronic document is general and neutral and doesn't refer directly to the electronic signature. The new definition corresponds to the eCommerce directive.

Hungarian contract law generally recognizes the validity of electronic documents. This recognition is based on several principles and presumptions set forth in the AES. The basic principles are declared in Section 3.

- *Acceptance of an electronic signature, or document, including if used as evidence, cannot be denied and their suitability for legal statement and their legal force cannot be disputed solely on the grounds that the signature or the document exists only in electronic format.*
- *In the cases defined in Subsection (3) and (4), if the law prescribes written documents, this requirement may be satisfied using electronic documents executed with electronic signatures as well.*

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[745] Kondricz Péter – Tímár András: Az elektronikus kereskedelem jogi kérdései. KJK-KERSZÖV Kiadó Budapest. 2000. 96. p.

[746] Act XXXV of 2001 on Electronic Signatures. Section 2. 12)-14). *From 12 June 2001 to 19 July 2004.*

[747] Directive 1999/93/ec of the European Parliament and of the Council of 13 December 1999 on a community framework for electronic signatures

[748] Act XXXV of 2001 on Electronic Signatures. Section 2. 12). *From 19 July 2004.*

- *Qualified certificates must be accepted in all the court or administrative procedures defined in Subsections (3) and (4).*

Subsection (3) prescribes that in the various types of judiciary proceedings, in addition to use as evidence, official actions may be introduced by electronic documents executed with electronic signatures, and electronic signatures only – disregarding the use of any documents other than those in electronic format - if this is expressly permitted by legal regulations which govern the type of proceeding in question.

Subsection (4) prescribed until 1 November 2005 that in administrative procedures by the authorities of the various sectors, in addition to use as evidence, official actions may be introduced by electronic documents executed with electronic signatures, and electronic signatures only – disregarding the use of any documents other than those in electronic format:

- if this is expressly permitted by legal regulation which governs the type of proceeding or the relevant sector, and as pertains to the case in question,
- in respect of local government, administrative and official matters, if the criteria under previous paragraph exist and the local government has adopted a legal regulation to permit administration in electronic format under its jurisdiction.

Accordingly the use of electronic documents in judiciary and administrative proceedings, except presentation as evidence is only a subsidiary opportunity in the case if the law explicitly opens this way.

On 1 November 2005 the Act CXL of 2004 on General Provisions of Administrative Proceedings and Services (hereinafter referred as: AAPS) came into force and the afore-mentioned Subsection (4) of Section 3 of AES was repealed. Section 160 of the new AAPS has radically changed the aforementioned principle. Use of electronic documents in administrative proceedings is not a subsidiary opportunity any more but a fundamental service. Unless an act or a government decree prohibits the use of electronic documents in certain types of proceedings, public authorities shall administer the cases also in an electronic way.

Obviously any electronic document can always be used as evidence, either in a judiciary or administrative process. However the courts and/or the administrative authorities are free to determine the actual evidentiary value of electronic document. This includes the right to discard it altogether, should they decide that it has no real value (e.g. if it contains no form of signature, and its origins are otherwise unverifiable). In commercial affairs, parties are free to conclude arrangements between themselves in which they can specify explicitly which forms of evidence can be deemed acceptable in a court of law, and such agreements are binding. This has been a great facilitating factor, given the specific nature of many types of trade and transportation contracts.

Additionally we can find some fundamental legal presumptions in Section 4 of the AES.

- Presumption on qualified electronic signature

If an electronic document is sealed with a qualified electronic signature, it is to be presumed that no change to the data of the document has been made subsequent to the execution of signature, unless otherwise indicated by the signature verification process.

- Presumption on security of testified electronic-signature products

Any electronic-signature product that has been certified by an organization appointed by the Minister of Information Technology and Communications or accredited by an accreditation committee according to Act XXIX of 1995 on the Accreditation of Laboratories and Certification and Authentication Organizations and is authorized to provide certification services, it shall be presumed - unless proven to the contrary - that such electronic-signature product is secure and that it satisfies all other criteria specified in the certificate.

- Presumption on exclusive control by the key-holder

If signature-creation data is placed in a signature-creation device by a service provider that is registered as a qualified service provider for the service in question at the time when the data was placed, it shall be presumed - unless proven to the contrary - that the signature-creation data is controlled exclusively by the person to whom the service is provided.

- Presumption on time-stamping

If time-stamping has been executed by a service provider that is registered as a qualified service provider *it shall be presumed - unless proven to the contrary* - that the data of the document remained unaltered subsequent to the execution of the time-stamping, unless otherwise indicated by the time-stamping verification process.

- Presumption on legal validity of archived electronic documents

If the archiving of electronic documents executed by an electronic signature is carried out by a service provider that is registered as a qualified service provider for the service in question, *it shall be presumed - unless proven to the contrary* - that the electronic signature or the time-stamp affixed to the electronic document and the certificate pertaining to them were legally valid at the time the signature was executed and the time-stamp was affixed.

Nota bene: the AES provides a clause on the validity and legal effect of 'hardcopy' of electronic documents. Accordingly any printout of an electronic document executed by an advanced or qualified electronic signature shall not be covered by the regulations governing admissibility as evidence of the same document made in electronic format.

However the AES also contains the reverse of this rule; where a copy is made of a printout of a document in electronic format as governed in specific other legislation, the electronic document containing the copy shall be subject to the same legal ramifications as those pertaining to the original printed document.

There are two main categories of the contracts in Hungarian legal system, which still need to be concluded on a written document for validity purpose. These categories are the contracts referring to

- domestic relations and
- transfer of real estates.

"In connection with the legal relationships referred to in Sections 598-684 of the Civil Code of the Republic of Hungary and in Act IV of 1952 on Marriage, Family and Legal

Custody, the relevant documents cannot be made with electronic signatures and in electronic format only, by abolishing the use of any format other than electronic."[749]

Under domestic relations we should mean laws of succession and family law, comprising the marriage, law of parents and children, adoption and many other institutions. All the contracts and notifications referring to these relations can be concluded in traditional written documents. For example a will can be made in an electronic document executed by a qualified electronic signature but it is not valid unless a public notary shall testify it by a paper document. We can find the same in the case of contracts concerning the transfer of real estates.

One of the basic principles of Hungarian contract law is the freedom from formalities. Most of the civil and commercial contracts can be concluded either verbally or even by a conduct (facta concludentia = tacit consent). The civil and commercial law prescribe the use of written documents only in certain limited cases. According to the general rules the informal contract is also legally binding.

The contracting parties are entitled to lay down not only the form but also the content of the contract unless otherwise provided by legal regulation. This is a characteristic of both civil and commercial contracts.

Contracting parties are generally free to determine whether verbal or written form should be used to conclude the contract. Under the written form the parties can also choose several manners as 'snail-mail', telegram, teletype, telefax, and electronic documents sealed with qualified electronic signature.[750]

Written form comprises also electronic methods; consequently, the electronic document must be accepted as a valid option for contract conclusion. In theory parties are not required to determine explicitly, which 'written form' shall be used during the negotiation. Even tacit acceptance should be possible. On the other hand the case-law of the courts clarifies that this consensus must be certain and undoubted. So in practice the consensus of the parties on the acceptability of electronic documents is a precondition of the validity and legal binding of the contract.

Contracting parties in Hungarian contract law are entitled to send electronic notifications instead of traditional paper documents. The proposition of the offerer, the declaration by the addressee and all the notifications binding to the contract or other transaction can be made in electronic form – except certain of the aforementioned contracts as domestic relations and transfer of real estate.

Civil Code also gives some additional rules on the formal requirements.[751]

If a written form is prescribed by legal regulation or by an agreement, at least the essential content of the contract must be put in writing.

If the validity of a contract is tied to a definite form determined by legal regulation or by the agreement of the parties, termination or cancellation of the contract concluded in such form shall also be valid only in the specified form. However, termination or cancellation of the contract by disregarding the specified form shall also be valid, if the

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[749] See: Section 3 Subsection 2 of Act on Electronic Signatures

[750] See: Section 218 of Civil Code and Section 38 Subsection (2) of the Law-decree 11 of 1960 on Explanatory Clauses of Civil Code (hereinafter referred as: CCE).

[751] [751] See: Section 218 Subsections (1) and (3) of Civil Code

actual state of affairs conforming thereto has been established upon the parties' mutual consent.

The electronic notification must fulfil the same requirements as the contract itself if the written form is prescribed by legal regulation. Regulation may demand that the contract should be concluded in a public document[752] or in a private document with full probative force[753].

As for electronic registered mail, Hungary has not implemented a generic regulation. The Hungarian CSP-s (Certification Service Provider) has not attempted to launch a service for electronic registered mail so far.

Concerning the issues of electronic archiving the Hungarian law comprises certain general rules. The last comprehensive amendment of AES in 2004 implemented the legal framework of this new service. This regulation is in force since 7 July 2004. Since that time, electronic archiving is the fourth type of service which can be provided by a CSP.

As part of the electronic archiving services, the service provider shall:

- archive the validity chain existing at the time of archiving to ensure that the documents are properly stored and that they cannot be disclaimed;
- ensure that the validity chain is not compromised so that the validity of electronic signatures it represents can be controlled in the long term;
- deliver the validity chain to the recipient forthwith when so requested;
- supply a certificate upon request concerning archived electronic documents executed with electronic signatures or validity chains.

The opinion that electronic documents fulfilling security and formal requirements posed in law and technical standards are acceptable as equivalent to traditional written documents is widely acknowledged in jurisprudence. However we mustn't disregard the fact that most of the legal professionals have no deep knowledge about IT-security, Public Key Infrastructure, online dispute resolution and other related issues.

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[752] Public document shall mean the paper or electronic document made out in proper form by court, public notary, other authority or administrative organ proceeding in its official capacity. *See: Section 195 Subsection (1) of Act III of 1952 on Civil Procedure.*

[753] Private document with full probative force shall mean
- a paper document written and subscribed by the signatory person with his/her own hand,
- a paper document with signature of two witnesses who testify that the signatory person acclaimed the document and the signature his/her own,
- a paper document with a verification of the signature by a court or by a public notary,
- a paper document of a business entity signed formally by the authorized officials,
- a paper document with a countersignature of a solicitor who testify that the signatory person acclaimed the document and the signature his/her own,
- an electronic document sealed with a qualified electronic signature. *See: Section 196 Subsection (1) of Act III of 1952 on Civil Procedure.*

B.1.2. Transposition of the eCommerce directive

Both the eSignature directive and the eCommerce directive have had a profound impact on Hungarian contract law. The eCommerce directive has been fully transposed into Hungarian law. The greater part of directive was implemented in *Act CVIII of 2001 on Certain Issues of Information Society Services and Electronic Commerce* (hereinafter referred as: AEC). A small part of the Directive talking about the treatment of contracts – Article 9 – was transposed by the AES. As pointed out above, certain type of transactions are excluded from the scope of electronic contracting, most notably contracts regarding real estate (with the exception of lease contracts) and contracts regarding family law or successions.

The Hungarian national transposition of the eCommerce directive only applies to information society services. Regulations of the AEC are applied to information society services provided to (and from) the territory of Republic of Hungary.[754]

Article 9 and 10 of eCommerce directive are fully transposed into Hungarian commercial law. The AEC and Civil Code make the online conclusion of contracts possible and declare electronic documents as a feasible and appropriate form of written notifications, resulting in a legal effect which is equal to traditional written documents. A written document is considered to be a string of intelligible signs that are accessible for later consultation, regardless of its medium or of transmission platform.

In practice an electronic document can result in legal binding force if an advanced or qualified electronic signature is applied to the record.

Detailed technical and security requirements regarding the advanced and qualified electronic signature are described in the AES. Its requirements comply with the requirements of the eSignature directive.

B.2 Administrative documents

During the last 10 years Hungarian governments adopted several national strategies focusing on information society. The most recent one is the MITS (Information Society Strategy for Hungary)[755], which ascribes a very important role in the expansion of the ICT sector and electronic literacy to the state organs and public administration. The development of electronic public administration services is supposed to be a promising step in this direction.

Both the central organs of public administration and the local authorities started to implement their first eAdministration systems from the middle of the 1990s. These first attempts resulted in very divergent and mutually incompatible solutions. Recent efforts of central administration focus on the development and implementation of unified and transparent models of eAdministration.

The legal environment of electronic administration has been recently reformed. The new act on *General Provisions of Administrative Proceedings and Services* (hereinafter

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[754] See. Section 1 of AEC.

[755] *Magyar Információs Társadalom Stratégia*; MITS was developed in Ministry of Information and Communications Technology in 2003. http://www.ihm.gov.hu/data/19797/MITS%20teljes%20anyaga.pdf

referred as: AAPS) came into force on 1 November 2005. Section 160 of the AAPS caused profound changes in electronic administration. The use of electronic documents in administrative proceedings is not a subsidiary opportunity any more but a fundamental service.

This legislation aims to

- provide a general legal framework for electronic communication between public administration and citizens / applicants;
- facilitate the use of electronic documents within public administration;
- mandate the acceptance of electronic documents by public administrations. (*N.B. this requirement is not general and comprehensive yet*);
- facilitate the electronic exchange of information within the government and public administration;
- define technical and security standards.

The government also took coordinated initiatives in this field.

- An online electronic public administration access point was launched on 20 February 2003. At the present time this so called '*government portal*' is able to provide 219 electronic services.[756]
- Some 400 'Document Bureaus' were established in 1999 all over the country where people can access several electronic public administration services. Citizens may apply for an access code to the 'government portal' in the local Document Bureau or must perform online registration with a qualified electronic signature, respectively a qualified certificate.

The national tax office (APEH) is a vanguard of electronic public administration. While use of electronic administration is an option for most inhabitants, the tax office mandates the biggest taxpayers to present an online electronic return. At the moment 51.000 taxpayers belong to this group but the scope is expanding. From January 2007 approx. 1.2 million taxpayers will be obliged to file an electronic tax return[757].

[756] A few of available services: data communication to the Central Statistical Office; online tax return; registering for entrance examination to higher education; public procurement; job hunting consultation; application for passport; customs declaration; application for driving licence; access to the register of title deeds; etc… See the site on: http://www.magyarorszag.hu/ugyintezo

[757] http://index.hu/gazdasag/magyar/apeh0510/

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The bill of exchange as a negotiable instrument has been used in Hungary in business circles and individual crediting activity for a long time. World War 2 and the after-war crisis combined with political changes broken this organic structure. During the decades of the communist regime crediting activity was slack. The bill of exchange was considered during this period a synonym of unreliability and corrupt practices. This reluctant attitude is changing very slowly. This is the reason why the bill of exchange is still virtually non-existent in Hungarian business life and why it is almost exclusively used in international transactions by big companies. Individuals and SME's don't consider this opportunity when in need of credit.

Hungary has also signed the Geneva Convention Providing Uniform Law for Bills of Exchange and Promissory Notes[758]. The Convention was promulgated with the Law-decree 1 of 1965. This is the only act in Hungarian domestic law which contains obvious description of the form and mandatory statements of bill of exchange.

The signature is a formal requirement for the legal *existence* of the bill, not merely to constitute valid *evidence* of its existence (i.e. without a signature, there is no bill from a legal perspective). The Act XXV of 2001 on electronic signatures expressly prohibits denying legal effectiveness to electronic signatures solely on the grounds that it is in electronic form[759]. However, this law does not modify or invalidate existing requirements of form that impose the use of paper. At the moment there is no explicit regulation regarding the use of electronic bill of exchange.

[758] People's Republic of Hungary deposited the ratification documents on 28. October 1964.

[759] Section 3 Subsection (1)

C.1.2. Documentary credit

Documentary credit as a commercial contract is not regulated by the Hungarian legal system at the moment. However it is remarkable that the regulatory concept of the new Civil Code refers to this institute among the bank and credit contracts[760].

In spite of this negligence in substantive law the documentary credit is applied in commercial practice; mostly in international transportation and technological transactions by banks and business clients.

Hungarian banks use this method of payment according to international standards. Both the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (UCC-500) and the new Supplement (eUCP) to this document are part of commercial portfolio and trade practice of banks. The international banking transactions related to documentary credit are performed within the framework of the SWIFT system in compliance with security and authentication standards and measurements.

Use of documentary credit is based on a contractual agreement of the bank and the client. Parties can conclude this contract by electronic documents sealed with a qualified electronic signature. This contract has the same legal binding and probative value as a traditional written document.

C.2 Transportation of goods: Bills of Lading and Storage agreements

Transportation of goods is a universal and ordinary transaction of economic life. These transactions are attested with several kinds of documents; bill of lading, warehouse warrant; deposit certificates. The transportation documents simultaneously testify a material transaction and represent a financial value. Being a landlocked country, maritime transportation is not a relevant part of economic life in Hungary. This is a good reason why the issuing of bill of lading is considered a special and rare event. Storage agreements unlike the maritime transportation are regular elements of trade activity; consequently, warehouse warrants are normal papers in banking transactions. Act XLVIII of 1996 on Public Warehousing provides detailed rules of this formal contract.

According to the traditional approach transportation documents can only appear in printed form with exacting and mandatory formal requirements. However, recent regulation makes the electronic processing of these instruments possible.

Act C of 2000 on accounting refers to these papers as printed or 'dematerialised' securities.

> *"securities signifying a creditor relationship" means all printed or dematerialised securities, or instruments which signify a right and which are deemed securities by law, in which the issuer (debtor) acknowledges that a certain amount of money has been placed at its disposal and that it commits itself to repaying the*

[760] Preparatory works of the new Hungarian Civil Code has begun in the beginning of 1990. The project is running according to the codification methods of Dutch Civil Code. A comprehensive concept is ready, five books of the Code are published and under discussion debate among legal professionals and in the public opinion. The presented books are: Law of Persons; Family Law; Property Law; Contract Law; Succession.

amount of the principal (loan) and the agreed interest or other returns, as well as to performing any other predetermined services, when applicable, to/for the holder of the securities (creditor) on the date and in the manner stipulated. This includes bonds, treasury bills, deposit certificates, treasury notes, trust bonds, savings notes, mortgage bonds, bills of lading, warehouse warrants, dockets and lien warrants, compensation notes, and investment notes issued by fixed term investment funds[761].

Among others bills of lading and warehouse warrants can be issued and used in dematerialised form.

It is the government decree 284/2000. (XII. 26.) which points out the technical and security criteria of dematerialised securities. Dematerialised securities are produced electronically as a set of signs processed by a computer.

Processing of data pertaining to production, registration and transmission of dematerialised securities can be performed by an authorized person equipped with identity code. The code and the computer program must be able to identify the person and the operation performed.

Production, registration and transmission of dematerialised securities and processing of data pertaining to these operations can be performed in accordance with regulations issued by the Hungarian Financial Supervisory Authority[762], by a computer program and data storage equipment which provides:

- interconnection with central depository;
- secure and confidential storage and transmission of data;
- use of date in accordance with data protection regulation;
- that rights and commitments attested by the dematerialised securities shall always be ascertainable;
- that both identity of the holder and the obligee of dematerialised securities and changing of them shall be ascertainable;
- that all the mandatory elements of the dematerialised securities can be displayed and printed by computer.

[761] See: Act C of 2000 Section 3, Subsection (6), Point 2.

[762] Pénzügyi Szervezetek Állami Felügyelete (PSZÁF) http://www.pszaf.hu/Engine.aspx or http://english.pszaf.hu/Engine.aspx

C.3 Cross border trade formalities: customs declarations

The eAdministration initiatives of the Hungarian government are presented in section B.2. The government portal allows the use of electronic communication between the authorities and the clients in several administrative affairs. Customs declarations also can be presented via electronic documents. Clients can register themselves on the portal of Hungarian Customs and Finance Guard[763] with a qualified electronic certificate. The registered clients can use the online form-filling facilities, based on XML documents.

Clients can actually provide declarations pertaining to several kinds of customs, environment protection dues and inland revenues.

Declarations are processed by CDPS system of EU (Customs Declaration Processing System).

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing and accounting

The e-Invoicing directive[764] deeply impacted the Hungarian tax law. The Directive has been transposed in Hungarian national by the

- Act LXXXV of 2003 amending the Act C of 2000 on Accounting (hereinafter referred as: AA),
- the Act XCII of 2003 on Rules of Taxation (hereinafter referred as: ART). ART is a code of procedural issues while substantive rules of taxation are incorporated into several other major codes like
- Act XCI of 2003 amending the Act LXXIV of 1992 on Value Added Tax (hereinafter referred as: AVAT).

These new acts entered into force on 1 January 2004. As required by the directive, the Hungarian law now allows electronic invoicing under the conditions imposed by the e-Invoicing directive. This comes from the consecutive rules of AA.

> *Electronic documents and instruments executed with advanced electronic signatures and time stamping under the Act on Electronic Signatures may be used for accounting documents, provided they satisfy the requirements set out in this Act. The conditions for using electronic documents and instruments as accounting documents and the requirements for their authenticity and reliability may be prescribed in specific other legislation.*[765]

The AA defines the notion of accounting documents as follows:

> *Accounting documents shall mean all instruments drafted or issued by the economic entity, or by natural persons and other economic entities in*

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[763] See: http://vam.gov.hu or http://vam.gov.hu/welcomeEn.do or http://openkkk.vpop.hu/cdps/default.aspx

[764] Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax.

[765] Section 167, Subsection (5) of AA.

business or other relationship with the economic entity (invoice, contract, agreement, statement, credit institution certificate, bank statement, legal provision, and other deeds regarded as such) - irrespective of whether they have been printed or produced in some other way - which have been prepared for the purpose of recording the economic transactions and events in the books, and which satisfies the general formal and content requisites prescribed in this Act.[766]

Concerning archiving the electronic invoices and other accounting documents also the Act on Accounting ordains that

> "***Accounting documents*** *made out in electronic format shall be retained in electronic form with sufficient facilities to permit the swift retrieval of all information contained in the original document in a permanently accessible form and to contain safeguards to prevent the stored contents from being manipulated or corrupted*".[767]

The AA also makes possible that accounting documents originally made out in a format other than electronic may be retained in electronic form with sufficient facilities to permit the swift retrieval of all information contained in the original document in a permanently accessible form and to contain safeguards to prevent the stored contents from being manipulated or corrupted.[768] Consequently if a digital copy is made, the technology used must guarantee the authenticity of its origin and the integrity of its contents.

D. General assessment

D.1 Characteristics of Hungarian eCommerce Law

- Hungarian commerce legislation has traditionally allowed trade partners a fair amount of flexibility in arranging methods of contract conclusion and evidence of commercial relationships. In a sense, the eCommerce directive is therefore a natural continuance of this general principle.
- The exceptions to this rule are certain more formal documents, where the physical carrier is traditionally considered to be an embodiment of the underlying legal reality, and where contract partners therefore attach a specific value to the document. While technological solutions are perfectly capable of emulating the traditional paper environments, no single standard or platform is often available and familiar to all parties involved. As a result, traditional paper documents are still usually the solution of preference by default.
- International and EU regulations can play a strong unifying role, as has been observed for the eInvoice directive. While these rules typically do not provide a technical framework for contracting partners, they do provide a measure of legal certainty, provided the partners choose to declare such regulations applicable to their situation.

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[766] Section 166 Subsection (1) of AA.

[767] Section 169 Subsection (5) of AA.

[768] See: Section 169 Subsection (6) of AA.

D.2 Main legal barriers to eBusiness

- The Hungarian lawmaker has taken a fairly open approach to the transposition of the eCommerce directive and many other international and EU-documents. The Hungarian eCommerce law acknowledges the principle that electronic contracting should be a possibility and stresses the importance of functional equivalence (i.e. the theory that a formal requirement can be met in an electronic context if it is ensured that its purpose is met), but it offers only few guidelines as to how this should be achieved. For many formal paper-based requirements (e.g. the use of a specific lay-out or colours), contracting parties therefore must determine on their own how this requirement is met in electronic documents. While this allows a great degree of flexibility, it also increases the risk to eCommerce businesses, which can never be sure that a judge might not refuse to acknowledge that their solutions meet legal standards.
- From a broader point of view, the legislative insistence on technological neutrality is a mixed blessing. On the one hand it allows ample space for the development of initiatives in the private market, but on the other hand it hinders the necessary standardization of legal solutions, electronic documents and also slows down the introduction of electronic contracting.

D.3 Main legal enablers to eBusiness

- As noted above, Hungarian commercial legislation allows trade partners a good deal of flexibility, by allowing them to regulate among themselves which methods of contract conclusion they deem to be acceptable. This existing framework has been amended by additional regulations, often inspired by European directives, including the eCommerce and eSignatures directives, as well as several consumer protection directives, resulting in a fairly complete picture.
- The first legal document of great importance in electronic commercial was the Act XXXV of 2001 on Electronic Signatures. The AES introduces a general principle of functional equivalence between traditional paper documents and electronic documents sealed with advanced respectively qualified electronic signature.
- The recent entry into force of *Act CXL of 2004 on General Provisions of Administrative Proceedings and Services* means a very important step forward. Use of electronic documents in administrative proceedings is not a subsidiary opportunity any more but a fundamental service. Unless act or a government decree prohibits the use of electronic documents in certain type of proceedings public authorities shall administer the cases also in electronic way.
- As such, it would be accurate to say that, although Hungarian legislation certainly does not eliminate all legal barriers to the development of eBusiness, it typically allows trade partners the possibility of agreeing to a suitable framework when required.

Iceland National Profile

A. General legal profile

Iceland is a Republic with a parliamentary government. The President of the Republic, the members of the Althing[769] (The Icelandic Parliament) and local governments for the country's 79 Municipalities[770] are all elected by popular vote at four-year intervals.

The Constitution of the Republic of Iceland No. 33, 17 June 1944[771] provides for separation of the three principal branches of government.

The legislative power is jointly vested in the Althing and the President of the Republic. With his signature the President ratifies laws passed by the Althing[772]. This process also applies to international treaties and legislation deriving from the Agreement on the European Economic Area[773] as the Icelandic legal system builds on dualism in its approach towards international obligations.[774]

Formally the executive powers rest with the President but the Constitution expressly provides that the President entrusts his authority to Ministers and is not responsible for executive acts. The Government Ministers are usually from the ranks of the members of the Althing and remain members of the Althing while serving as Ministers. Important bills are usually submitted by Ministers and drafted on their initiative. The Ministers are the heads of executive authority, each in his own field. Accordingly the power to regulate eCommerce mainly lies within the Ministry of Industry and Commerce[775], which i.a. is responsible for the transposition of the EU Directives on electronic signatures and eCommerce[776] in Iceland.

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[769] *Alþingi*

[770] S*veitarfélög*. The Association of Local Authorities in Iceland, see: http://www.samband.is/template1.asp?id=364

[771] Stjórnarskrá lýðveldisins Íslands 1944 nr. 33 17. júní, see English translation http://government.is/constitution/

[772] Art. 26 of The Constitution of the Republic of Iceland No. 33, 17 June 1944, provides that the Presidents veto has the effect of submitting an enactment to a plebiscite.

[773] Iceland is a member of the European Economic Area (EEA). The EEA Agreement, see http://secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/EEAAgreement/#_Toc2116 3189 entered into force on 1 January 1994

[774] See Ólafur Jóhannesson, *Stjórnskipun Íslands,* Háskólaútgáfan, Reykjavík 1994, p. 36-7

[775] See http://eng.idnadarraduneyti.is/

[776] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market These directives are among the *acquis communautaire* applicable in the EEA, see further on http://secretariat.efta.int/Web/InfoKit/Info_Kit/OverviewLegelTexts

There are eight district courts[777] in Iceland in which all have jurisdiction in civil as well as criminal cases. The only court of appeal is the Supreme Court[778] which has a nationwide jurisdiction. Judgements in criminal cases may be referred to the Supreme Court without any restriction and for appeal of civil judgements there are minor requirements related to the minimum interests at stake. There is no legislation that obliges judges to follow precedents of former judgements.[779] However, the decisions of the Supreme Court are highly authorative and rarely disregarded. It is a case of academic dispute to which extent precedents are legally binding.[780]

Iceland is one of the Nordic countries, which have for long kept in touch with one another in the development of their laws and development of their judicial systems, accordingly close parallels can be found between the legal systems of these countries.[781]

B. eCommerce regulations

B.1 eCommerce contract law

One main characteristic of Icelandic law – by comparison with that of many nations on the European Continent – is that there is no comprehensive code covering the principles of private law. Written law is composed of individual statutes dating from various times, issued in response to different incentives. Many important legal principles are not enacted at all, and their application and effect derives from other sources of law.[782] In this section the main pillars of eCommerce regulation in Iceland will be described.

B.1.1. General principles

The main principle in Icelandic contract law is that contracts are not bound by formal requirements.[783] Therefore the question whether an agreement has been concluded orally or in writing, or by some other means capable of giving rise to an obligation under law, is generally irrelevant.

There are, however, many exceptions to that main principle, either based on legislation, agreements between parties executed in advance, the nature of circumstances or

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[777] *Héraðsdómur*; see http://www.domstolar.is/

[778] Hæstiréttur Íslands, see http://www.haestirettur.is/control/index?pid=333

[779] Sigurður Líndal: *Um lög og lögfræði – Gundvöllur laga – Réttarheimildir*, Rkv. 2002, p. 193

[780] Jón Steinar Gunnlaugsson, *Um fordæmi og valdmörk dómstóla*, Reykjavík 2003, p. 79-83.

[781] See Anderson, J.B.R., *Anglo – Scandinavian Law Dictionar,* Universitetsforlaget, Oslo 1977, p.11-12

[782] Sigurðsson, P.,"The Icelandic Law of Contracts – An Overview" published in *Lagaskuggsjá – greinar um lög og sögu*, Háskólaútgáfan 2004.

[783] See e.g. Ólafur Lárusson, *Kaflar úr kröfurétti*, Reykjavík 1950, p. 24; Páll Sigurðsson, *Samningaréttur*, Reykjavík 1987, p. 40

custom.[784] In general it can be stated that the form of a contract has an important practical value even though it does not affect the contract's legal value, at least not with respect to proving that a contract exists.[785]

There is no generally accepted legal definition of an electronic document in Icelandic law. In fact it could be said that the word "document" has no unequivocal meaning.[786] The common meaning of the word document is a written or printed paper. In 1998 it was deemed necessary to change the chapter in the General Penal Code[787], No. 19/1940, on document forgery, so that it expressly took to electronic documents. In the legal exposition to the Bill, which became Act. No. 30/1998, it was stated that there was general consensus among scholars that the definition of a "document" did not include electronic documents.[788] However, some scholars have since suggested that a legal definition of the word "document" could include electronic documents.[789]

There is no legislation which generally recognises the validity of electronic documents in contract law. However, the Administrative Procedures Act[790] No. 37/1993 which applies to state and municipal administration was amended in 2003 by Act No. 51/2003 to include a chapter on Electronic Administrative Procedures. In Art. 36 of the Administrative Procedures Act it is decreed that where the law, administrative provisions or custom requires information to be in writing, that requirement is met by an electronic document if the information contained therein is technically accessible to the receiver so as to allow him to familiarise himself with the information and preserve the information so as to be usable for subsequent reference. Similarly, in Art. 8 of the Act No. 30/2002 on Electronic Commerce and other Electronic Services[791] it is laid down that *"Where written contracts are required by law, by administrative provisions or for other reasons, such contracts shall be replaceable by an electronic contract, provided that the contract is available to both parties and in preservable form."* Finally Art. 4 of the Act No 28/2001 on Electronic Signatures[792] stipulates that:

> *In the event of a signature being a condition for legal effect pursuant to legislation, administrative requirements or for other reasons, a qualified electronic signature shall in all cases fulfill such requirements.*
>
> *The provisions of Paragraph 1 do not preclude electronic signatures other than*

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[784] See Páll Sigurðsson, ibid., p. 40

[785] See Gunnar Thoroddsen and Skúli Magnússon, *Rafræn viðskipti: umfjöllun um íslensk lög*, Reykjavík 1999, p. 29

[786] See Gunnar Thoroddsen and Skúli Magnússon, ibid., p. 33

[787] Almenn hegningarlög nr. 19/1940

[788] See Parliament document No. 771 – issue No. 444, put forward on the 122nd legislative session 1997–98, http://www.althingi.is/altext/122/s/0771.html

[789] See Publication from the Prime Minister's Office: *Lög um rafræna stjórnsýslu ásamt greinargerð*, Reykjavík 2003, p. 27

[790] Stjórnsýslulög, nr. 37/1993

[791] Lög um rafræn viðskipti og aðra rafræna þjónustu nr. 30/2002

[792] Lög nr. 28/2001 um rafrænar undirskriftir

those stipulated therein from meeting the conditions for signatures pursuant to law, administrative instructions or other reasons.

It is highly likely if a case concerning contract law would be presented before the courts and the validity of electronic documents were at issue, but the case fell outside the scope of the Act No. 30/2002 on Electronic Commerce and other Electronic Services, that the court would use the yardstick set forward in aforementioned Art. 8. as well as the provision of 36 of the Administrative Procedures Act.

As mentioned in the beginning of this sub-chapter the main principle in Icelandic contract law is that contracts are not bound by formal requirement. However, in some instances individual statutes and enactments require contracts either to be in writing or signed by hand. Failure to observe statutory requirements in this regard rarely causes the complete invalidity of a contract by Icelandic law. In many cases legal requirements are to be considered as recommended procedure, but in other cases a failure to observe formal requirements changes the validity of or affects the importance of the agreement.

An example hereof can be found in The Title and Mortgage Registration Act[793] No. 39/1978 which requires that a deed or a contract on real property shall be in writing for the registration of title, which is recommended in order to protect the rights of the purchaser over the property vis-à-vis a bona fide third party negotiating with the seller.

Another example is the Act on Trade Organisations and Labour Disputes[794] No. 80/1938 which specifies that although Collective Labour Agreements shall be in writing, omission thereof will not cause invalidity of the agreement between parties, but the Labour Court[795] will only consider disputes over written agreements.[796] Act No. 93/1933 on Bills of Exchange[797] offers a similar situation (cf. section C.1.1). All these examples regard actions or inactions of public institutions in connection with a written agreement, but not the validity of the agreement as such. The fact that this specialised legislation has not accepted electronic documents has been considered to be one of the main barriers to the practical application of the Electronic Signature Act.[798]

In addition to the principle that contracts are not bound by formal requirements, Icelandic contract law is based on the recognised maxim of freedom of contract[799]. Hence it has to be concluded that contracting parties are free to conclude agreements on formal requirements to their own contracts, given of course that the form in question is not in breach of what is generally acceptable by law and ethical standards. However, if such an agreement were to be disputed before the courts it would always be the subject of interpretation by a judge, where she would, according to Icelandic sense of justice

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[793] Þinglýsingalög nr. 39/1978

[794] Lög um stéttarfélög og vinnudeilur nr. 80/1938

[795] Félagsdómur

[796] Sigurðsson, P. "The Icelandic Law of Contracts – An Overview" published in *Lagaskuggsjá – greinar um lög og sögu,* Háskólaútgáfan 2004, p. 312

[797] Víxillög nr. 93/1933

[798] Óttarsson A., "Rafrænar undirskriftir*",* Úlfljótur – tímarit laganema, 2002 (4), p.694

[799] Sigurðsson P., Ibid. p.306

and the laws now in effect, have considerable degree of freedom in assessing the importance of various factors.[800]

As regards notifications between contracting parties, the general principles of Icelandic law can be found in the Act on Making of Contracts, Agency and Void Undertakings[801], No. 7/1936 (the Contract Act). Section I of the Contract Act provides that an offer is by definition a declaration which indicates a willingness to obligate oneself, and is addressed to another person. An offer becomes binding upon the offeror at the time it comes to the knowledge of the offeree through an action of the offeror. The words "comes to" mean that the offer must have arrived where its recipient can generally be expected to be able to make himself familiar with it if he so chooses, for example by a letter delivered at his office, a notification placed in his mailbox or at his home etc.[802] The Act seems to be open ended towards the method used to bring an offer to the knowledge of the offeree and the reply to the offeror.

The Act concerns itself mainly with three types of communication i.e. oral, by letter or by telegram, and ties different effects to each in regard to deciding from which point of time it shall be considered to take effect. This list of methods is not exhaustive as in Art. 39, concerning reclamations, it is stated that if a person has delivered a reclamation by phone, mail or any other accepted method of delivering it shall not be held against that person if its delivery is delayed or if it disappears.

Further examples of legislation explicitly referring to what is an acceptable method of delivery can be found in e.g. the Act on Sale of Goods[803], No. 50/2000 and Act on Insurance Activity[804], No. 60/1994. The implications of this are that in Icelandic contract law the requirements for the form of notifications refer to what is considered to be acceptable. The evaluation of this acceptability is in the hands of a judge if the matter were to be disputed before a court.

According to Art. 44 of the Civil Procedure Act[805], No. 91/1991 a judge has the discretion to evaluate the proof of a disputed fact, except in cases where the form of proof before a court is stipulated by law. As there is no existing precedet from an Icelandic court pertaining to the validity of an electronic notification[806], a judge in her evaluation process would take notice of Nordic court decisions in similar situations.

To this day development of practical solutions, such as registered e-mail, time-stamps and third party mediation has not been stipulated by law, although Public Authorities have diligently promoted the development of eCommerce.

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[800] Sigurðsson, P., Ibid, p. 314

[801] Lög um samningsgerð, umboð og ógilda löggerninga nr. 7/1936

[802] Sigurðson, P., Ibid. p. 317-18

[803] Lög um lausafjárkaup nr. 50/200

[804] Lög um vátryggingastarfsemi nr. 60/1994

[805] Lög um meðferð einkamála nr. 91/1991

[806] The Supreme Court has decided that the requirement in Art. 92(1) of the Civil Procedure Act regarding that notifications of judges to parties have to be demonstrably sent was not fulfilled with a telefax as the postal authorities informed that the sender of a telefax could never be 100 per cent sure that the receiver had in fact received the telefax even if the sender had a confirmation slip regarding that the telefax had been sent, see the Supreme Court's decision in case No. 438/1994. The same is likely to apply to such notifications sent by ordinary e-mail

As for electronic archiving, Iceland has not implemented a generic framework that could be useful across sectors or for multiple document types. Specialised legislation, for example on accounting and bookkeeping provides a framework within its sector (which will be discussed in section C) but this has not inspired the creation of a more generic framework up till now.

B.1.2. Transposition of the eCommerce directive

The eCommerce directive was implemented into Icelandic legislation with the Act on Electronic Commerce and other Electronic Services[807], No. 30/2002. As the name implies, the Act applies to information society services.[808] In line with Art. 1(5) of the eCommerce directive, the Act does not apply to electronic services relating to taxation, protection of personal data, unlawful collusion or concerted practices, representation by legal counsel before the courts, gambling activities involving wagering money in games of chance and the activities of public notaries to the extent that such activities involve the exercise of public authority.[809]

The Act stipulates that where written contracts are required by law, administrative provisions or for other reasons, such contracts shall be replaceable by an electronic contract, provided that the contract is available to both parties and in preservable form.[810] This applies also to requirements for written notifications or other actions required of parties to a contract in connection with their contractual relationship and which, under law or administrative provisions or for other reasons, must be in writing.[811]

However, these provisions do not apply to contracts governed by family law or by the law of succession, contracts requiring stamps and contracts that create or transfer rights in real estate, except for rental rights. In addition, the provisions do not apply to public registration or notarial acts.[812]

In the legal exposition to the Bill for the Act there it is explained that, as the main principle in Icelandic law is that validity of contracts is independent of its format which ensures that electronic contracts are valid except where explicitly stipulated otherwise, it was deemed to be unnecessary to have a specific provision to that effect.[813] A reference was made in the same place to the Act on Electronic Signatures[814], No. 28/2001, which stipulates that a qualified electronic signature is equivalent to handwritten signatures and that other electronic, i.e. not qualified, can also be deemed to be equivalent.[815]

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[807] Lög nr. 30/2002 um rafræn viðskipti

[808] See Art. 1(1)

[809] See Art. 1(2)

[810] See Art. 8(1)

[811] See Art. 8(2)

[812] See Art. 8(3)

[813] See Notes on Article 8 in the Parliament document No. 774 – issue No. 489, put forward on the 127. legislative session 2001-2002,

[814] Lög nr. 28/2001 um rafrænar undirskriftir

[815] See Art. 4 of the Act on electronic signatures

Hence there are no further specific requirements with regard to the use of electronic signatures in the Act implementing the eCommerce directive.

B.2 Administrative documents

The Administrative Procedures Act, No. 37/1993 which applies to state and municipal administration was amended in 2003 by Act No. 51/2003 to include a new chapter No. IX. on Electronic Administrative Procedures, cf. B.1.1. Through this modification, general obstacles to the development of electronic administration were removed. The amendment was guided by the concept of equivalent value, and also emphasized the maintenance of technical impartiality.[816]

In Art. 36 of the Administrative Procedures Act it is stipulated that where the law, administrative provisions or custom requires information to be in writing, that requirement is met by an electronic document if the information contained therein is technically accessible to the receiver so as to allow him to familiarise himself with the information and preserve the information so as to be usable for subsequent reference. The alteration involved mere permission for the electronic handling of governmental administration cases, not an obligation, see Art. 35.

C. Specific business processes

This section of the study provides information on the relevant Icelandic law and administrative practice for certain specific eBusiness processes and the requisite documents for such transactions.

The section below is organised according to four stages in the electronic provision of goods on the European market. They comprise credit arrangements, transportation and storage, cross border trade formalities and financial/fiscal management.

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

Usage of bills of exchange is common for banks and business entities as a negotiable instrument for short term credit. The Act on Bills of Exchange, No. 93/1933, is modelled for international trade in conformity with the Geneva Convention for a Uniform Law for Bills of Exchange and Promissory Notes in 1930. Art. 1 of the Act provides that a bill of exchange is an instrument containing certain mandatory statements and signed by the drawer of the bill. The law states no requirement for the use of paper, but the document must contain the signature of the issuer. However the prescribed adherence to a certain form has been construed as indicating that there has to be a written document.[817]

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[816] See chapter 2.19 of the report, *Iceland and the Information Society 2003*, published by the Prime Minister´s Office, Iceland 2003

[817] Sigurðsson, P., *Samningaréttur*, Reykjavík 1987, p. 40

The question whether a bill of exchange can exist in an electronic form is neither addressed by the Act on Bills of Exchange, nor by the by the Act on Electronic Signatures, No. 28/2001, although the latter legislation expressly prohibits denying legal effectiveness to electronic signatures solely on the grounds that it is in an electronic form.

For the verification of the existence of bill of exchange there would have to exist an original, something that would seem to bar the application of the Act on Electronic Signatures for Bills of Exchange. For electronic documents there is no difference between an original and a copy. Therefore the usage of electronic documents for tradable documents is only feasible where an escrow service is available for the preservation of a designated original.

However, an electronic document fulfilling other mandatory statements for a bill of exchange could nevertheless, depending upon a special legal provision or the existence of an agreement between the parties, be given a status analogous to that of a bill of exchange.[818] However, it would not be enforceable against a third party under the Bill of Exchange. Such an arrangement is now possible with the application of the eCommerce Act, No. 30/2002 whereby two parties, conducting business through electronic networks can conclude an agreement having similar effect as a bill of exchange.

C.1.2. Documentary credit

International trade may involve the risk of delivering payments and goods to previously unknown foreign trading partners. A frequently used method of minimising such risk is to use a documentary credit. Documentary credit or a letter of credit is for the purpose of this study assumed to be a form of bank guarantee that permits the payment from a bank to a designated recipient, usually a seller of goods, against the receipt of stipulated documents (title to goods).

The use of documentary credit is not regulated by special law, other than laws and regulations on surveillance of financial institutions. Apart from that general principles of contract law apply. The same goes for the regulation of electronic documentary credit agreements. The cross border acceptance of documentary credit relies on an international framework of recommendations and guidelines such as the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation or "eUCP " which entered into force 1 April 2002. The eUCP is an extension of the UCC-500 documentary credit framework created by the International Chamber of Commerce (entry into force 1994). The eUCP draws on the previous framework of general rules for documentary credit and adds to these guidelines for presentation of documents in electronic format.

The use of eUCP is optional for the parties and can be complemented with the use of electronic signatures, where available. Most eUCP transactions in Iceland take the form of SWIFT transactions from one bank to another, where the format of the electronic document has been standardised. The eUPC is still in its infancy. How and to what extent it will replace conventional documentary credit is yet to be seen. To a large extent this will depend upon available market solutions, the availability of a trusted third party for the storage of electronic “originals”. How the courts will apply rules, designed for paper to electronic contracts remains to be seen.

[818] See Gunnar Thoroddsen and Skúli Magnússon, ibid., p. 35

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

Bills of lading are the internationally accepted title to goods in transport, mostly in maritime traffic. These bills have a role to play where documentary credit is used as an instrument for secure payments and are one of the prerequisite documents for customs clearance of imported goods. The carrier issues a bill of lading under a transportation contract upon request of the shipper. The general definition of bills of lading is a document verifying the existence and reception of the goods to be transported and the carriers obligation to transport the goods. The recipient under the bill of lading has the legal title to the goods upon arrival to a final destination.

A bill of lading is also an instrument for collecting payment for goods. The Act on Sale of Goods[819], No. 50/2000, provides that if a bill of lading is used for the shipment of goods to its destination or the shipment is in other respects subject to terms whereby the seller does not have control of the goods following payment, payment may be claimed against delivery of a bill of lading under such terms. This rule applies even if the goods have failed to appear or the buyer has not had an opportunity to inspect them.[820]

Under Icelandic law a bill of lading can either be in paper or an electronic form, as an EDI document. For electronic bills of lading special provisions apply regarding presentation and storage of such documents. The Customs Act[821] of 1987, provided the opportunity to use the EDI and X.400 protocols to submit electronic bills of lading for customs clearance. A later amendment to the Customs Act in 1996 made it compulsory for all businesses to submit customs clearance documents electronically by 2001.

The current Customs Act[822], No. 88/2005, refers to the duty of an importer with an EDI customs clearance to preserve all electronic import documents, including the bill of lading, under the Accounting Act[823], No. 145/1994, for the period of six years from the date of import. He shall keep custody of all computer data concerning customs clearance for six years from the date of customs clearance and keep unaltered all standard messages which he transmits to the director of customs or receives from the director of customs. When a journal of data is kept in computer form, the standard messages must be easily accessible for reproducing them or printing them in a legible manner when so requested. An importer who holds a permit for WEB customs clearance must keep in his custody a printout[824] of the customs declaration and the electronic

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[819] Lög nr. 50/2000 um lausafjárkaup

[820] Art. 49(3)

[821] Tollalög nr. 96/1987

[822] Tollalög nr. 88/2005

[823] Lög nr. 145/1994 um bókhald

[824] This seems to discriminate against the holder of a permit for a WEB customs clearance. However, this requirement is designed with SME's in mind, to simplify the procedure so that permit holders, usually SME's, need not to invest in a large electronic databases

notice from the director of customs on the customs clearance and the debiting of the import charges.[825]

The Customs Act is technologically neutral when it comes to practical solutions. Standard software solutions and PKI infrastructure draw on the "CMI Rules on Electronic Bills of Lading" for standardised EDI formats. In addition to software solutions for customs authorities, carriers, shippers etc., the existence of a central electronic registry, controlled by the transporter, is necessary for registration of shipping details. Transfer of title to the goods in transport is made possible whereby the transporter can then issue a new electronic key to the new holder of the electronic bill of lading.

C.2.2. Storage contracts

Storage of transported goods that have reached their port of destination, but are awaiting customs clearance is commonly done in warehouses, also referred to as duty-free warehouses and bonded warehouses. This method of supply chain management permits retailers and manufacturers to maintain a just-in-time delivery of ready made goods and components for assembly lines, thus minimising investment in storage facilities and offering in many situations a value added service for freight companies. The provision of storage services is conducted through the conclusion of storage agreements and the issuing of negotiable or non-negotiable receipts. As regards negotiable receipts, electronic storage contracts could be one of the pillars for streamlining international trade.

The Customs Act refers to the legal status of uncleared goods stored in warehouses, but has no provisions on storage contracts or electronic versions thereof. The Act on Making of Contracts, Agency and Void Undertakings, No. 7/1936, with later amendments regulates general contracts (cf. B.1.1). A storage contract can thus be concluded in any manner as agreed upon by the parties. In most cases, however, such contract forms are standardised by the warehouse operators and contain the usual disclaimers and limitations of liability. It is therefore up to the warehouse operators to offer the possibility of electronic storage contracts. Here the general rule of contract law applies, i.e. there is no legal requirement for a paper document for a storage contract to be legally binding. For the proof of the existence of a storage contract, the principles of contract law described above can be applied. As indicated above, written proof is now understood to include both paper and electronic records. The final conclusion is that there is no legal barrier for the use of electronic contracts for storage agreements.

C.3 Cross border trade formalities: customs declarations

The lack of worldwide legal acceptance of electronic documents for customs clearance is one of the largest barriers to efficient international trade. This requires both the relevant legal framework and a competent technical infrastructure with private entities and customs authorities alike.

As discussed above in C.2.1., the Customs Act of 1987 made a provision for the electronic submission of customs declarations and the acceptance of clearance notices using the EDI and X.400 protocols. An amendment to the Act in 1996 made it

[825] Art. 29 of the Custom Act

compulsory for all importers to adopt electronic submission by 2001. Although as many as 70 per cent of customs declarations were submitted electronically in 1999, it was felt that to reach the remaining, generally small businesses, it would be necessary to offer an additional electronic channel for customs clearance, a Web-based solution using a PKI infrastructure and electronic certificates for authentication.[826] In accordance with the 1996 amendment all importers and exporters reverted to electronic submission by the close of 2001. In addition, internal processes at the customs authorities have become fully automated, so that the demand for goods to flow rapidly in international trade is now easier to meet.

The current Customs Act No. 88/2005 added further onto to the previous regime of electronic customs clearance. There it is stipulated that customs brokers and professional importers must submit to the relevant director of customs through electronic data interchange the information required for the customs clearance of goods (EDI customs clearance) or through web connection with the customs web site (WEB customs clearance). The provision also grants the director of customs the authority to decide the form of a standard message for import declarations. Further instructions for the technical execution of EDI and WEB customs clearance are to be put in place with a regulation issued by the Minister of Finance.[827] Such a regulation is yet to be issued. Meanwhile customs authorities work under the framework of the Regulation on EDI Customs Clearance[828], No. 858/2000, that was issued under the previous Customs Act (No. 55/1987).

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

Reference is made to information under point C.4.2. (Electronic Accounting) on the Accounting Act, No. 145/1994, and Regulation on electronic accounting, storage of electronic data and minimum specifications for electronic accounting systems[829], No. 598/1999, with later amendments. Under the framework of this legislation companies in Iceland have the option to issue legally valid electronic invoices. VAT declarations can be submitted to the Inland Revenue Service (IRS)[830] electronically via Web based interface. The Regulation for VAT forms and payments[831], No. 667/1995, as amended by Regulation No. 741/2001, now provides that the IRS can on the basis of a written application grant

[826] In this case, the only investment for the user is in a computer with access to the Internet, a web browser, and a digital signature certificate, which is provided by the customs authorities. Not only is this service open round the clock, but it also rationalises the task of users when preparing and submitting customs declarations, significantly shortens turnaround time, and is more reliable, because declarations are automatically checked for errors.

[827] Art. 23 of the Custom Act

[828] Reglugerð nr. 858/2000 um SMT tollafgreiðslu

[829] Reglugerð nr. 598/1999 um rafrænt bókhald, geymslu rafrænna gagna og lágmarkskröfur til rafrænna bókhaldskerfa

[830] Ríkisskattstjóri

[831] Reglugerð nr. 667/1995 um framtal og skil á virðisaukaskatti

a VAT debtor a license to submit VAT returns in an electronic format. The IRS can limit the use of such license to the use of a special WEB-key (an electronic certificate and a PK infrastructure), provided by the IRS.[832] The Regulation further provides that the use of a WEB key for an electronic VAT form is equivalent to a handwritten signature of a paper based VAT form.[833]

It is worth noting that the e-invoicing directive[834] has not been incorporated into the EEA Agreement as VAT issues are not covered by the Agreement.

C.4.2. Electronic accounting

The Accounting Act, No. 145/1994, provides that the Minister of Finance can issue regulations on electronic accounting, including software for exchange of data between data transmission systems, and further conditions for the adoption of electronic accounting.[835] Such rules have been put in force with Regulation on electronic accounting, storage of electronic data and minimum specifications for electronic accounting systems, No. 598/1999, with later amendments.

The Regulation provides for the definition of terms such as messages and data-journals.[836] It stipulates that a description must be available for the security and logging measures built into the system.[837] Every entry in an electronic accounting system shall be based upon reliable and sufficient messages relating to the transaction, whether they are sourced within or outside the company.[838] A twofold data-journal has to be kept; one part a journal for all incoming messages, the other part for messages sources within the company. All messages shall be registered and numbered in a chronological order.[839] All messages that contain information on transactions shall be entered into the accounting system.[840]

Electronic records and accounts must be kept for seven years from the completion of each fiscal year.[841] The Regulation does not specify any details for the storage of electronic accounts with a third party. It is up to the relevant company to make security copies of the accounts, secure the storage of such copies and grant access to

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[832] Article 6(1) of the Regulation

[833] Article 9(2) of the Regulation

[834] More formally known as Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax; *Official Journal L 015 , 17/01/2002 P. 0024 - 0028*

[835] Art. 7(4) of the Act

[836] Art. 1 of the Regulation

[837] Art 2 of the Regulation

[838] Art. 3 of the Regulation

[839] Art. 4 of the Regulation

[840] Art. 5 of the Regulation

[841] Art. 9 of the Regulation

surveillance authorities.[842] The Regulation provides for the minimum requirements of accounting systems, as regards the items to record and store.[843]

The conclusion under this point is that the Icelandic Accounting Act and the accompanying regulation provide for the possibility for a complete electronic accounting system.

D. General assessment

D.1 Characteristics of Icelandic eCommerce Law

- In this report it has been established that the legislator in Iceland has been rather reserved with regard to regulation of eCommerce. This reflects one of the main characteristics of Icelandic contract law and regulation of commerce in general, i.e. the freedom of contracting both in terms of form and content. The legislative approach has been to lay down general principles and guidelines. This has enabled contracting parties as well as courts to adopt new customs and trends in commerce if considered in accordance with these principles without having to wait for legislative initiatives. It does not therefore come as a surprise that the directives on eCommerce and Electronic Signature were implemented with a relatively "open" approach into Icelandic legislation. In fact it is doubtful if specialised legislation in the field of eCommerce would exist in Iceland if it had not been necessary to enact it to fulfil the obligations under the EEA agreement.

D.2 Main legal barriers to eBusiness

- Legal barriers to eCommerce in Iceland are scarce. In general the legal environment has been receptive to changes in technology and after the important addition of the Act on Electronic Signature and the Act on eCommerce there seem to be few obstacles to eCommerce.
- However, there are a few examples of specialised legislation still embodying formal requirements that may be considered as obstacles to eCommerce. In most cases these requirements are to be found in statutes where Public Authorities are obliged to attach their powers to private contracts.
- The chairman of Icepro, the Icelandic Committee on Trade Procedures and e-Commerce[844], claims the main barriers to eCommerce are not of a legal nature. In his opinion technological problems and human behaviour are the two greatest obstacles.[845] The latter seems to be changing rapidly; a recent survey by Statistics Iceland[846] shows that in March 2006 around 84 per cent of Icelandic households

[842] Arts. 13 and 14 of the Regulation

[843] Art. 11 of the Regulation

[844] See www.icepro.is

[845] G. H. Sigurðardóttir "Tregða meðal stjórnenda" Frjáls Verslun, 2004 (3), p.93

[846] Hagstofa Íslands; http://www.statice.is/

had access to the Internet. Almost three out of every ten individuals in Iceland had ordered or purchased goods or services over the Internet in the year 2006 and the vast majority of Internet users showed interest in interacting with public authorities over the Internet.[847]

D.3 Main legal enablers to eBusiness

- It has already been established that the structure of the regulating framework for commerce in Iceland makes it receptive to new technology and customs.[848] The implementing of the eCommerce directive and the Electronic Signature directive into law have led to further evolvement towards eCommerce.
- In addition to this the Government has convincingly supported this development by:

  a) Promoting and implementing electronic administration where possible. This has been an overall success, resulting in both the IRS and the Directorate of Customs (DoF) being awarded the "e-Government Good Practice Award" by the European Commission under Belgian Presidency in 2001.[849]

  b) Supporting and participating, where applicable, in initiatives in the private sector, for example IcePro, which is the forum of official bodies, businesses and individuals who are working on facilitating commerce and trade procedures, using EDI (Electronic Data Interchange), ebXML and other standardized means of Electronic Commerce[850].

[847] "Use of ICT and the Internet by households and individuals in Iceland 2006", News message No. 64/2006 from Statistics Iceland on http://www.statice.is/?PageID=444&NewsID=2006

[848] See http://www.forsaetisraduneyti.is/utgefid-efni/nr/1249

[849] The IRS started to accept tax returns in the electronic format in 1997 and already in 2003 80 per cent of all the tax returns were submitted electronically. The DoF has accepted customs forms in the electronic format since 2001, See report on the Government iniciatives in this regard on http://www.forsaetisraduneyti.is/utgefid-efni/nr/1249.

[850] See http://www.Icepro.is

Ireland National Profile

A. General legal profile

The modern Irish legal system is derived from the English common law tradition.

Since the foundation of the Irish Free State in 1922, however, Irish law has developed a character of its own. A major milestone in the development of Irish law was the coming into effect in 1937 of the Irish Constitution[851] which includes a Bill of Rights. The power to pass legislation is vested by the Constitution in the Oireachtas (the parliament). The primary sources of Irish law consist of the Constitution, legislation, the common law and European Community law.

The Irish civil court system consists of District courts, which hear cases involving claims for damages of up to €6,530. Circuit courts which deal with claims for between €6,530 and €38,092, and the High Court which deals with claims above €38,092. All of these courts are competent to handle eCommerce disputes. Special provision was however made in 2004 for the establishment of a commercial division within the High Court which may prove attractive to those involved in eCommerce disputes, because of the speed with which cases are dealt with. The categories of proceedings which may be allocated for disposal in the Commercial List include:

- claims or counterclaims in respect of a variety of specified commercial transactions where the value of the claim or counterclaim is not less than €1,000,000;
- claims or counterclaims irrespective of their value, which, having regard to the commercial and any other aspect, are considered appropriate for entry in the List;
- proceedings under the Arbitration Acts where the value of the claim or any counterclaim is not less than €1,000,000;
- proceedings for remedies in respect of intellectual property rights; and
- appeals from or application for judicial review of decisions made or directions given under statutory regimes which having regard to the commercial or any other aspect, are considered appropriate for entry in the Commercial List.

[851] *Bunreacht na hEireann*

B. eCommerce regulations

B.1 eCommerce contract law

B.1.1. General principles

In general, where there is an agreement, supported by consideration and an intention to create legal relations, there are no further requirements as to form, for a valid and enforceable contract. The contract can be concluded orally, or in writing, or it may be implied from conduct. A written contract may be useful for evidential purposes but writing is not essential. Therefore, in general, the emphasis is on stressing the expressed will of the parties rather than formalities.

There are a limited number of statutory exceptions to this general rule. Perhaps most importantly, under section 2 of the Statute of Frauds (Ireland) 1695, contracts of guarantee, and contracts for the sale of land or an interest therein, must be evidenced in writing and signed by the party to be charged, that is, sued. These requirements as to form have been broadly interpreted by case law and following the enactment of the Electronic Commerce Act 2000 can clearly be satisfied electronically.

There is no distinction between civil and commercial contracts, as regards formation and proof, in Irish law.

In general, notifications can be sent electronically, subject to the exceptions under the Electronic Commerce Act 2000. In this regard it should be noted that the law governing the making and use of an affidavit or a statutory or sworn declaration, and the rules, practices or procedures of a court or tribunal are excluded under section 10 of the Electronic Commerce Act 2000.

There is no legal framework for sending electronic registered post.

In terms of archiving, there are generic rules in the Electronic Commerce Act as regards the retention and production of documents, subject to conditions. Section 18(1) provides that if by law a person or public body is required or permitted to retain for a period or produce a document that is in paper form or other written form then, subject to certain conditions, the person or public body may retain or produce the document in electronic form. The conditions are elaborated on in section 18(2) which provides that a document may be retained throughout the period, or produced, by the person or public body as provided in subsection (1) only—

> (a) if there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form as an electronic communication,
>
> (b) in the case of a document to be produced— if the information is capable of being displayed in intelligible form to the person or public body to whom it is to be produced,
>
> (c) in the case of a document to be retained— if, at the time of the generation of the final electronic form of the document, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useable for subsequent reference,

(d) where the document is required or permitted to be retained for or produced to a public body or for or to a person acting on behalf of a public body, and the public body consents to the document being retained or produced in electronic form, whether as an electronic communication or otherwise, but requires that the electronic form of the document be retained or produced in accordance with particular information technology and procedural requirements— if the public body's requirements have been met and those requirements have been made public and are objective, transparent, proportionate and non-discriminatory, and

(e) where the document is required or permitted to be retained for or produced to a person who is neither a public body nor acting on behalf of a public body— if the person for or to whom the document is required or permitted to be retained or produced consents to it being retained or produced in that form.

There is no jurisprudence explicitly acknowledging the acceptability of electronic documents as equivalent to traditional paper based documents.

B.1.2. Transposition of the eCommerce directive

The eCommerce Directive has been fully transposed into Irish law by two instruments:

1. the Electronic Commerce Act 2000[852], and
2. the European Communities (Directive 2000/31/EC) Regulations 2003[853].

The key principle of non-discrimination is to be found in section 9 of the 2000 Act which states:

"Information (including information incorporated by reference) shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form, whether as an electronic communication or otherwise".[854]

This general principle is then expanded upon in relation to specific matters, such as, writing, signatures, documents under seal, originals, retention and production, and contracts, in section 12-23 of the 2000 Act.

Like the UNCITRAL Model Law, the 2000 Act follows the 'exclusion model' whereby information in electronic form, such as signatures and documents are treated as equivalent to manual signatures and paper documents, and then the legislation provides for specific exclusions. There are two forms of exclusion from the general principle in section 9 and the subsequent provisions. First, section 10 provides that ss. 12-23 are without prejudice to:

a) the law governing the creation, execution, amendment, variation or revocation of—

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[852] This Act, which was influenced by the UNCITRAL Model Law (1996), was drafted in advanced of the eCommerce Directive and only partly transposes the Directive. Further legislation, in the form of the 2003 regulation, was therefore needed to complete the transposition process.

[853] S.I. No. 68 of 2003.

[854] 'Information' is further defined as including data, all forms of writing and other text, images (including maps and cartographic material), sound, codes, computer programmes, software, databases and speech: 2000 Act, s.2(1).

(i) a will, codicil or any other testamentary instrument to which the Succession Act, 1965, applies,

(ii) a trust, or

(iii) an enduring power of attorney,

(b) the law governing the manner in which an interest in real property (including a leasehold interest in such property) may be created, acquired, disposed of or registered, other than contracts (whether or not under seal) for the creation, acquisition or disposal of such interests,

(c) the law governing the making of an affidavit or a statutory or sworn declaration, or requiring or permitting the use of one for any purpose, or

(d) the rules, practices or procedures of a court or tribunal, except to the extent that regulations under section 3 may from time to time prescribe.

Importantly, section 3 referred to above, allows the relevant Minister to extend the application of the Act taking into account developments in technology and developments in practice and procedure and the public interest.

A second form of exclusion operates under section 11 which provides that nothing in the 2000 Act will prejudice the operation of—

(a) any law relating to the imposition, collection or recovery of taxation or other Government imposts, including fees, fines and penalties,

(b) the Companies Act, 1990 (Uncertificated Securities) Regulations, 1996 (S.I. No. 68 of 1996) or any regulations made in substitution for those regulations,

(c) the Criminal Evidence Act, 1992, or

(d) the Consumer Credit Act, 1995, or any regulations made thereunder and the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 No. 27 of 1995).

Section 19 deals specifically with contracts. It provides:

(1) An electronic contract shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form, or has been concluded wholly or partly by way of an electronic communication.

(2) In the formation of a contract, an offer, acceptance of an offer or any related communication (including any subsequent amendment, cancellation or revocation of the offer or acceptance of the offer) may, unless otherwise agreed by the parties, be communicated by means of an electronic communication.

Any formalities as to writing and signatures can also be satisfied electronically (noting the above exclusions). Accordingly, section 12 provides:

If by law or otherwise a person or public body is required … or permitted to give information in writing (whether or not in a form prescribed by law), then, subject to *subsection (2)*, the person or public body may give the information in electronic form, whether as an electronic communication or otherwise.

And section 13 states:

If by law or otherwise the signature of a person or public body is required … or permitted, then, subject to *subsection (2)*, an electronic signature may be used.

B.2 Administrative documents

The Electronic Commerce Act seeks to facilitate the use of electronic documents in public administration and in the private sector. The aims of the relevant provisions of the Act are to provide a general legal framework for electronic communications. There is nothing mandatory about its provisions and as can be seen from the description below, the operation of the provisions is subject to a range of exceptions (see above).

Sections 12, 17 & 18 deal specifically with legal validity of information or writing retained, produced or presented in electronic form. Section 13 deals with the issue of electronic signatures. Section 14 is concerned with documents that require to be witnessed and Section 16 is concerned with documents under seal.

Section 17 provides that where a person is required or permitted to present or retain information in its original form, then the information may be presented or retained in electronic form. It is subject to a number of conditions, however, and these are set out in subsection 2. In the first place, originals can be produced or retained in electronic form only where there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form as an electronic communication.

In addition, the information must be capable of being displayed in intelligible form and it must have been reasonable to expect, at the time the information was generated in its final form, that it would be readily accessible so as to be useable for subsequent reference. The most important condition relates to the obtaining of the consent of the person or body for whom the document is required or permitted to be retained, or to whom it is required or permitted to be produced. In the case of both public bodies and private sector bodies, the consent of the person to whom the information is required or permitted to be presented or for whom it must be retained, must be obtained. A further requirement applies in respect of public bodies only: the public body's requirements concerning information technology and procedural matters must be met. Those requirements must, however, be made public and must be objective, transparent, proportionate and non-discriminatory.

As previously noted, section 18 provides that electronic information can be used to meet a requirement to produce or retain information. The operation of this provision is also subject to a number of conditions. In the case of a document to be produced, the information must be capable of being displayed in intelligible form. In the case of a document to be retained, information can only be retained in electronic form where, at the time of the generation of the final electronic form of the document, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useable for subsequent reference. The same conditions with regard to obtaining consent and the fulfilment of public bodies' technological and procedural requirements apply in respect of the production and retention of information in electronic form as have been outlined in relation to section 17.

Section 12 provides that where a person is required or permitted to give information 'in writing' then that requirement can be met by writing in electronic form. Again, the operation of this section is subject to a range of conditions similar to those set out in ss.17 and 18, in particular, that it was reasonable to expect, at the time the information was given, that it would be readily accessible to the person or public body to whom it was directed, for subsequent reference; that consent has been obtained; and that in the case of a public body, that the body's technological and procedural requirements have been met. A further condition not encountered in ss.17 and 18 is that a public body's

requirement that a particular action be taken by way of verifying the receipt of the information must be met. This condition is also subject to the proviso that such requirements have been made public and are objective, transparent, proportionate and non-discriminatory. The scope of section 12 is broad in that the definition of 'giving' information includes making an application, making or lodging a claim, making or lodging a return, making a request, making an unsworn declaration, lodging or issuing a certificate, making, varying or cancelling an election, lodging an objection, giving a statement of reasons, recording and disseminating a court order, giving, sending or serving a notification.

Section 13 provides that where the use of a signature is required, an electronic signature may be used provided two conditions are met:

1. where the recipient is a public body, any information technology or procedural requirements imposed by that body must be complied with; and
2. the person or body to whom the signature is addressed must consent to the use of the electronic signature.

Section 14 provides for a signature to be witnessed electronically and contains a number of conditions:

1. the signature to be witnessed must be an advanced electronic signature, based on a qualified certificate, of the person or public body by whom the document is required to be signed;
2. the document must indicate that the signature of that person or public body is required to be witnessed;
3. the signature of the person purporting to witness the signature to be witnessed must be an advanced electronic signature, based on a qualified certificate;
4. the receiver of the document to be witnessed must consent to the electronic witnessing and any procedural requirements imposed by a public body must be complied with.

Section 16 is concerned with ensuring that requirements to execute documents under seal can be met through electronic means. It provides that where a seal is required to be affixed to a document that requirement is taken to have been met if the document indicates that it is required to be under seal and it includes an advanced electronic signature, based on a qualified certificate, of the person or public body by whom it is required to be sealed. This provision is subject to the same requirements with regard to consent as have been set out in relation to section 17 above.

The scope of these provisions is limited by a number of specific exceptions which apply to the Electronic Commerce Act. These are outlined above. Section 24 may also be viewed as generally restricting the scope of the Act. It underlines the voluntary character of the Act's provisions by stating that nothing in the Act shall be construed as requiring a person or public body to generate, communicate, produce, process, send, receive, record, retain, store or display any information, document or signature by or in electronic form, or as prohibiting a person or public body engaging in an electronic transaction from establishing reasonable requirements about the manner in which the person will accept electronic communications, electronic signatures or electronic forms of documents.

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The law relating to bills of exchange is contained in the Bills of Exchange Act 1882[855] and the related common law. The 1882 Act defines a bill of exchange as

> "*an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.*"[856]

An instrument that does not comply with these conditions is not a bill of exchange.[857] The requirements of writing and signature have been broadly interpreted by case law and today are addressed specifically by the Electronic Commerce Act 2000. Therefore there is no doctrinal reason why an effective bill of exchange could not be created using a computer and transmitted electronically from that computer to another, to be printed out and accepted, for example.[858]

However, it has been noted that while it is possible in theory to create an electronic bill of exchange, the simulation of all the aspects of a bill by electronic means, including its transfer is problematic. For example, a bill of exchange gives rise to a string of contracts: each transferor incurs some legal liability and a where a bill is payable to order, each indorser incurs a contractual liability enforceable by the subsequent parties. Thus an electronic bill must not only be capable of being transferred but also of being transferred so as to create similar contractual liabilities on the transferors.[859]

As with bills of lading, the suggested solution involves using a registry system whereby a central body would act as a repository or registry, and dealings with the bill would be deal with by sending messages to the registry, for it to record. This system could be based on the deposit of actual paper bills or could operate wholly electronically. However, there are no plans to establish such a system in Ireland at present.[860]

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[855] See also the Cheques Act 1959; and the Consumer Credit Act 1995, s.41.

[856] 1882 Act, s.3(1).

[857] 1882 Act, s.3(2).

[858] In the US, it has been held, for example, that a telex message in the correct from was a bill of exchange: *Chase Manhatten Bank v Equibank* 394 F Supp 352 (1975).

[859] Ellinger, "Electronic Funds Transfer as a Deferred Settlement System", in Goode (ed.,) – *Electronic Banking, the legal implications* (1985).

[860] In the UK, where the Bill of Exchange 1882 also applies, the Review Committee on Banking Law and Practice (Cmnd 622, 1989) recommended legislation be enacted to enable such a system to be established and the Government in its 1990 White Paper (Cmnd 1026) accepted this recommendation.

C.1.2. Documentary credit

Documentary credits are not regulated by statute. The relevant law is found in the common law, which is largely based on commercial practice. The majority of documentary credits are made expressly subject to the Uniform Customs and Practices relating to Documentary Credits (UCP), promoted by the International Chamber of Commerce (ICC). The UCP is revised periodically in keeping with commercial practice: the current version is UCP 500 (1993), which has been supplemented by the eUCP (2002). Importantly, the eUCP applies only to the presentation of the documentary credit and not the issuing or advice process. In practice, the initial process (such as opening the credit) is frequently conducted electronically but the final stage in the process of presenting the documents remains largely a paper-based process.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

A bill of lading is a transport document with unique characteristics. It has three functions:

1. it evidences the contract of carriage;
2. it is a receipt for the goods; and
3. it is a document of title.

The relevant law is to be found in the common law, the Bill of Lading Act 1855 and the Merchant Shipping (Liability of Shipowners and Others) Act 1996 (which incorporates the Hague-Visby Rules 1968/1979). None of these rules address the form of a bill of lading.

Various initiatives have sought to develop electronic bills of lading. A central registry system, SEADOCS, was piloted without success in the 1980s. In 1990, the CMI adopted a set of rules for electronic bills of lading but they were not taken up by the commercial community. The most promising development is BOLERO (which has been in operation since 2000). This system does not create an electronic bill of lading, as such, but based on the principle of 'functional equivalence', it creates a network of contracts that replicate the legal and commercial functions of a bill of lading. Importantly, however, BOLERO is a closed system based on contract – it does not bind outsiders.

C.2.2. Storage contracts

Storage contracts or warehousing contracts are not treated separately from other contracts in Irish contract law and so in theory can be concluded electronically.

C.3 Cross border trade formalities: customs declarations

The European Communities (Customs Declarations) Regulations, 1996 (S.I. 114 of 1996) allows for the making of customs declarations by means of EDI. Figures for 2005 indicate that electronic filing of customs documents is widely availed of: 96.57% of import declarations were submitted electronically and 88.50% of export declarations were submitted electronically. Reg. 8(3) of the European Communities (Customs Declarations) Regulations, 1996 (SI 114 of 1996) allows for accompanying documents to be stored electronically, subject to the agreement of the Commissioners. The Irish Customs authorities were unable to supply data on the extent to which accompanying documents are stored electronically in practice. The reason given by the authorities was that traders may hold their documents either manually, electronically or a mixture of both and in order to gather this information, the authorities would need to do an in-depth analysis of traders and their systems. The costs associated with doing such an analysis would, according to the authorities, be prohibitive.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

Section 17 of the Value Added Tax (VAT) Act 1972 deals with the issuing of invoices and related documents such as credit notes, settlement vouchers and debit notes. Section 1A of that Act (as inserted by s.86 of the Finance Act 1986 and as substituted by s.193 of the Finance Act 2001) which transposes the parts of Directive 2001/115/EC relating to electronic invoicing, provides that invoices and other documents required to be issued under section 17 will be deemed to be issued if the necessary particulars are recorded, retained and transmitted electronically by a system or systems which ensures the integrity of those particulars and the authenticity of their origin, without the issue of any invoice or other document. Where this provision is sought to be availed of, the person issuing the invoice must comply with such other conditions as may be specified by regulations and the system used by that person must comply with any specifications required by regulations. Similarly, a person who receives a transmission of an electronic invoice or other document will not be deemed to be issued with that invoice or other document unless the necessary particulars are received electronically in a system which ensures the integrity of those particulars and the authenticity of their origin and unless the system conforms with such specifications as are required by regulations and that person complies with such conditions as are specified by regulations.

The Value-Added Tax (Electronic Invoicing and Storage Regulations 2002 (SI 504 of 2002) sets out detailed provisions relating to electronic invoicing. Reg.3(1) establishes two methods by which messages issued or received by electronic means can to be deemed to be issued or received for the purposes of section 17(1A) of the VAT Act:

1. transmission using an electronic data interchange system: note that the option In Directive 2001/115/EC of requiring an additional summary document on paper has not been adopted.
2. transmission using an advanced electronic signature and associated system.

The requirements relating to the advanced electronic signature are the same as those provided for in the Electronic Commerce Act 2000 viz. in order to qualify as such, the signature must be

> (a) uniquely linked to the signatory,
>
> (b) capable of identifying the signatory,
>
> (c) created using means that are capable of being maintained by the signatory under his or her sole control, and
>
> (d) linked to the data to which it relates in such a manner that any subsequent change of the data is detectable;

Regs.3(2) and 3(3) set a range of conditions for the systems concerned. Reg.3(2) requires that the electronic data interchange system or the advanced electronic signature and associated system used must capable of the following:

> (a) producing, retaining and storing, and making available to an officer of the Revenue Commissioners on request, electronic records and messages in such form and containing such particulars as may be required in accordance with sections 16 and 17 of the Act and Regulations made under the Act,
>
> (b) causing to be reproduced on paper any electronic record or message required to be produced, retained or stored in accordance with sections 16 and 17 of the Act and Regulations made under the Act,
>
> (c) allocating a unique identification number for each message transmitted, and
>
> (d) maintaining electronic records in such manner as will allow their retrieval by reference to the name of a trading partner or the date or the unique identification number, of the message.

Regulation 3(3) provides that the electronic data interchange system or the advanced electronic signature and associated system shall–

> (a) preclude the repeated transmission of a message,
>
> (b) preclude the omission of any message from the electronic record,
>
> (c) verify the origin or receipt of a message by a trading partner, and
>
> (d) guarantee the integrity of the contents of a message, or of an electronic record related to that message, during transmission and during the period provided for in section 16 for the retention of records, invoices or any other documents specified in the Act or in Regulations made under the Act.

Regulation 4 allows for the transmission of messages by means other than through EDI or electronic signatures where the person transmitting the message is satisfied that the messages are recorded, retained and transmitted in accordance with section 17(1A) of the VAT Act, the requirements of Reg.3(2), 3(3) and 3(4) are met, and the person transmitting the message notifies the Revenue Commissioners. Up until the 31st December 2005, such notification was required to be undertaken prior to the transmission of such messages but on expiry of that date, the requirement of prior notification ceased. In terms of practice, the Revenue Commissioners say that they have been notified in a small number of cases of the proposed use of systems other than EDI or electronic signatures, but with similar controls. In many cases, notification has come from companies who sell invoicing systems to business clients.

Section 16 of the Value Added Tax Act 1972 requires the retention of invoices and related records for a period of 6 years from the date of the latest transaction to which

the records or invoices or any other document relate. The elements of Directive 2001/115/EC concerning the storage of electronic invoices is transposed into Irish law by s.122 of the Finance Act 2003 which inserts a new subsection, (15), into s. 17 of the VAT Act 1972. Section 17(15)(b) provides that any invoice not stored by electronic means in a manner which conforms with requirements laid down by the Revenue Commissioners, shall be stored within the State, but subject to the agreement of the Revenue Commissioners and any conditions set by them, such invoice may be stored outside the State. Thus, invoices stored by electronic means that conform with the Revenue Commissioners' requirements may be stored outside the State. The Revenue Commissioners say that this is not problematic in practice in that companies in Ireland invariably allow access to such invoicing records to Revenue auditors through a computer terminal located in Ireland. In the case of paper invoices, Revenue has agreed to storage outside the State in a small number of cases involving, for example, companies with branches in a few Member States. According to the Revenue Commissioners the demand for this facility has been minimal.

Reg.3(4) of the Value-Added Tax (Electronic Invoicing and Storage Regulations 2002 (SI 504 of 2002) requires those who issue or receive messages by electronic means in accordance with paragraph 3(1) must retain and store such messages or copies of such messages as appropriate together with electronic records related to those messages. In addition, retention and electronic storage of the following data is required:

> (i) details of the form of encryption, electronic signature, signature creation data or device, signature verification data or device, or any other method used to ensure the integrity of the records and messages transmitted, retained and stored and the authenticity of their origin,
>
> (ii) details of where and in what format the information required in accordance with clause (i) is stored and how it can be accessed.

In addition, the terms "signatory", "signature-creation data", "signature creation device", "signature-verification-data", and "signature-verification device" have the meanings assigned to them by the Electronic Commerce Act 2000.

C.4.2. Electronic accounting

Section 249(i) of the Companies Act 1990 provides that the Minister may make provision by regulations for enabling title to securities to be evidenced and transferred, for the making of returns and for the returning of accounts without a written instrument. However, no such regulations have yet been introduced.

The Companies Registration Office nonetheless operates a system of electronic filing of annual returns. The legal basis on which they rely is sections 12 and 13 of the Electronic Commerce Act 2000. As noted above, section 12 allows for the giving of information in electronic form, subject to certain restrictions. The definition of giving information expressly includes "making or lodging a return". Section 13 of the Electronic Commerce Act, as noted above, sets out the requirements for the use of electronic signatures.

Currently only 5% of annual returns are electronically signed and delivered by electronic means. The electronic signing and delivering of annual returns requires the use of an approved software package. Under s.57 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005, a company may authorise a person to be its Electronic Filing Agent. The aim of this initiative is to make the process simpler for

individual companies. Electronic filing of returns is encouraged through lower charges for the filing of returns electronically.

There is, as yet, no facility for the filing of accounts electronically and Directive 2003/58/EC has not yet been transposed into Irish law. It may be that the provisions of the Electronic Commerce Act will be deemed a sufficient legal basis for the filing of accounts electronically. The filing of accounts is not expressly referred to in the definition of "giving of information" in that section. However, the definition of giving is expressed in terms of including, but not being limited to, the items listed therein, and, on that basis, it can be argued that it does include the filing of accounts. Even if that is the case, the consent of the Companies Registration Office to such electronic filing will still be required. The Companies Registration Office hopes to be in a position to facilitate the filing of accounts electronically by 1 January 2007 in order to meet the deadline set by Directive 2003/58/EC.

Books of accounts are required by s.202 of the Companies Act 1990 to be kept either in written form, or "so as to enable the books of account and the accounts and returns to be readily accessible and readily convertible into a written form". Thus, there is no barrier to the keeping of accountancy records in electronic form. Accountancy records are required to be kept for at least 6 years after the latest date to which they relate.

D. General assessment

D.1 Characteristics of Irish eCommerce Law

- The most significant policy choice made in Ireland was the introduction of the Electronic Commerce Act 2000. This Act establishes a general legal framework which seeks to promote the development of ecommerce and the use of electronic documents in the public sector. The main thrust of the Act is to facilitate rather than mandate these activities. In certain sectors, such as customs and e-invoicing, more specific legislation has been enacted to enable the use of electronic documents. In other areas however, such as bills of lading and bills of exchange, no specific legislative basis for the use of electronic documents exists. Instead, developments in this regard are market driven and are based on closed networks and contract.

D.2 Main legal barriers to eBusiness

- Barriers to the conduct of eBusiness of both a legal and practical nature are evident. In terms of legal barriers, the aforementioned absence of a specific legal basis for eBusiness in certain sectors is an issue.
- The scope of the eCommerce Act to encourage the development of eBusiness has its limitations. In particular, the broad range of exclusions from the Act and the detailed conditions which apply to the operation of many of the provisions of the Act can be seen as limiting its impact. For example, the requirement relating to consent has the potential to hamper the development of eBusiness. One potential solution to this limitation would be the introduction of a form of "sunset clause" whereby after a specified date, for example, all public authorities would mandated to conduct their business electronically.

- Our research has indicated that practical barriers such as cost and availability of broadband internet access also currently hinder the uptake of eBusiness in Ireland. While in some areas, particularly that of customs declarations, eBusiness is well established, in others, although the legal framework and the institutional infrastructure is in place, the rate of uptake is disappointingly low. Certain public authorities have embraced eBusiness more successfully than others, most notably the Revenue Commissioners which has responsibility for Customs and the widely used system of online submission of tax returns. This suggests that success in this area within the public sector has, to date, developed on a rather ad hoc basis rather than being driven by a broad policy-based agenda.
- This raises the question whether a more pro-active approach should be taken by government in a broader range of areas. This said, certain areas, particularly in the private sector, which are primarily market driven, might not benefit from heavy-handed intervention by government. Examples might include the development of electronic Bills of Lading and documentary credits.

Italy National Profile

A. General legal profile

Italy is a republic (established since 2 June 1946, as a result of a referendum), consisting of 20 Regions, among which 5 enjoy a special autonomy. These are Sardinia, Sicily, Friuli-Venezia Giulia, Trentino-Alto Adige/Südtirol and Valle d'Aosta/Vallée d'Aoste. Two provinces, Trento and Bolzano are given the same level of autonomy.

At a lower administrative level, Italy comprises 107 Provinces and 8101 Municipalities (source: Istat, census 2001).

Legal sources follow the following hierarchy:

1. EU Treaty and EU Regulations;

2. Italian Constitution (in force since 1 January 1948) and Constitutional laws;

3. State laws (hereinafter l.)[861]; Regional laws (including those issued by the Provinces of Trento and Bolzano);

4. Regulations (e.g. *decreto del Presidente della Repubblica*, hereinafter d.p.r.; *decreto ministeriale*, hereinafter d.m.; *decreto del presidente del consiglio dei ministri*, hereinafter d.p.c.m.);

5. Usages.

General regulation for private affairs is provided in the Civil Code which is a State law (level 3 of the above mentioned hierarchy). Types of acts like *decreti legislativi* (hereinafter d.lgs.) and *decreti legge* (hereinafter d.l.) have approximately the same legal power as laws.

As to the structure of the Court system, the ordinary jurisdiction, both private and criminal, is administered on a two level-basis. In private matters, courts of first instance are Judges of the peace[862] and Tribunals[863]; courts for reviewing sentences are Courts of appeal[864]. Atop the system there exists a third level of jurisdiction, the Supreme Court[865].

Administrative judges are part of a special jurisdiction.

Being a civil law system, precedents have no binding force. However, decisions issued by the Supreme Court and, within narrower limits, by some highly credited tribunals carry a strong persuasive effect.

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[861] Note however that, while since 1946 Italy is a republic, some acts issued during the monarchy and termed *regi decreti* (royal decrees, hereinafter "r.d.") are still in force. They enjoy the same hierarchical level of laws.

[862] *Giudici di pace*

[863] *Tribunali*

[864] *Corti d'appello*

[865] *Corte di Cassazione*

Finally, the Italian Constitutional Court[866] must be mentioned which, among other attributions, deals with the constitutional coherence of laws.

B. eCommerce regulations

B.1 eCommerce contract law

B.1.1. General principles

In the Italian system, contracts are based on the autonomy of will. Electronic contracts are no exception in this regard. The first source to look at for a regulation is the Italian Civil Code (hereinafter CC). According to the CC, a contract is any agreement between two or more parties having an economic content and setting obligations on at least one of the said parties. Here a mutual consensus, based on the autonomy of will, is therefore essential. Moreover there exists the general principle of the freedom of form, with the exception of specific matters where contracts must be in writing: such is for instance the case for the sale of real estate. For a more complete set of cases we can refer to Art. 1350 CC. Note that it is sometimes required that an act not only is in writing but is also made by a public notary (deed or *atto pubblico*, as defined under Art. 2699 CC). Typically this is the case for gifts (see Art. 782 CC).

Therefore, and leaving said exceptions aside, as a general rule even an oral contract enjoys full legal validity, and the only problem here may be constituted by understandable difficulties of offering evidence in case of objection.

Now, when dealing with eCommerce as it is commonly intended, the use of information technology is limited to be the means for transmitting parties' will, and, as such, easily falls into the general framework of Civil Code.

The Law No. 59 of 15 March 1997, Art. 15.2 provided the general principle of validity of electronic documents. It reads:

> *"Acts, data and documents created by Public administrations and private persons by means of computer-based or telematic systems, contracts stipulated in such forms, as well as their storage or transmission by means of computer systems, shall be legally valid and relevant for any purpose of law".*

The very general principle affirmed by the Law 15 March 1997, No. 59 was specified in the Presidential Decree (now abrogated) of 10November 1997, No. 513, which provided the general principle of legal equivalence between digital signature and handwritten signature, both in the private sector and in the public sector.

It has been subsequently substituted by the d.p.r. of 28 December 2000, No. 445, ("the Consolidation act on administrative documentation"[867]). Note that most of the provisions of the d.p.r. 513/1997 have substantially flown over into the d.p.r. 445/2000. The latter, after having been amended, was recently substituted by the d.lgs. 82/2005 (Code for digital administration, hereinafter CDA), which entered into force on 1 January 2006.

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[866] *Corte Costituzionale*

[867] *Testo unico delle disposizioni legislative e regolamentari in materia di documentazione amministrativa*

CDA has been recently amended by d.lgs. 4 April 2006 No. 159, which entered into force on 14 May 2006. It has to be noted that the above mentioned principle, stated by l. 59/97, concerns electronic documents in a broad sense, including all the applications in the public sector and in the private sector. Italian legislation regards the formation, the transmission and the storage of electronic documents.

Under the current framework there is no need of any kind of consensus as a precondition to the legal acceptability of electronic documents.

It has to be noted that on a legal standpoint we have to distinguish between the legal validity of an act or of a contract and their value for evidence purposes.

Validity

In those areas of private law where a written form is required, a question might arise whether or not it is possible to consider a communication in electronic form as one in writing. Pursuant to paragraph 1-bis, recently introduced, it is up the judge to evaluate whether or not an electronic document as such can be considered a written document, taking into account its objective characteristics of quality, security, integrity, and inalterability. However, if it is signed using a qualified electronic or digital signature and is constituted following the technical rules set forth in Art. 71, which guarantee the identifiability of the author and the integrity of the document, it has to be considered in written form (Art. 20 (2)).

The electronic document is defined in Art. 1 (1) p) of d.lgs. 82/2005 as "the representation in electronic form of legally relevant acts, facts or data". Art. 20 provides that "electronic documents, formed by anybody, computer-based storages and transmissions over telematic systems shall be legally valid and effective if they abide by the provisions set out in this regulation". Summarising, it can be concluded that almost any electronic communication is an electronic document, and, where it is signed using a "qualified signature" (e.g. a digital signature) it certainly meets the requirements for a written document.

Of course, an electronic contract can be considered an electronic document.

In order to better understand the above definition, it must be explained that under Italian law a "digital signature" is defined (see Art. 1 (1) s) CDA) as a subtype of a "qualified signature" implementing a particular PKI architecture, and that a qualified signature corresponds to the "advanced electronic signature" of Directive 1999/93/EC based on a qualified certificate and created with a secure-signature-creation device.

Evidence

Moving now to the different question of the use of electronic documents for evidence purposes, it has to be stressed that an electronic document signed with a mere electronic signature[868] can be freely evaluated by the judge, taking into account its objective characteristics of quality and security (see Art. 21 (1) CDA): here legislation submits to judges all decisions about the evaluation of the proof. Of course when electronic documents are not signed their value as proof is understandably less, because

[868] In CDA an electronic signature is defined as the set of data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of asserting identity.

they lack even of a basic form of authentication like the one provided by an electronic signature.

When the party against whom the evidence is invoked does not refuse it, legislation attaches to that evidence a conclusive value. Indeed Art. 2712 of Italian Civil Code, as amended by CDA, reads as follows:

> *"Photographic, electronic or cinematographic reproductions, phonographic recordings, and in general any other mechanical representation of facts and things make conclusive evidence of facts and things represented therein, if the person against whom they are invoked does not dispute their conformity to the said facts and things".*

That provision was also applicable to electronic documents under previous legislation. The Italian Supreme Court has decided on two occasions that an electronic document, without any signature, can be used as evidence in a trial[869]. Tribunals, under previous legislation, have issued decisions in which an email has been considered as possessing enough requirements of written evidence in order to obtain a *decreto ingiuntivo* (type of judicial order)[870].

Finally, as to the electronic documents signed with a qualified signature (including a digital signature), we must refer to Art. 21 (2) CDA, which considers an evidence as strong as that of a recognised private written document, which means a conclusive evidence, until objection, of the origin of the declarations from the person whom has signed it (see Art. 2702 of Italian Civil Code). It is important to stress that the legal holder of the signature device is considered to be the subscriber, unless he/she proves the contrary.

Electronic communications[871] are regulated in exactly the same way as traditional manifestations of will. Any contract and therefore also an electronic one, is concluded only when the party who has made the proposal knows that the other party has accepted it (Art. 1326 (1) CC). Unless the proposal is irrevocable (Art. 1329 CC), the proposer may withdraw it any time before the contract is concluded (Art. 1328 CC), that is to say before he/she knows of the other party's acceptance. The acceptance itself can be withdrawn, provided that the other party knows of such withdrawal before the acceptance. Thus, both for traditional and for electronic contracts the relevant element to focus on is always the moment in which the receiver gets the knowledge of the sender's notification. Here Art. 1335 CC establishes an useful presumption, stating that any proposal, acceptance, including their withdrawal, and any other notification is considered as being known when it arrives at the address declared by the receiver, except when the latter proves that it was impossible for him/her to know of the notification, for reasons not depending on any negligence on his/her part.

This of course applies as well to electronic notification. In particular, Art. 45 (2) CDA establishes the following presumption concerning the sending of electronic documents (and therefore any notification[872]): "An electronic document transmitted via telematic means is considered [...] as having been received by the recipient when available in the

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[869] Cf. Cass. 11445/2001 and Cass. 9884/2005.

[870] Cf., among others, Trib. Cuneo 15.12.2003, Trib. Bari 20.1.2004, Trib. Lucca 17.7.2004.

[871] "Notifications" in Eldoc questionnaire, p. 5.

[872] Please note that, according to the definition of an electronic document given by Italian legislator (any representation in electronic form of legally relevant acts, facts or data), a notification must be considered as an electronic document.

mailbox that has been offered by the recipient's provider at the electronic address the recipient has declared".

Plainly, this is the transportation of the general rule to an electronic context.

Finally as to the issue of the tacit acceptance of electronic notifications, this is regulated as any notification, no exception depending on the use of electronics or traditional means of expression. Indeed as a general rule, a contract may be concluded both in an express and in a tacit manner.

Italy has set forth norms for the regulation of electronic registered mail (*posta elettronica certificata* or PEC). Here the sources are Articles 6, 47, 48 and 54 CDA and d.p.r. 11 February 2005, No. 68. Legislation deals with the requirements of this means of communication either when used for the exchange of documents among public administrations and when it is used by private parties. Not any economic entity can run a service of PEC, but only those meeting high standards of quality (ISO9000 certification among others) and capital (not less than 1 million €, and a proper insurance coverage), provided they enrol into the registry of CNIPA, the governmental agency for informatics in the public administration[873]. As to safety measures, certified e-mail providers (hereinafter CEPs) are obliged to guarantee privacy, security (including from viruses) and preserve the integrity of information contained in the so-called "transportation envelopes" for 30 months.

It is important to note that the transmission and receipt of messages will be certified by both the sender's and the recipient's CEPs: the former will send an "acceptance receipt", and the latter a "delivery receipt". The sender gets a "receipt" from the recipient if email reaches his/her inbox, whether it has been read or not.

It is important to note that for the system to work both the sender and the recipient must have a CEP.

Regarding the issue of the consent of the recipient as a precondition for sending PEC-emails, different rules are followed depending on the nature of the parties involved. In communications addressed to public administrations, the latter seem obliged to accept PECs (cf. Articles 3, 47 (3) a) and 48 CDA). An express declaration of will is necessary in b2b communications for receiving PECs. Parties may indicate their PECs and declare them as valid means of communication in the State registry of enterprises (Art. 4 (4) d.p.r. 68/05). They can of course withdraw that indication.

The D.m. of 2 November 2005 has set forth the technical rules to be followed for the formation, transmission and validation of PEC.

Finally, as to electronic archiving, general norms have been issued by Italian lawmaker. Art. 39 CDA states that all mandatory books, digests, account books, notary archives, including those required by notary law, can be made and kept on memory devices, according to the norms set forth in the code itself and in technical reference legislation. Moreover Art. 43 CDA declares that documents of archives, account books, correspondence, and any act, data or document to be kept by law or decree are legally valid when transferred into a memory device if they have been saved therein in a form suitable to guarantee their conformity to originals and their durability, following technical reference legislation.

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[873] *Centro Nazionale per l'Informatica nella Pubblica Amministrazione*, www.cnipa.gov.it. Most of the following information can be read also in the English section of Italian Ministry for Innovation and Technologies (MIT) website, at url http://www.mininnovazione.it/eng

As to the technical rules, we refer to the d.p.c.m. of 13 January 2004, providing technical rules for the formation, transmission, conservation, duplication, reproduction and validation, temporary too, of electronic documents and to the *circolare* CNIPA of 19 February 2004, introducing technical rules for the reproduction and conservation of documents on optical devices suitable to guarantee the conformity to originals. In matter of archiving, CDA norms addressed to public administrations and legislation on electronic invoicing and electronic accounting must be also considered: both issues will be discussed in the following sections. The d.m. of 23 January 2004 on modalities to fulfil tax obligations concerning electronic documents and their archiving on different types of memory devices must be mentioned as well.

Norms recognising the validity of digital optical storage of documents are not new. Art. 6 d.p.r. 445/2000 granted validity to storage using optical devices, and the d.l. of 10 June 1994, No. 357 had already inserted a norm, paragraph 3 of Art. 2220 CC, which allows to save account books and accounting documents (invoices, etc.) as images on storage devices, provided that such images match with the original documents and are readable at any moment with instruments made available by the user of such storage devices. We refer also to Art. 2 (15) l. 24 December 1993, No. 537.

B.1.2. Transposition of the eCommerce directive

Directive 2000/31/EC has been implemented in Italy with the d.lgs. of 9 Apri 2003, No. 70.

As to the scope of this decree, it applies only to services of the information society. Notice that it does not address issues like the form of contracts or questions tied to the value of documents as evidences.

Not all services of the information society are regulated, in fact the following matters fall outside the regulation:

a) relationships among citizens and the Tax Agency, and in general questions in the field of taxation;

b) questions related to the protection of privacy, including privacy in telecommunications;

c) agreements in the fields of cartel law;

d) services provided by subjects established outside the European Economic Space;

e) activities performed by notaries or other professionals, to the extent that they involve a direct and specific connection with the exercise of public authority;

f) the representation of a client and the defence of his/her interests before courts;

g) gambling activities which involve wagering a stake with monetary value, games of chance including lotto, lotteries, betting transactions, and any other game based on a prevailing element of hazard.

Moreover, under Article 11, the following categories of contracts fall outside the regulation of d.lgs. 70/2003:

a) contracts that create or transfer rights in real estate, except for rental rights;

b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authorities;

c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

d) contracts governed by family law or the law of succession.

B.2 Administrative documents

The use of electronic documents in administrative procedures is regulated in the CDA, which provides a general framework for electronic communications both for their use in public administration (including the interchange of documents) and in the relationships between private persons and public administrations. This regulation has a wide scope, as it concerns all documents which can be used and communicated to public administrations. Note, furthermore, that some parts of the CDA, e.g. those concerning electronic documents, their transmission, electronic signatures, their legal requirements and their validity as evidence, electronic payment, and other issues, apply also to private-to-private relationships. Other sources define in detail all technical standards to be observed. The principle here is not to simply replicate the traditional framework in an electronic format but to design an original system with additional features which exploits all the advantages of ICT.

The current setting implements what can be called a double regime, as an equal level of recognition is attributed to both electronic and paper-based documents, while the push toward a complete dematerialisation remains the ultimate goal for the lawmaker[874]. Indeed as of today the recourse to digital instruments for the formation, transmission, and storage of administrative documents is strongly encouraged. Note for instance that, pursuant to Art. 50 (3) d.p.r. 445/2000, starting from 1 January 2004[875] all public administrations must have implemented a system of recording and storage of documents in electronic format, known as *protocollo informatico*[876]. This does not mean an immediate and radical shift to digital, rather the beginning of a presumably long hybrid phase of simultaneous presence of paper and electronic documents (we refer also to articles 40 and 43 (3) CDA), which will eventually result in the definitive affirmation of the latter.

However, the fact that all administrations must be prepared to handle digital documents in order to process them whenever possible appears to be a considerable step toward the said goal. Furthermore, Article 42 CDA requires public administrations to evaluate, taking into account costs and benefits, whether or not to transform their paper archives into electronic ones. According to Art. 43, digital reproductions of paper documents are valid and relevant under any profile.

Pursuant to Art. 50, public administrations should use ICT in order to form, gather, archive, and make available and accessible all relevant data. As to reciprocal

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[874] An interesting overview can be found in CNIPA publication *I quaderni*, issue No. 24, April 2006, available online at url: http://www.cnipa.gov.it/site/it-IT/La_Documentazione/Pubblicazioni/i_Quaderni/.

[875] This term however has not to be strictly intended as deadline, as no real sanction is provided in case of falling behind.

[876] It was firstly introduced with *d.p.r.* 428/1998, and subsequently included in *d.p.r.* 445/2000 and CDA.

communications, public administrations should perform them via email (Art. 47), using PEC in cases where it is necessary to get a notice of the sending or the receipt of a communication (Art. 48).

As to the relationships between private persons and public administrations, Art. 3 reads: "Citizens and enterprises have the right to request and obtain the use of ICT in communications with public administrations and providers of public services of the State, to the extent of the provisions of this code (CDA)". Note that in case such right is violated, recourse to administrative tribunals is possible[877]. In brief, the acceptance of electronic documents by public administration is to be considered as mandatory.

Art. 4 CDA states that the participation in administrative procedures and the right to access administrative documents can be exercised through ICT, and that any act or document can be transmitted to public administrations through ICT, provided of course that the relevant norms in force are respected.

Art. 5 reads: "Starting from 30 June 2007, central public administrations based on Italian territory will make possible the execution of any payment they are entitled to through the use of ICT".

Under Art. 6, on request by the subjects concerned, public administrations must use PEC for any interchange of documents and information.

Note that starting from 1 September 2006 all public administrations must have an institutional email address and a PEC address. However such a term has a merely programmatic nature.

Art. 45 (1) sets forth a general rule of the utmost importance: any document, meeting such requirements as stated in CDA, which is sent to a public administration using ICT is considered valid (with no need of a subsequent transmission of a paper-based document) and fulfils the requirement of a document in writing.

It is interesting to observe that some articles of CDA do not set rules but rather express general principles, whose practical application is still far from being immediate. Nonetheless they are important as such, because they reflect the drive toward digitalisation that Italy is currently experiencing. For instance Art. 8 reads: "The State promotes initiatives aimed to encourage the ICT alphabetisation, with a particular regard to groups in risk of exclusion, and to familiarise them with the use of public administrations' ICT-based services". Art. 9: "The State favours all use of ICT in order to promote a wider participation to democracy by the citizens, including those living abroad, and to ease their exercise of political and civil rights, both individual and collective". However, the gap between the expression of such principles and their effective implementation through concrete initiatives is still far from being filled.

[877] This norm has been introduced by *d.lgs.* April 4, 2006, No. 159, which will be in force starting from May 14, 2006.

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and documentary credit

In Italian legal system, the notion of *titoli di credito* (singular: *titolo di credito*), which approximately corresponds to that of negotiable and quasi negotiable instruments, applies to a great range of documents: *vaglia cambiario, cambiale tratta, assegno, azione, obbligazione, titoli del debito pubblico, titoli rappresentativi di merci*, etc. It has to be noted that, notwithstanding the important function fulfilled by *titoli di credito*, Italy has not yet passed any specific regulation as how to implement them in eCommerce.

The *vaglia cambiario* (or *cambiale propria*) and *cambiale tratta* correspond respectively to the "promissory note" and the "bill of exchange", and are regulated by r.d. 14 December 1933, No. 1669, which is also known as *legge cambiaria*, hereinafter "l. camb.", implementing the 1930 Geneva Convention providing a uniform law in that matter. The promissory note is a signed and dated document by which a maker (*emittente*) promises to unconditionally pay back a sum of money to a recipient (*prenditore*). The bill of exchange is a signed and dated document containing an unconditional order that a person (*traente*) addresses to another subject (*trattario*) to pay a given amount of money to a third party carrying the document (*prenditore*). There are many mandatory formal requirements set forth by law for both these instruments (see Articles 1 and 100 l. camb.).

The *assegno*, cheque, is regulated by r.d. December 21, 1933, No. 1736, implementing the 1931 Geneva convention. Differently from bills of exchange and promissory notes, which are basically instruments for obtaining credit, cheques, being payable on demand, are by nature means of payment.

Nowadays the traditional circulation of *titoli di credito* is subject to a profound renovation as an effect of the strong present trend toward the dematerialisation of classical paper-based instruments. A remarkable legislative step in this direction has been made by d.lgs. June 24, 1998, No. 213, which has introduced a normative framework for exchanging electronic records in the negotiation of stocks and bonds instead of recurring to a traditional paper-based exchange.

Whilst electronic money and electronic means of payment are experiencing an increasing importance in the Italian legal system, it must be acknowledged that the picture is still fragmentary and that at present legislation addresses only specific topics. Looking closer to that legislation, it is appropriate to recall law March 1 2002, No. 39, which has implemented Directives 2000/46/EC and 2000/28/EC of European Parliament and Council concerning the taking up and pursuit of the business of credit institutions and electronic money instruments. It has consequently modified the code-law on banking and crediting (d.lgs. September 1, 1993, No. 385), introducing an ad hoc regulation for electronic money (Articles 114bis to 114quinquies). A special attention is due to the establishment of a proper system of checks and an high level of security in the use of electronic money (Art. 146 d.lgs. 385/1993). The Bank of Italy has issued a general regulation[878], describing the most important obligations, including the duty to inform, to

[878] *Provvedimento del 24 febbraio 2004, Disposizioni in materia di vigilanza sui sistemi di pagamento*

be observed by those who issue or manage instruments of payment, in order to guarantee their authenticity, reliability and efficiency.

Pursuant to Articles 5 and 38 of CDA, public administrations, citizens and entrepreneurs can execute their payments using electronic means.

Besides, pursuant to Article 13 of d.lgs. of 19 August, No. 190, implementing Directive 2002/65/EC concerning the distance marketing of consumer financial services, "consumer can execute his/her payments using credit cards (...) and other means of payment, when this is provided". Electronic instruments must be included in such a definition. Note that this is reaffirmed in Art. 1, lett. m) of the abovementioned general regulation, where the expression *strumento di pagamento* (means of payment) refers to "any instrument, either paper-based, electronic or other, aimed at transferring or withdrawing money".

As to what concerns security, the issuer of the means of payment bears the burden of proving that a payment transaction has been authorised and accurately recorded and that it has not been altered due to technical damage or other reasons, and that the supplier adopts all security prescriptions as set forth under Art. 146 d.lgs. of 1September 1993 No. 385, having regard in particular to the need of integrity, authenticity and traceability of the said operations.

Finally, it can be opportune to highlight that according to Art. 114ter of the said law, Italian electronic money providers can operate in Member States, without the need to establish their own branches, provided that they comply with Bank of Italy procedures, and can operate even in non-Member States following authorisation by Bank of Italy.

Italy has recently issued d.lgs. of 20 February 2004, n. 52, which implemented Directive 2001/115/EC simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax. Most notably the said law has set norms for issuing invoices both paper-based and electronic, enforcing the principle of dematerialisation. In this respect it is also appropriate to mention the *circolare*[879] of October 19, 2005, No. 45/E of the Italian Tax Agency and the d.m. of 23 January 2004 issued by the Ministry of Economy and Finance.

Italian lawmaker has regulated as well the formation, transmission, storage, reproduction, and validation of electronic documents with either the d.p.c.m. of 13 January 2004, or the CNIPA deliberation of 19 February 2004. These acts regulate the electronic storage of documents that were originally made either in electronic form or on paper.

[879] The "*circolare*" is a document containing instructions for internal use in public administration.

C.2 Transportation of goods: Bills of Lading and Storage agreements

The Italian legal system lacks a specific legislation concerning electronic documents of title to goods, which are: *lettera di vettura* (consignment note), *polizza di carico* (bill of lading) and *fede di deposito* (dock warrant). *Lettera di vettura* (in terrestrial transportation) and *polizza di carico* (in maritime transportation) state the conditions under which the contract of transportation has been agreed (see Art. 1684 and following CC) and are issued by the carrier on request of the consignor. The *fede di deposito* is issued by storaging enterprises on request of depositor, and like any other document of title to goods enables its holder to claim the goods therein indicated and as well to transfer them to a third party by simply transferring him/her the said document (Art. 1996 CC).

C.3 Cross border trade formalities: customs declarations

With regard to cross border trade formalities, Italy appears to lack specific norms converting traditional rules and procedures into an ICT-compliant framework. Here the source remains the d.p.r. of 23 January 1973, No. 43. However note that the already mentioned d.m. of 23 January 2004 of the Ministry of Economy and Finance on modalities for fulfilling tax law obligations concerning electronic documents and their archiving on various types of memory devices does not apply to tax obligations in matter of customs when falling in the jurisdiction of Italian Tax Agency (cf. Art. 2 (2)).

On a more general level, it must be recognised that the Italian Customs Agency has made a concrete effort toward the implementation of electronic substitutes of traditional instruments making the Telematic Customs Service, which allows the electronic transmission and storage of customs documents and certificates[880].

C.4 Financial/fiscal management: electronic invoicing and accounting

As already indicated, Directive 2001/115/EC has been transposed into the Italian system with the d.lgs. 52/2004. The *circolare* of 19 October 2005, No. 45/E issued by the Italian Tax Agency has clarified some aspects of the said law. The D.m. of 23 January 2004, already mentioned above, has regulated some technicalities concerning the fulfilment of tax obligations related to electronic documents and their reproduction.

Art. 1 (3) of d.lgs. 52/2004, amending d.p.r. 633/72, in order to guarantee the date, authenticity, origin and integrity of electronic invoices, establishes the obligation to use an advanced electronic signature with a qualified certificate and secure-signature-creation device (*firma elettronica qualificata*) or an EDI-based system, provided the latter possesses the same level of security.

Art. 2, modifying Art. 39 of d.p.r. 633/72, states that the place of storage can be located outside national territory, on condition that a legal instrument exists which regulates the reciprocal assistance between Italy and the chosen country. In addition, the taxable person, established in national territory, must ensure to the competent authorities, for checking purposes, the automatic access to the archive, and make it

[880] *Servizio Doganale Telematico*; see url http://www.agenziadogane.it

possible to print and copy on drive all documents and data stored therein, including certificates guaranteeing the origin and integrity of electronic invoices.

As to the duration for which electronic invoices must be kept, as set forth in Articles 22 of d.p.r. 600/73 and 2220 (1) CC, it is fixed at 10 years starting from the last record concerning the current tax period. Moreover, as to the archiving, the above mentioned d.m. of 23 January 2004 reads under Art. 3 (2): "Archiving shall be done every 15 days as to electronic invoices [...]". As to the form, for tax purposes any electronic document shall be saved on drives or memories possessing an adequate level of durability and integrity, and shall be guaranteed that a chronological order exists and cannot be altered. There shall not be any gap in tax periods; moreover it must be feasible to perform a search and to extract data using such keywords as name, surname, denomination, Italian fiscal code, VAT number, date, even in combination.

As to electronic accounting, we refer also to what has already been said about electronic archiving. All account book and other mandatory recordings, digests, etc., can be dematerialised following the technical rules set forth in the aforementioned legislation.

Concerning the deposit of companies' annual report with competent authorities, Italy has implemented an electronic solution, generally known as *bilancio telematico*. According to Art. 2435 CC a copy of the annual report shall be deposited with the State registry of enterprises within the term of 30 days following its approval. Pursuant to Art. 31 (2) l. 24 November 2000, No. 340 (recalling Art. 15 (2) l. 59/97), it has to be made using electronic means and following a particular procedure implementing an advanced digital signature. However some categories of enterprises are excluded from such obligation.

D. General assessment

D.1 Characteristics of Italian eCommerce Law

- The Italian legislation on electronic documents may be considered complete. It deals with formation of electronic documents, their transmission and also their storage.
- The Italian legislator may be considered a pioneer on this field as it started to legislate on this subject in 1997, being the first one in Europe.

D.2 Main legal barriers to eBusiness

- Italian and European legislation moved from two different approaches: the former regulated a particular technique of "signature", on the basis of which it defined the equivalence relationships with the private written document and the authenticated private written document, a precise system of controls under public law, a severe liability of the certification service provider.

  The Community legislator, instead, has adopted a technologically neutral approach, articulated on two levels of electronic signature. However, the Italian regulation now has been harmonized with European directive.

In the following years, the first regulation (d.p.r. 513/1997) has been changed many times (d.p.r. 445/2000, d. lgs. 10/2002, d.p.r. 137/2003, d. lgs. 82/2005, d. lgs. 159/2006), not only to adapt the Italian regulation to the European directive but also to assess the legal value and probative effectiveness of electronic documents. This subject has proven to be the most difficult to regulate.

Therefore, because of these changes, Italian companies may have had the feeling of an unstable legislation.

- The Italian legislation is also quite complex, bringing together legal issues and technical regulation.
- The Italian lawmaker has chosen a regulation based on general principles, which does not modify the civil code and the code of civil procedure. However, the general regulation does not apply in some specific cases which have been mentioned in the report. Also, it seems extremely difficult to apply the regulation in cases in which the right is "embodied" in the paper. Some problems have also arisen concerning digital archiving and cultural artefacts.
- Summarizing, we may conclude that the Italian legislator has removed the legal obstacles to the development of the sector. However, autonomy accorded to the operators by the Italian legislation needs to be declined through guidelines and best practises, in order to become really effective and be more largely used.

Latvia National Profile

A. General legal profile

Latvia (the Republic of Latvia) is a unitary parliamentary republic. According to the constitution[881] Latvia is composed of four regions – Kurzeme, Zemgale, Vidzeme and Latgale.

There are two territorial levels of local administration – local government - in Latvia. There were a total of 563 local governments on January, 2005:

(1) 530 municipalities (7 republican cities and 53 towns, 444 parishes, 26 amalgamated local municipalities) perform in local or first territorial level;

(2) 33 municipalities (26 counties and 7 republican cities) perform in regional or second territorial level.

Commerce and contract law is a central matter, which is generally incorporated into the Civil Code[882] and the Code of Commerce[883], both of which largely follow Roman Civil Code and German legal traditions.

eCommerce is also regulated at the central level, through a number of specific laws adopted by the Parliament[884] and regulations of the Cabinet of Ministers[885]. On lower administrative level, the municipalities may adopt binding regulations[886], but only within the competence specified by Municipality Law.[887] Regulations on commercial transactions do not fall within this competence.

Disputes regarding commercial relations are typically dealt by the regular courts. For matters with a financial value of LVL 30 000 or less – by the district (city) courts[888]; or by regional courts[889] for matters of higher value. Appeals against the decisions of the district (city) courts can be lodged with the regional court, and against the decisions of the regional courts with the Chamber of Civil Cases of the Supreme Court[890]. The Senate of the Supreme Court[891] is a revision instance, which only hears points of law. The Latvian system of jurisprudence does not have any binding power of precedent, although the

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[881] *Satversme*

[882] The Civil Code (*Civillikums*), adopted on 28.01.1937, legal force renewed on 01.09.1992 (introduction part, property law, and inheritance law), on 01.03.1993 (contract law), and on 01.09.1993 (family law).

[883] The Code of Commerce (*Komerclikums*), adopted on 13.04.2000, in force from 01.01.2002.

[884] *Saeima*

[885] *Ministru Kabineta noteikumi*

[886] *Pašvaldību saistošie noteikumi*

[887] The Municipality Law (*Par pašvaldībām*), adopted on 19.05.1994, in force from 09.06.1994.

[888] *Rajona (pilsētas) tiesa*

[889] *Apgabaltiesa*

[890] *Augstākās tiesas Civillietu tiesu palāta*

[891] *Augstākās tiesas Senāts*

decisions of the Senate of the Supreme Court are authoritative and should be taken into account by the courts of lower instances.

B. eCommerce regulations

Many questions regarding the validity and recognition of electronic documents must be answered based on doctrine, and the interpretation of legislation does not always provide a clear answer. Moreover, to the best of our knowledge, the court practice with respect to these issues is not well developed. In this section, the Latvian laws and doctrine regarding the legal value of electronic documents are briefly commented.

B.1 eCommerce contract law

B.1.1. General principles

Generally, the Latvian legal system envisages that in case of commercial contracts the formation and proof should be more flexible than for other civil contracts. However, both civil and commercial contracts are regulated by the Civil Code, as the Code of Commerce does not contain separate rules for the conclusion of commercial transactions. The assessment that the formation of the commercial contracts is more flexible can nevertheless be derived from certain rules of the Code of Commerce, which reflect the purpose of ensuring smooth functioning of commercial market.

For example, one of the basic issues for every contract is that it shall be concluded between parties or their duly authorized representatives. According to the Civil Code, if the representative of the party did not have the necessary authority, the contract is binding only to the representative, not to the party itself.[892] On the other hand, the Code of Commerce provides that all contracts concluded by a legal representative of the merchant who is registered as legal representative with the Commercial Register, shall be presumed binding to the merchant itself, as the limitations of the representation rights of the legal representatives are not valid with respect to the third parties.[893] Also, even if the representative is not legally registered with the Commercial Register, but is otherwise authorized to pursue commercial activities on behalf of the merchant (e.g., sales representatives, commercial agents, shop assistants, etc.), it is presumed that the contracts concluded by them within the normal course of commercial activities are binding to the merchant.[894]

This flexibility is rooted in the basic principles of the contract law of Latvia, which is more based on the principle of autonomy of will, and not on formal requirements. The Civil Code provides that the form of a legal transaction depends on the discretion of parties, except the cases directly indicated in the law. The parties may conclude an

[892] Article 1518 of the Civil Code.

[893] Article 223, part 3 (regarding Management Board members in private limited liability companies); Article 303, part 3 (regarding Management Board members in public limited liability companies); Article 92, part 2 (regarding legal representatives of general and limited partnerships); Article 36, part 1 (regarding procuration holders).

[894] Articles 40 to 42 of the Code of Commerce.

agreement orally or in a written form, invite witnesses, as well as involve a notary. [895] The main principle is the will of the parties to become bound by the contract. The will of the parties is crucial also in cases where the law requires a certain form. The Senate of the Supreme Court has recognized that even if there are formal defects, the court should always assess their significance and the real intention of the parties. If the intention of the party may be proved by other means, the defect of form cannot constitute the base for a total invalidity of the contract. Thus a non-observance of formal requirements doesn't always result in the nullity of the transaction.[896]

A legal definition of an electronic document is provided in the Electronic Documents Law[897]. Article 1 of the Electronic Documents Law states: "an electronic document - any electronically created, stored, sent or received data, which ensures the possibility to use it for the performance of any action, for the use and protection of any rights."

Generally, the validity of electronic documents in contract law is recognised by the law: the Electronic Documents Law envisages that an electronic document is legal evidence and there should be no restrictions for submitting an electronic document as evidence to the competent authority based on the fact that the document is electronic or that it lacks a secure electronic signature.[898]

The Electronic Documents Law distinguishes between an "electronic signature" and a "secure electronic signature". An electronic signature is characterized as electronic data, attached to the electronic document or logically associated with this document, which ensure the authenticity of the document and confirm the identity of the signatory.[899] A secure electronic signature is such electronic signature, which confirms to all of the following requirements:

(a) it is uniquely linked to the signatory;

(b) it is capable of identifying the signatory;

(c) it is created using means of creating a secure electronic signature that the signatory can maintain under his sole control;

(d) it is linked to the signed electronic document in such a manner that any subsequent change of the document is detectable;

(e) it is confirmed with a qualified certificate.[900]

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[895] Articles 1473 and 1474 of the Civil Code.

[896] Judgment of the Senate of the Supreme Court Department of Civil Cases in case No.SKC-304, 3 November 2004.

[897] Electronic Documents Law (*Elektronisko dokumentu likums*), adopted on 20.11.2002, in force from 01.01.2003. This law implements the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (hereinafter: eSignature directive) and partly also the Directive 2000/31/EC of the European Parliament and of the Council of 8 July 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (hereinafter: eCommerce directive).

[898] Article 3, part 4 of the Electronic Documents Law.

[899] Article 1, paragraph 4 of the Electronic Documents Law. The definition is substantially similar to definition included in eSignature Directive, Article 2, paragraph 1.

[900] Article 1, paragraph 2 of the Electronic Documents Law. Sections (a) to (d) substantially quote the relevant provisions of the eSignature Directive, Article 2, paragraph 2.

It should be stressed that at the moment of drafting this report, the secure electronic signature has not been introduced in practice, as there are no providers of certification services, nor a system for issuing qualified certificates.

The Electronic Documents Law also says that if there is a requirement in law for a written form, then the electronic document fulfils this requirement only if it has the electronic signature and if the electronic document confirms to other requirements stipulated by law. The Electronic Documents Law does not specify what these "other requirements" might entail.

It may be assumed that these "other requirements" should be assessed on case-to-case basis, taking into account the specific legal relationship and the laws regulating it. For example, the Civil Procedure Law[901] stipulates that the arbitration clause shall be concluded in writing, and it specifies that it is deemed that the agreement is made in writing, if it is made by exchange of letters, fax messages, telegrams, or by using other telecommunication means, which ensure that the will of the parties to refer the dispute to arbitration is fixed.[902] An electronic document should fall within the ambit of other telecommunication means, thus this requirement for a written form is rather flexible.

Nevertheless, taking into account that the Electronic Documents Law uses the notion of the "document", a reference may be made to the requirements stipulated by Regulations on Drafting and Processing Documents[903], which apply to any documents issued, received or stored by any person. These regulations state that the document has a legal force if *inter alia* it has been signed.[904] As the Electronic Documents Law does not regulate the requirements for the general legal force of the electronic documents, the necessity of the existence of signature is applicable also to electronic documents: an electronic document is deemed to be signed by the individual only if it has a secure electronic signature.[905] An alternative: the parties have agreed that the document may be signed by an electronic signature (in such a case this agreement must be written on paper and signed or, if in electronic form, confirmed by a secure electronic signature).[906] Consequently, a full legal validity may be achieved only by a secure electronic signature or by a relevant agreement of the parties to use and mutually recognize other mode of electronic authentication.

In addition, although generally the Latvian legal system provides contractual freedom by allowing the parties to conclude agreements on which form they wish, there are cases envisaged by the law where a specific form is required and its non-observance makes the transaction invalid. As stated in the legal doctrine, a certain form may be necessary either due to the contents of the act (*corpus*) or due to ensuring the evidence (*onus*

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[901] The Civil Procedure Law (*Civilprocesa likums*), adopted 14.10.1998, in force from 1.03.1999.

[902] The Civil Procedure Law, Article 492, part 2.

[903] Regulations No.154 of the Cabinet of Ministers of 23.04.1996. "Regulations on Drafting and Processing of Documents" (*Dokumentu izstrādāšanas un noformēšanas noteikumi*).

[904] Paragraph 18 of the Regulations on Drafting and Processing of Documents.

[905] Article 3, part 2 of the Electronic Documents Law.

[906] Ibid.

probandi).[907] For example, if the law requests that the agreement must be concluded at the public notary, then an agreement ignoring this requirement is void.[908]

Notwithstanding the mandatory requirements, otherwise the Latvian laws allow the parties to agree upon the form of their contracts to be legally binding.[909] This applies to all types of contracts. The parties are free to choose the form, unless it is already stipulated by mandatory requirements of the law. For electronic documents, the consensus of both parties is not a precondition if the document has a secure electronic signature: in such cases one party may not refuse to accept it. However, if the document does not have a secure electronic signature, its validity is subject to the agreement of the parties.[910] The special exceptions with respect to the transactions which may not be concluded in electronic form are included in the Electronic Documents Law (for a detailed description see section B.1.2. below).

Latvian laws do not directly regulate the sending of electronic notifications instead of paper documents. However, it should be noted that the Civil Code does not require a paper form for the notifications. The form of the notification depends on the substantial transaction to which this notification is related. If the notification is related to an already concluded contract (e.g., a notification on termination of the contract), then it normally shall be made in the same form as the contract itself: according to the Senate of the Supreme Court, the rule "from the larger to the smaller" shall be applied, i.e., if the contract itself was concluded in a written form, also all notifications in relation to it shall have the same form.[911] So, electronic notifications are allowed if the contract itself was concluded either in an electronic form or orally. Also, in case of written contract, an electronic notification having an electronic signature should be deemed as valid, unless the law or the contract requires the signing of such notification.

Electronic notifications without a secure electronic signatures are allowed if the parties agree to it or if the law or the transaction itself did not require a signed document (e.g., when agreeing on using arbitration, the Civil Procedure Law allows a notification by "other telecommunication means", which should include an electronic notification[912]). In case the parties are not in contractual relations yet, e.g., when accepting an offer, the form of such notification would depend on the form of the offer: if the offer does not require any specific form for its acceptance, it may also be given electronically. Additionally, special requirements for sending electronic notifications within the realm of information society services are stipulated by the Law on Information Society Services.[913]

The Latvian legal system has not implemented a framework for sending electronic registered mail. The sending of electronic mail is regulated only with respect to the communication within state and municipal institutions and between such institutions and

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[907] Sinaiskis V. "Latvijas Civiltiesību apskats. Lietu tiesības. Saistību tiesības" (*Overview of Latvian Civil laws. Property law. Contract law*), Rīga: 1996., p.125.

[908] Article 1486 of the Civil Code.

[909] Article 1473 of the Civil Code.

[910] Article 3, part 2 of the Electronic Documents Law.

[911] Judgment of the Senate of the Supreme Court Department of Civil Cases in case No.SKC-223, 25 April 2001; also in case No.SKC-441, 22 September 2002.

[912] See above, footnote 14.

[913] Law on Information Society Services (*Informācijas sabiedrības pakalpojumu likums*), adopted on 4.11.2004, in force since 01.12.2004.

private parties.[914] The regulations provide that the electronic documents shall be circulated by use of electronic mail, special online forms, or 3,5" floppy disks. If the document has been sent by electronic mail or by special online forms, it is deemed that the addressee has received it within two business days after its sending. In case of dispute, the institution has the burden to prove that the document has been sent.

With respect to electronic archiving, the Electronic Documents Law provides that generally electronic documents shall be archived in the same cases and order as paper documents. These rules do not apply to the electronic archiving of paper documents, for which there is no special regulation. For the archiving of electronic documents, the following special requirements are applicable: the possibility to use the data shall be ensured; storage is done in the original form; and the stored data allows to determine the origin or destination of the document, the time of its sending or reception.[915] Also, there are special rules for transferring the electronic documents for archiving to the State archive.[916] The regulations apply to state and municipal institutions and to those private legal entities who have the duty to transfer their documents for storage to the State archive. The state and municipal institutions are also required to draft internal instructions on circulation of electronic documents, including their storage.[917]

B.1.2. Transposition of the eCommerce directive

The eCommerce directive has been transposed in Latvian legislation through the Electronic Documents Law and by the Law on Information Society Services.

The transposition applies only to information society services. The law does not apply to areas governed by laws on personal data protection and on gambling services where a monetary award may be gained.[918]

Article 9 of the Directive (formal requirements in an electronic context) is not transposed by the Law on Information Society Services. Instead, it is transposed by the Electronic Documents Law: Article 3, parts 4 and 6 reflect the provisions of the Directive, Article 9, parts 1 and 2 respectively. Thus the Electronic Documents Law provides that generally contracts may be concluded by electronic means and that such contracts may not be deprived of legal effectiveness and validity on account of their having been made by electronic means.

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[914] Regulations of the Cabinet of Ministers No.473 of 28 June 2005 "Order of drafting, forming, storing and circulation of electronic documents in state and municipal institutions and the order how the circulation of electronic documents within state and municipal institutions or between these institutions and natural or legal persons takes place" (*Elektronisko dokumentu izstrādāšanas, noformēšanas, glabāšanas un aprites kārtība valsts un pašvaldību iestādēs un kārtība, kādā notiek elektronisko dokumentu aprite starp valsts un pašvaldību iestādēm vai starp šīm iestādēm un fiziskajām vai juridiskajām personām*).

[915] Article 7 of Electronic Documents Law.

[916] Regulations of the Cabinet of Ministers No.117 of 02.03.2004 "Regulations on way of assessment, order of storage and transfer for storage to state archive" (*Noteikumi par elektronisko dokumentu izvērtēšanas veidu saglabāšanas kārtību un nodošanu valsts arhīvam glabāšanā*).

[917] Article 6, part 4 of Electronic Documents Law.

[918] Article 2, part 2 of Law on Information Society Services.

Also, Latvian legislators have used the discretion provided by Part 2 of Article 9 of the Directive to exclude the application of the general validity of electronic documents to specific categories of contracts. The following categories of contracts shall be concluded on a written (paper) form and may not be carried out by electronic documents: (1) agreements by which the rights to real estate are created or transferred (except lease rights); (2) agreements, which according to law are invalid if not approved as requested by law (usually by the public notary); (3) guarantee agreements and security of pledge, if such guarantees or securities are given by persons acting in the realm not connected with their profession, business, or trade; (4) transactions within the area of family and inheritance law – for example, marriage contracts, testaments, inheritance agreements, etc.).[919]

The specific requirements for the use of electronic signatures are also provided by the Electronic Documents Law. The law distinguishes between regular electronic signatures and secure electronic signatures. An electronic signature is defined as electronic data attached to the electronic document or logically connected with this document and which ensures the authenticity of the electronic document and confirms the identity of the signing person. A secure electronic signature is such electronic signature, (i) which is linked only to the signing person, which ensures the identification of the signing person; (ii) which is created by a secure means of creating the electronic signature, (iii) which are under the sole control of the signing person, (iv) which is connected with the signed electronic document in such a way that later amendments to this document would be noticeable, and (v) which is approved by a qualified certificate. Full recognition is given only to electronic documents signed by a secure electronic signature: a document is deemed to be individually signed if it has a secure electronic signature. Alternatively, the parties may agree in writing (within the traditional (hand written) sense, or this writing is confirmed by the secure electronic signature) that they deem the electronic document to be individually signed even if it has a nonsecure electronic signature.

B.2 Administrative documents

The Electronic Documents Law applies also to the use of electronic documents in administrative procedures. This process is regulated in more detail by Regulations of the Cabinet of Ministers No.473 of 28 June 2005 entitled "Order of drafting, forming, storing and circulation of electronic documents in state and municipal institutions and order how the circulation of electronic documents within state and municipal institutions or between these institutions and natural or legal persons takes place".[920]

These rules aim towards providing a general legal framework for electronic communication with public administrations, as well as mandates the acceptance of electronic documents by public institutions as of 1 January 2004.[921]

The scope of regulation is broad: it applies to all state and municipal institutions. It should be noted, however, that in practice the regulations are not functioning, since at the moment of drafting this report a secure electronic signature has not yet been introduced. The institutions interpret their obligation to accept electronic documents in

[919] Article 3, part 6 of the Electronic Documents Law.

[920] See footnote 26 above.

[921] Paragraph 1 of the Transition Terms of Electronic Documents Law.

such a way that they would have to accept only documents with a secure electronic signature. This is based on the presumed lack of legal force of documents without a secure electronic signature, as according to Regulations on Drafting and Processing of Documents the signature is a necessary component for the legal force of the document.

Another possibility is to agree on the acceptance of electronic documents. So far, the State Revenue Service has taken up an initiative to conclude such agreements with taxpayers, enabling them to file the tax reports as electronic documents.[922]

Certain other institutions have introduced electronic filing of documents, however, mostly subject to further confirmation in paper form.[923]

C. Specific business processes

In this section of the study, we will take a closer look at certain sections of the applicable Latvian legislation and legal and administrative practice. Specific examples of common document types will be examined to assess the validity and recognition of their electronic counterparts.

The section below is organised according to four stages in the electronic provision of goods on the European market. They comprise the credit arrangements, transportation and storage, cross border trade formalities and financial/fiscal management. As a preliminary note it should be pointed out that there is practically no local court practice with respect to the use of electronic documents in the areas described above. In addition, the use of electronic documents in these business processes is not very common, as it is hindered by the incapability to apply a secure electronic signature.

[922] On 24.03.2006. came force a State Revenue Service instruction No.1 of 13.03.2006. "Agreement on the signing of electronic documents with the electronic signature by using the services of the electronic reporting system of State Revenue Service and the ensuring of these services". According to this instruction the State Revenue Service is entitled to conclude agreements with tax payers on the signing of electronic documents with the electronic signatures. The tax payers who have concluded this agreement may file their tax reports in an electronic form and do not have to submit them on paper anymore.

[923] Bureau of Tender supervision allows to apply for publishing of tender announcements electronically. However, the applications are reviewed only after a printed application form with regular signature is received.

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

Bills of exchange are governed by two rather old laws, both adopted in 1938.[924] The laws do not contain a definition of a cheque or a bill of exchange, however, they list the necessary components. One of the necessary components is the signature of the issuer. If there is no signature, the bill of exchange is not valid.

Taking into account that the respective laws were adopted in the first part of the last century, as well as the fact that their renewal in 1992 took place without any substantial amendments to the text, a literal and historical interpretation of their wording excludes the use of electronic documents. However, the laws should be interpreted in accordance with the system of laws currently in place, also taking into account the purposes of the regulation. Thus, if the necessary requirement of the bill of exchange is the signature of the issuer, the Electronic Documents Law may be applied, which states that the document is deemed to be individually signed, if it has a secure electronic signature. Consequently, the cheques and bills of exchange should be deemed valid if they have a secure electronic signature.

On the other hand, certain wordings of the law make its application difficult for electronic document, as they presume the use of the paper. E.g., it is stated that the endorsement shall be written on the bill of exchange or on the page attached to it.[925] Also, some sections envisage the striking out of certain sections or writing across an already written text. Problems might occur also with respect to the originality of the bill. Normally, a paper bill of exchange is a single unique document (or several identical documents), signed by the issuer. Any copies must be clearly designed as such and duly numbered. [926] In case of electronic documents, it remains to be solved how the authenticity of the original bill is ensured. Nevertheless, the use of paper is nowhere explicitly requested, thus a teleological interpretation of the law should allow the use of electronic documents, with a condition that a secure electronic signature is included.

It should be noted that there is no explicit regulation how electronic bills of exchange should be formed and used, nor are the criteria for their validity clear.

C.1.2. Documentary credit

There is no specific legal regulation for documentary credits in Latvia. Thus the documentary credit is largely subject to the general rules of the contract law. Consequently, there is also no specific legal framework for electronic documentary credit agreements.

In broad terms, the documentary credit would fall under the guarantee under the Civil Code. According to the Civil Code, a guarantee is a duty undertaken by an agreement to be liable to the creditor for the debt of the third party, however, not liberating the latter

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[924] The Law on Cheques (*Čeku likums*), adopted 27.09.1938; The Law on Bills of Exchange (*Vekseļu likums*), adopted 27.09.1938; the force of both laws renewed on 01.10.1992.

[925] Article 13 of the Law on Bills of Exchange; Article 16 of the Law on Cheques.

[926] Articles 64 to 67 of the Law on Bills of Exchange; Article 49 of the Law on Cheques.

from its debt.[927] With respect to the formal requirements, the guarantee needs to be in a written form.[928] According to the Electronic Documents Law, the requirement to have a written form is fulfilled if the electronic document has an electronic signature (not necessarily a secure electronic signature). In addition, the practice of issuing documentary credits largely follows the Uniform Customs and Practice for Documentary Credits (UCC-500), created by International Chamber of Commerce. Banks usually give a reference to these customs in their rules on issuing documentary credits.[929]

As there is no detailed regulation, the parties have a significant freedom to agree on the practical organization of the documentary credit. They may agree to present certain document in an electronic form. In practice, however, the filing of applications for documentary credits and presentation of documents takes place on paper form. The banks request that the applications are signed by the authorized representatives of the person applying for documentary credit. As there is no secure electronic signature, the signature on a paper document presents the only possibility. Alternatively, several banks allow a possibility to fill in the applications for several types of credit electronically, if the person is already a bank client and has received the necessary password for the use of internet banking. Nevertheless, a secure electronic signature should present a workable solution.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

A bill of lading is a document issued by the carrier of goods to the sender and confirming that the goods are received for transportation and the carrier's commitment to transport them. It is issued by the carrier at the sender's request. The holder of the bill of lading is entitled to receive the goods upon arrival at their final destination.

The use of bills of lading for maritime transport is governed by the Maritime Code.[930] The Maritime Code provides the mandatory details to be included in the bill of lading. There are no special requirements as to the form of the bill, however, it is indicated that it shall be signed by the shipmaster or a person authorized by the carrier.

There are no explicit regulations with respect to the use of electronic documents. However, as there is a requirement for signing, it may be derived that electronic documents may be allowed only if signed by a secure electronic signature. When using electronic documents, it would be crucial to designate the original bill of lading, as only the presentation of the original entitles the holder to receive the goods.

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[927] Article 1692 of the Civil Code.

[928] Article 1695 of the Civil Code.

[929] E.g., General Terms and Conditions for Issuance of Letters of Credit of Nordea Bank Plc. Latvia branch (http://www.nordea.lv/sitemod/default/index.aspx?pid=69282).

[930] The Law *Shipping Code* (Jūras kodekss), adopted on 29.05.2003, in force since 01.08.2003.

C.2.1. Storage contracts

A storage contract is generally governed by the Civil Code. Within the understanding of the Civil Code, by the storage contract the custodian undertakes to store a movable property, which has been entrusted to him.[931] A storage contract is a *real* contract, which means that the contract comes into force only when the relevant property has been transferred to the custodian. The law does not contain any requirements in which the contract on storage terms should be concluded, so the terms may be agreed in any form, including electronically. In any case, the agreement will come into force only after the property to be stored will have been transferred physically to the storage by the custodian.

With respect to storage contracts evidenced by the use of International Federation of Freight Forwarders Associations (FIATA) documents, such as FCR (Forwarders Certificate of Receipt) and FWR (FIATA Warehouse Receipt)[932], it should be noted that it is crucial to distinguish between the original document and its copies. Thus, in case of using electronic documents, the authenticity of the original shall be clearly designated (e.g., by a secure electronic signature).

C.3 Cross border trade formalities: customs declarations

According to recently adopted regulations, it is possible to file customs declarations in an electronic form.[933] The regulation codifies two earlier instructions of the State Revenue Service of 28 October 2004 *On Permissions to Declare Goods Electronically* and instruction of 28 April 2004 *On certification of declaring persons*.[934]

The regulations state that the State Revenue Service shall ensure the possibility to file custom declarations in electronic form. The person wishing to do the electronic declaration shall receive a relevant permit from the State Revenue Service. Upon issuing the permit, the State Revenue Service also grants a user name and password, which shall further on be used for electronic declaring. The State Revenue Service decides on issuing the permit within 30 days after reception of the application and accompanying documents.

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[931] Article 1968 of the Civil Code.

[932] More information available in www.fiata.com. FIATA documents are commonly used in freight forwarding, including the storage of goods.

[933] Regulations of the Cabinet of Ministers No.999 of 27.12.2005 "The Order how the permits for submitting custom declarations in electronic form shall be issued" (*Kārtība, kādā izsniedzamas atļaujas muitas deklarāciju iesniegšanai elektroniskā veidā*).

[934] Instructions No.1808 of the State Revenue Service of 28 October 2004 *On Permissions to Declare the Goods Electronically (Par atļaujām deklarēt preces elektroniski*) and instruction No.664 of 28 April 2004 *On certification of declaring persons* (*Par deklarētāju sertifikāciju*).

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

The eInvoicing Directive[935] has been transposed in Latvian laws by various amendments to VAT laws, as well as related regulations.[936] However, none of the amendments address specifically the issuing of electronic invoicing. Consequently, there is no explicit authorization for the use of electronic invoices. There are also no provisions for the storage or archiving of electronic invoices.

The VAT law does not explicitly require that the invoice should be signed, thus formally complying with the provision of the eInvoicing directive that the member states shall not request the signature on the invoice. However, it should be noted that the VAT law states that the VAT invoice is a document.[937] Consequently, the requirements of the Regulations on Drafting and Processing of Documents can be applied, *inter alia*, the stipulation that the legal force of the document is ensured only by its signing. Therefore an electronic invoice might be issued only with a secure electronic signature.

C.4.2. Electronic accounting

The accounting procedures are governed by the Law On Accounting.[938] The law generally allows to carry out the accounting in electronic form, but with a rather broad condition that the requirements of this law may not be violated. Specifically, entries in the accounting registers shall be timely, complete, precise and systematically arranged. Entries, the content or quantifiers of which differ from corroborative documents, shall not be allowed. If entries in the accounting registers or documents are amended, their initial content shall be visible, and each correction shall be justified and confirmed with a signature. Corrections may not be made in such a manner that it is not comprehensible when and why such have been made. Furthermore, representation of the data in a form legible to third persons, and provision of their printout, if necessary, shall be ensured.

If corroborative documents are prepared with computers, the signatures of persons responsible for the performance of the economic transactions and correctness of information may be replaced by their electronic confirmation (authorisation). The procedures for electronic confirmation (authorisation) at an enterprise shall be determined by the manager of the enterprise. Electronic confirmation (authorisation) of external documents may be utilised only if the parties to the transaction have mutually agreed upon the procedures by which an electronic exchange of corroborative

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[935] Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax.

[936] Law on Value Added Tax, adopted on 9.03.1995, in force from 01.05.1995; Regulations of the Cabinet of Ministers No.339 of 25.06.2003. "Regulations on the strict recording waybills-invoices" (*Noteikumi par stingrās uzskaites preču pavadzīmēm-rēķiniem*).

[937] Article 8, Section 5.1.

[938] Law On Accounting (*Par grāmatvedību*), adopted 14.10.1992.

documents shall be performed and upon the procedures for electronic confirmation (authorisation).[939]

Thus, generally it is possible use fully electronic accounting, if the all of the above conditions are observed.

It should be noted that the Latvian laws require a deposit of the company's annual account with the competent authority (the Company Register).[940] The law does not contain an explicit provision that the annual account shall be drafted and submitted in a paper form, however, it provides that the annual account shall be duly signed by the legal representatives of the company.[941] The law provides that the documents may be submitted to the Company Register electronically, if they are accompanied by a written confirmation that the submitted documents are identical to the originals.[942] As soon as a secure electronic signature is introduced, there should be no legal obstacle to submit the annual account fully in an electronic form.

D. General assessment

D.1 Characteristics of Latvian eCommerce Law

- Latvian eCommerce Law is based largely on the laws transposing the relevant EU directives: the eCommerce Directive and the eSignature Directive. In broad terms, Latvia has adopted the general legal framework for enabling the functioning of eCommerce. The main legal act ensuring this is the Electronic Documents Law, which introduces notions of electronic documents, electronic signature, secure electronic signature, certification services, and which also establishes the validity of electronic documents and their legal equivalence to traditional documents. However, the practical functioning of eCommerce is currently impeded due to the lack of infrastructure for activities of certification services providers and for creating secure electronic signatures.

  The Electronic Documents Law is the *lex specialis* for eCommerce, while the Civil Code still has to be applied as the general law. The Civil Code is quite flexible with respect to the formal requirements of the documents, and its principal aim is to ensure the autonomy of will of the parties.

- Following the Electronic Documents Law a range of secondary legal acts have also been adopted, governing specific issues in relation to circulation of electronic documents, the technical requirements, requirements for providers of certification services, etc. The following regulations are adopted on basis of the Electronic Documents Law: regulations on the use of electronic documents in state and municipal institutions[943]; regulations on storing and archiving[944]; regulations on information to be indicated in the description of systems of certification

[939] Article 7 of the Law on Accounting.

[940] Law on the Annual Accounts, adopted 14.10.1992.

[941] Article 61 of the Law on the Annual Accounts.

[942] Article 66 of the Law on the Annual Accounts.

[943] See footnote 26 above.

[944] See footnote 28 above.

services[945]; regulations for order and terms of examination of systems of certification services[946]; regulations on minimum insurance of providers of certification services[947]; regulations on technical and organizational requirements for qualified certificate[948].

- The content issues of eCommerce are governed also by the Law on Information Society Services, which largely copies the provisions of the eCommerce Directive.

D.2 Main legal barriers to eBusiness

- In fact, there are no substantial legal barriers to eBusiness, as the necessary legal acts have been adopted.
- However, the most important barrier is that so far these legal acts have not been implemented in practice, as the possibility to create a secure electronic signature has not been ensured. There is no system for issuing qualified certificates and there are no certification service providers.

  Consequently, electronic commerce and business cannot be carried out in practice, as according to Electronic Documents Law the document is deemed to be individually signed only if it has a secure electronic signature. As lots of documents involved in commercial transactions need to be individually signed (e.g., documents to be submitted to public institutions), the lack of secure electronic signature forces the use of the traditional paper form. Moreover, the general regulations for the legal validity of any documents require the signature as a necessary precondition for legal enforceability.

  It is to be hoped that the problem of the lack of the necessary structure for a secure electronic signature will soon be solved. On 15 June 2005 the Republic of Latvia entered into an agreement with SIA Lattelekom (largest fixed telephony operator controlled by state with 51% shares) and VAS Latvijas Pasts (fully state owned postal services provider) by which it is agreed that Latvijas Pasts will

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[945] Regulations No.357 of the Cabinet of Ministers of 01.07.2003 "Regulations on the information to be indicated in the security description of information systems, equipment, and procedures of provision of certification services" (*Noteikumi par sertifikācijas pakalpojumu sniegšanas informācijas sistēmu, iekārtu un procedūru drošības aprakstā norādāmo informāciju*).

[946] Regulations No.358 of the Cabinet of Ministers of 01.07.2003 "Regulations on the order and terms of the security examinations of information systems, equipment, and procedures of provision of certification services" (*Sertifikācijas pakalpojumu sniegšanas informācijas sistēmu, iekārtu un procedūru drošības pārbaudes kārtība un termiņi*).

[947] Regulations No.267 of the Cabinet of Ministers of 19.04.2005 "Regulations on the minimum amount of civil insurance of a reliable provider of certification services" (*Noteikumi par uzticama sertifikācijas pakalpojumu sniedzēja civiltiesiskās atbildības minimālo apdrošināšanas summu*).

[948] Regulations No.514 of the Cabinet of Ministers of 12.07.2005. "Regulations on technical and organisational requirements to which a qualified certificate and a reliable provider of certification services shall confirm, on secure tools for creating a secure electronic signature, as well as on order how a secure electronic signature shall be verified (*Noteikumi par tehniskajām un organizatoriskajām prasībām, kādām atbilst kvalificēts sertifikāts, uzticams sertifikācijas pakalpojumu sniedzējs, droši elektroniskā paraksta radīšanas līdzekļi, kā arī kārtību, kādā veicama droša elektroniskā paraksta verificēšana*).

become a reliable provider of certification services, and Lattelekom will be a technological partner, ensuring the necessary infrastructure and services.[949]

- On 7 November 2005 the Cabinet of Ministers approved a Concept on Choice of the Carrier of Secure Electronic Signatures and Introduction of Secure Electronic Signatures. By this concept it is envisaged that the device for carrying the secure electronic signature shall be a smart card.[950] According to the Ministry for Special Assignments for Electronic Government Affairs, the secure electronic signature should be introduced by September 2006.[951]

D.3 Main legal enablers to eBusiness

- As described above, the flexibility with respect to the formal requirements of documents and the party autonomy principle are the key factors for enabling the functioning of eBusiness. Also, the Electronic Documents Law presents a workable framework for use of the electronic documents by establishing criteria according to which the traditional requirements may be fulfilled in electronic form, such as substitution criteria for individual signatures and for stamping requirements. Thus, as soon as there is be a practical possibility to use a secure electronic signature, there should be no significant legal obstacles to eBusiness.
- On the other hand, it also cannot be excluded that a practical and more common use of electronic documents (including use of secure electronic signatures) may reveal additional impediments in the form of wording of certain legal acts (e.g., implication of the use of paper, requesting certain procedures presumed to be performed in paper form, etc.).
- Nevertheless, such problems may be solved by systemic and teleological interpretation of such laws and by adopting a flexible approach to formal requirements. Within eCommerce as in the business in general the intention of the parties is the key factor, and this may be derived also from electronic documents, if their authenticity and originality is ensured.
- eBusiness would be substantially encouraged if there would be a relevant court practice confirming the correctness of the above described understanding and interpretation of applicable laws, however, according to our best knowledge, currently there is little or no such practice.

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[949] Approved by the Cabinet of Ministers on 14 June 2005, protocol No.35 30.§.

[950] Approved by the Direction of the Cabinet of Ministers No.714.

[951] Press release of 27.04.2006, available at www.eparvalde.lv.

Liechtenstein National Profile

A. General legal profile

The Principality of Liechtenstein is a sovereign constitutional hereditary monarchy on a democratic and parliamentary basis, consisting of two regions and eleven municipalities[952]. The country's territory of 160 km^2 hosts approximately 34.000 inhabitants and neighbours Switzerland and Austria.

Commercial contracts are governed by the General German Commercial Code[953], which was adopted in 1865, and, complementarily, the General Civil Code[954], which was adopted in 1812. Both codes have been amended and partially superseded by numerous amendments in the interim.

The General Civil Code follows the Austrian tradition, while the ADHGB is of German origin.

Disputes arising from commercial relations are dealt with by the Lower Court[955]. Court proceedings have to be preceded by proceedings before the Mediation Office[956]. Appeals against decisions of the Lower Court may be brought before the High Court[957], judgements of which may in turn be appealed against to the Supreme Court[958]. The Liechtenstein system of jurisprudence does not explicitly state any binding power of precedent, however, decisions of the Supreme Court are highly authoritative and only very rarely disregarded.

Due to its accession to the European Economic Area[959], Liechtenstein has *inter alia* enacted the Act on E-Commerce[960], the Act on Distance Selling[961], and the Act on Electronic Signatures[962] and the pertinent Regulation on Electronic Signatures[963].

In addition, Liechtenstein has passed legislation in transposition of Directive 2002/65/EC and Directive 2000/46/EC, to wit, the Act on the Distance Marketing of Consumer

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952 *Gemeinden*

953 *Allgemeines deutsches Handelsgesetzbuch – ADHGB*

954 *Allgemeines bürgerliches Gesetzbuch – ABGB*

955 *Landgericht*

956 *Vermittleramt*

957 *Obergericht*

958 *Oberster Gerichtshof*

959 *Europäischer Wirtschaftsraum – EWR*

960 *E-Commerce-Gesetz – ECG,* no. 133/2003 of the Official Law Gazette of Liechtenstein in transposition of Directive 2000/31

961 *Fernabsatzgesetz – FAG,* no. 71/2002 of the Official Law Gazette of Liechtenstein in transposition of Directive 97/7/EC

962 *Signaturgesetz – SigG,* no. 215/2003 of the Official Law Gazette of Liechtenstein

963 *Signaturverordnung – SigV*, no. 130/2004 of the Official Law Gazette of Liechtenstein in transposition of directive 1999/93/EC

Financial Services[964], and the Act on Electronic Money Institutions[965], respectively, which will be not be dealt with any further in this profile.

B. eCommerce regulations

B.1 eCommerce contract law

B.1.1. General principles

Liechtenstein contract law is generally based on the principle of autonomy of will and does not put great emphasis on formal requirements. Generally, for a contract to be entered into, Liechtenstein law only demands that a consensus exists between parties with regard to the essential elements of a contract; a written document is not typically required. However, irrespective of the validity of the contract itself, the question of proof often hinges on the existence of credible documentation. Therefore, the question of the validity of the contract is often not of pivotal importance; the contracting parties will often be more concerned of how to retain evidence on a contract which has been entered into orally or e.g. by virtue of electronic communication.

Please appreciate, however, that certain transactions are required by civil law to be entered into in compliance with formal requirements stipulated by the law (written contract, witnessing, notary public etc.), such as transactions related to family and/or inheritance law, certain donations, suretyships, real estate transactions etc..

Many common contract types, including contracts on the sale and purchase of goods or on the providing of services do not necessarily have to be entered into in a written form.

Commercial law contracts as defined by Art 271 *et seq.* ADHGB are privileged as compared to ordinary civil law contracts, insofar as the ADHGB provides for commercial contracts to be exempt from certain (but not all) general civil law formal requirements (if any).

Neither the FAG nor the ECG nor the SigG/SigV[966] stipulate a legal definition of the term "electronic document". Furthermore, to our knowledge, such a definition has not been formed through Liechtenstein doctrine nor through its jurisprudence.

Any means of communication including electronic communication is generally recognized by law as a means for somebody to express his or her legal will. In so far as no specific formal requirements are provided for the validity and enforceability of a given contract by law or agreement, a contract may also be entered into by exchange of electronic communication. If a dispute arises, however, appropriate evidence will have to be produced if litigation ensues on the matter.

This is bolstered by Art 3 SigG, which expressly allows the use of ordinary electronic signatures (electronic signatures underneath the level of secure electronic signatures) in

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[964] *Fern-Finanzdienstleistungs-Gesetz – FernFing*, no. 36/2005 of the Official Law Gazette of Liechtenstein

[965] *E-Geldgesetz*, no. 109/2003 of the Official Law Gazette of Liechtenstein

[966] See http://www.gesetze.li/DisplayLGBl.jsp?Jahr=2003&Nr=215

the course of business and legal transactions in the absence of specific formal requirements stipulated by law or agreement.

As stated above, there are certain contract types which still need to be concluded in writing for validity purposes. For evidence purposes it is always highly recommendable to conclude contracts in writing.

Electronic communications furnished with a secure electronic signature in accordance with the SigG/SigV (corresponding to the notion of a qualified signature) are now recognized as to satisfactorily meet the formal requirement of a written expression of will through a personal signature.

However, Art 4 Sub-Clause 2[967] of the SigG lists certain exceptions ("qualified documents"), in particular legal transactions related to family or inheritance law, which require the written or an even more formalized form (such as marriage, which requires personal attendance of the bride and the groom in front of the *Standesbeamten* and express oral consent; or the last will and testament); furthermore legal transactions related to public registers or which require public recording or public certification; finally suretyships and certain forms of guarantees.

In addition to these mandatory exceptions provided for by the law, the parties to a contract may opt out from the recognition of electronic communications furnished with a secure electronic signature as a written communication by mutual consent (Art 4 Sub-Clause 1 SigG).

Liechtenstein law allows the parties to a contract to agree amongst themselves on the form their contracts need to take to be legally binding. However, parties cannot deviate from formal requirements imposed by mandatory law. In contrast, the parties can stipulate stricter formal requirements than those provided for by the law. This applies both to civil contracts and commercial contracts.

If there is no legal or contractual requirement as to the form by means of which the contract may be entered into, such contract can also be entered into by an exchange of electronic communication. If one party to the contract which is about to be entered into does not want to be bound by such a contract due to the fact that the contract will be entered into by means of mutual electronic communication, he is certainly entitled to reject the offer. However, if such party has accepted the offer, the contract has become valid, binding and enforceable unless one party can claim that he or she has been induced in relevant error.

In this regard, it is worth noting Art 12 of the eCommerce Act (ECG) which provides with regard to the scope of the applicability of the ECG that electronic communications are deemed to have been duly served to the recipient if the recipient is in a position which

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[967] The said paragraph reads as follows:

"2) Eine sichere elektronische Signatur entfaltet nicht die Rechtswirkungen der Schriftlichkeit im Sinne des § 886 ABGB bei:
a) Rechtsgeschäften des Familien- und Erbrechts, die an die Schriftform oder ein strengeres Formerfordernis gebunden sind;
b) anderen Willenserklärungen oder Rechtsgeschäften, die zu ihrer Wirksamkeit an die Form einer öffentlichen Beurkundung oder Beglaubigung gebunden sind;
c) Willenserklärungen, Rechtsgeschäften oder Eingaben, die zu ihrer Eintragung in das Grundbuch, das Öffentlichkeitsregister oder ein anderes öffentliches Register einer öffentlichen Beurkundung oder Beglaubigung bedürfen; und
d) Bürgschaftserklärungen (§ 1346 Abs. 2 ABGB) und Garantieerklärungen, die von Personen außerhalb ihrer gewerblichen, geschäftlichen oder beruflichen Tätigkeit abgegeben werden."

under ordinary circumstances allows a recipient to retrieve such communication. This provision may not be deviated from to the disadvantage of a consumer.

As stated above, under Liechtenstein law, parties are generally allowed to express their will by means of electronic communication. However, certain types of expressions of will or statements have to meet certain formal requirements, such as certain notices of termination of lease contracts.

Even if no such requirements apply, the crucial question will always be whether it can be proven that the notification has actually been sent and that it has been delivered to the appropriate recipient.

Liechtenstein has not implemented a legal framework for sending electronic registered mail, which is to say that the recipient of electronic mail is not required by law to explicitly acknowledge receipt of an electronic message. If, however, he voluntarily confirms receipt, this acknowledgment may be used as evidence before the courts.

Liechtenstein has not implemented a generic framework for the electronic archiving of electronic or paper documents.

To our knowledge there is no explicit Liechtenstein jurisprudence specifically acknowledging the acceptability of electronic documents as equivalent to traditional written documents.

B.1.2. Transposition of the eCommerce directive

The eCommerce Directive (the "Directive") has been transposed into Liechtenstein national legislation by the ECG. Whether such transposition has been complete is for the EFTA-Court of Justice to assess.

The ECG applies uniquely to services of the information society.

Liechtenstein has taken advantage of Art 9 Sub-Clause 2 of the Directive by sustaining its domestic legal requirements of form with regard to all types of contracts listed in Art 9 Sub-Clause 2 of the Directive. In this regard, we refer also to Art 4 Sub-Clause 2 SigG.

With regard to the use of electronic signatures for services of the information society, Liechtenstein has taken no further measures apart from its enactment of the SigG.

B.2 Administrative documents

Liechtenstein has not yet enacted specific legislation with regard to the use of electronic communication in administrative procedures. However, it is under discussion whether legislation should be enacted with regard to the Land Register and Public Register Office which would facilitate electronic communication with such Office.

C. General assessment of Liechtenstein eCommerce Law

The Liechtenstein legal eCommerce framework appears to be in line with the framework of many European fellow states. The impression is that the level of demand for eCommerce transactions is not exclusively determined by the legal framework but also by technological issues (long-term storage; comfortable software; access to high-performance networks) and questions of convenience and confidentiality. Certainly, the compartmentalisation of Europe into a series of separate national jurisdictions imposes a certain impediment to cross-border eCommerce, as it does to trade and commerce in general, but as the process of the European integration moves ahead towards a more uniform legal framework, these impediments will be significantly reduced.

Lithuania National Profile

A. General legal profile

Lithuania is a democratic republic, divided into administrative units. The Republic of Lithuania comprises 10 higher administrative units, called Counties, and 50 Municipalities.

The Lithuanian legal system is a typical example of continental legal tradition, heavily influenced by Roman Law. The relatively short history of modern Lithuanian civil law started with the adoption of the new Civil Code („the Civil Code")[968], which entered into force as of 1 July 2001. The Civil Code codifies the general commercial and contract law.

eCommerce, falling within the scope of private law, primarily resides on the general norms of private law, at the same time being subject to specific regulations in various fields, such as consumer protection law, data protection law, *etc*.

As a result, disputes arising in the field of eCommerce are also mostly subject to general civil procedural regulation. Thus, disputes regarding commercial relations should be dealt with quite in the same way as ordinary civil cases. The first instance of civil cases is the district court[969], if the total monetary value of the matter is below 100 000 Litas; or the county courts[970], if the monetary value of the matter is above the said benchmark. Appeals against the decisions of the district court may be lodged with the county courts. However, the Court of Appeal of the Republic of Lithuania[971] is an appellate instance for the decisions of the county courts. The final instance is cassation, the Supreme Court of the Republic of Lithuania[972] (hereinafter – "the Supreme Court") being the only court of cassation for the judgements of the county courts after their entry into force, as well as for cases of the Court of Appeal. The Supreme Court hears the cases on the merits of law only. In addition, the Supreme Court publishes an official bulletin of the case-law. Although the Lithuanian system of jurisprudence formally does not have binding power of precedent (*stare decisis*) in the sense of common law tradition, derogation from the officially published case-law of the Supreme Court may serve as an absolute ground for cassation. Finally, even those decisions of the Supreme Court, which are not officially published, are highly authoritative and its decisions are rarely derogated by the courts of the lower instances.

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[968] As approved by the Law No. VIII-1864, as of 18 June 2000.

[969] *Apylinkės teismas*

[970] *Apygardos teismas*

[971] *Lietuvos apeliacinis teismas*

[972] *Lietuvos Aukščiausiasis teismas*

B. eCommerce regulations

Most questions regarding the validity and recognition of electronic documents are fleshed-out virtue of the legal doctrine, although evolving case-law also serves as a solid gap-filling tool in the legal system. In this section, the main tenets of Lithuanian doctrine regarding the legal value of electronic documents are briefly commented.

B.1 eCommerce contract law

B.1.1. General principles

As far as contract law is concerned, the legal framework in Lithuania is rather flexible, based on the principle of freedom of contract, and does not strictly restrict the form of expression of will of the parties. These principles are also applicable in the context of eCommerce contract law.

Validity of e-contracts

Contracts may be concluded both in writing and orally. However, a written (or notary) form is a prerequisite for certain types of contracts.[973] Article 1.73 of the Civil Code[974] provides that documents, transmitted via phone, facsimile, telex or any other type of terminal equipment of a telecommunications network are equated to hand-written paper based documents, provided such document ensures the protection of the text (message content) and it is possible to identify the signature of the signatory party. This provision plays a pivotal role, as it mandates the principle of technological neutrality and functional equivalency, which firstly were introduced as universal principles by the UNCITRAL Model E-commerce Law of 1996, and attaches to electronic documents (electronic contracts) legal value and legal effect which is identical to paper based written documents. Thus, the Civil Code is permeated with the basic principle that electronic documents may not be discriminated against paper-based written documents, exercising the same or equivalent functions, and may not be deprived of legal effect and force solely on the ground that it lacks a paper-based format.

Thus, pursuant to Lithuanian law, written transactions may be concluded by signing an electronic document, which may be transmitted via means of telecommunication terminal equipment. Such electronic document authorised by an electronic signature is equated to a written or paper document.

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[973] Such as, for example, contracts of purchase and sale of goods by instalments; insurance contracts; contracts of lease of movable property for a period exceeding one year, other.

[974] As approved by the Law No. VIII-1864, as of 18 June 2000.

Notion of electronic document

The notion of "electronic document" is central for the comprehension of the entire Lithuanian legal framework of eCommerce.

An electronic document in a broad sense may be understood as a functional analogue (not a copy) to paper-based written documents. In a narrower sense, an electronic document can also be understood as a functional analogue of a paper based written document, logically relating the electronic signature and the electronic data.[975]

A more form-oriented notion of "electronic documents" may be found in the Rules of Management of Electronic Documents ("the Rules"), approved by the Order of the Director of the Lithuanian Archives Department under the Government of the Republic of Lithuania No V-12 as of 11 January 2006. The Rules introduce the procedure for preparation, management, record, storage, and destruction of electronic documents as well as set out functional requirements for the Management systems of electronic documents, and are obligatory for the institutions of public administration. However, the Rules do not have a binding nature as far as private entities and organisations are concerned. The Rules define an "electronic document" as <…> "a document, prepared or received using information technology devices, provided it bears a legally valid electronic signature and the document is recorded with the Management system of electronic documents.[976]

It is noteworthy that only those electronic documents are recognised as legally enforceable and creating legal outcomes which satisfy the above-indicated criteria, one of such primary requirements being the presence of a signature – of "legally valid electronic signature".

The use of electronic signatures has been recognised in Lithuanian legislation since the year 2000 and is governed by virtue of the Law on Electronic Signatures (No VIII-1822, as of 11 July 2000) (hereinafter – "the Law on Electronic Signature"). This Law regulates the creation, verification, and validity of electronic signatures, rights and obligations of signature users, etc.

The definition of the electronic signature ("e-signature")[977] is in conformity with the provisions of the E-signatures directive. The Law on Electronic Signatures establishes and upholds the technologically neutral and unspecified model of e-signature, which in principle encompasses all possible forms of electronic data authentication and identification of the signatory.

Secure e-signature is defined to mean a signature, which meets all of the following requirements: it is uniquely linked to the signatory; it is capable of identifying the signatory; it is created using a means that the signatory can maintain under his sole control; and it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.

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[975] Civilka M. *et al*., "Law of Information Technologies", Vilnius, 2004, at p. 188.

[976] Item 1 of the Order of the Director of the Lithuanian Archives Department under the Government of the Republic of Lithuania No. V-12, as of 11 January 2006.

[977] Electronic Signature means data, which are inserted, attached to or logically associated with other data for the purpose of confirming the authenticity of the latter and (or) identification of the signatory. (Art. 2 of the Law on Electronic Signature)**.**

The concept of "secure e-signature" is identical to the notion of "advanced electronic signature", as employed by the said E-signature directive (Article 5, part 1). Generally, the provisions of the Law on Electronic Signature, regarding the legal effect of e-signature echo the requirements laid down in the e-signature directive.

A secure e-signature created by a secure e-signature-creation-device and based on a qualified-certificate which is valid, is granted the same legal force that a hand-written signature in written documents has and is admissible as evidence in court (Article 8, part 1).

The Law specifies, that a signature may not be deemed invalid based on any of the grounds listed below, that it is: in electronic form; not based upon a qualified-certificate: not based upon a qualified-certificate issued by an accredited certification-service-provider; not created by a secure signature-creation device (Article 8, part 2).

Evidentiary issues

The Lithuanian Code of Civil Procedure (hereinafter - "the Code of Civil Procedure") paves the road for the submission of electronic documents to the court and provides for their recognition as an admissible means of evidence. However, no separate category of electronic data based evidence can be found in the Code of Civil Procedure. Deriving from the above-mentioned principles of technological neutrality and functional equivalence that are statutorily indicated in the Law on Electronic Communications (Article 2)[978], an electronic document should generally be equated to a written document, provided that it was transmitted through terminal equipment or that it is a computer-made document which is saved on a non-paper material medium in an electronic format (in case it is not intended for transmission); and that the protection of the text is assured (this function is carried out by the electronic signature, as well as various authorisation systems); and that the signature of the author may be identified (this function is carried out by the electronic signature).

This would allow electronic documents to be invoked as evidence, although the court is in principle free to determine the actual value of the document as evidence. Consequently, the court is entitled to discard it as evidence if it decides that the document bears no real evidentiary value (e.g., if it contains no signature, its origins are unverifiable). When evaluating the evidence, the courts should take into consideration the following criteria: the reliability of the way the data message was created, saved and transmitted, the reliability of document integrity, the manner of indicating the person or institution as the author of the data message, and the source of the data message. Thus, even relatively informal (e.g. electronic mail[979]) notifications may be invoked as written evidence, provided that the information recorded in such notifications may be useful when determining all the relevant circumstances in the case at hand.

Moreover, there exists a possibility to determine the factual circumstances of the case, if the matter of the case is somehow related to the computer-equipment and/or its operation: using devices and software, information, saved in the servers of the

[978] As approved by the Law No. IX-2135, as of 15 April 2004.

[979] Electronic mail is defined as any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient. (Art. 3 of Law on Electronic Communications, Official Gazette, 30 April 2004, No. 69-2382).

computers, computer systems etc. Such investigations are performed by the experts of the Forensic Science Centre of Lithuania. The main purpose of investigations of this kind is to establish whether a document created using computer devices is not false.

Article 198 of the Code of Civil Procedure, which is devoted to the submission of written evidences[980], determines that the documents signed by the persons participating in the case and transmitted by the terminal equipment in accordance with the laws and other legal acts, are equated to the written form of the document.

As far as civil law is concerned, the term "written documents" intrinsically does not imply any additional requirements. Thus, one may reasonable claim that an electronic document which is printed and certified by the signature of the person participating in a case before the courts should be deemed acceptable by the courts as proper means of evidence. However, it must be noted that the provision requiring that documents which are submitted to the court should be signed by a person participating in the case is rather dubious. Strictly following the said provision of Article 198 of the Code of Civil Procedure, electronic documents that are issued by the person or the governmental institutions signed by a person other than the one participating in the court, may not be considered as the proper evidence, even if it is reduced to the printed format and is properly signed and any other formal requirements are duly observed. At odds with the rationale of eBusiness, such a norm, if interpreted strictly, would eliminate from legal consideration any electronic data approved or certified by third parties (i.e., trusted third parties).

However, the scope of this rule depends on the interpretation given to the term "written document". There exists a general tendency to interpret that all written documents have to be signed. However, even documents that are subject to certain specific statutory requirements, as provided for in some legal acts, do not always have to be signed. E.g., the Law on Accountancy[981] provides that a signature is an obligatory requisite for accounting documentation, although this requirement is not applicable to the invoices for telecommunication services provided to mass consumers (usually they are not signed).

The requirement that electronic documents must be transmitted by terminal equipment in order to be accorded evidentiary value is subject to certain controversies as well, largely due to the fact that such a requirement implies that electronic documents saved in a computer or stored in a depositary may not be used as evidence.

As for electronic archiving, the general framework is to be found in the above-mentioned Rules. As stated above, the Rules establish the procedures for preparation, management, recording and storage of electronic documents as well as set out the functional requirements for the management systems of electronic documents. The Rules divide the whole process in connection to the electronic document management into two main subsystems: (1) preparation and management of electronic documents and (2) storage of electronic documents.

The first subsystem covers the procedures of preparation of the electronic document, and enumerates all the requisites that an electronic document must bear. The

[980] According to the Article 73 of the Code of Civil Procedure, written evidence is defined as an act, document or business and personal correspondence.

[981] No IX-574 adopted on 6 November 2001 (as amended on 18 December 2003 by the Law No IX-1914)

registration procedure also falls under the first subsystem, as well as formation and management of electronic files. Thus, the first subsystem covers important parts of electronic archiving, and if the documents are required to be stored for a period of one to ten years, they remain in the same format as they are after they have been duly prepared, registered and systemised into electronic files, and remain stored according to the procedures set in connection to the first subsystem. The Rules oblige the institutions and entities[982] to assure that during the whole period of storage the contents and the related metadata would remain identifiable/ recognisable for consumers.

In cases where the period of storage of electronic files, after their value has been reviewed by experts, is extended for more than ten years, the electronic files have to be transferred to the storage (second) subsystem. The Rules establish the procedural requirements for the storage of electronic files, as well as provide for the concrete specific measures for assuring the security of the stored electronic documents. The second subsystem also covers the procedure of destruction of the electronic documents. The general rule is that stored electronic documents cannot be destroyed/deleted unless there is an explicit decision to do so, based on legal requirements. The electronic documents may be destroyed or deleted unless retaining them could give rise to damages or adversely influence the management system of electronic documents.

However, it still remains to be seen whether the above-described specific regulation could serve as an inspiration for a more general framework designed for archiving electronic documents.

Despite the limited number of court cases where the question of usage of electronic evidence was put under consideration, several decisions of the Supreme Court are worth mentioning in this section of the study.

Lithuanian case-law concerning the validity and mutual recognition of electronic documents is undergoing development, thus it still lacks any clearly fleshed-out preconditions for the electronic document to be accorded evidentiary value. A clear majority of the cases heard by the Supreme Court demonstrates that the question of proof often plays a much more pivotal role than the issues of legal validity of the electronic contract.

In the case *R. Beliackas v. UAB „Sabina", No. 3 K – 3 – 619/2000*, heard on 29 May 2000, the Supreme Court has held that electronic document – facsimile statements (notification) should be accorded the same evidentiary validity as the typical written statement, in this way acknowledging the electronic document being equivalent to a traditional written document.

In the case *"Sėkmės Sistemos" v. AB "Lietuvos telekomas, No. 3K-3-927/2001*, heard 10 October 2001 the Supreme Court arrived to the conclusion that the district court of first instance has violated the claimant's right to a proper trial by dismissing electronic correspondence as admissible evidence. This spelled-out the court's aspiration to ensure that electronic documents should enjoy the privilege of admissible means of evidence.

The other noteworthy case in this context is *J.Kaliačius v. I.Starošaitė-Žvagulienė No. 3k-3-579*, heard 27 October 2004. In this case the Supreme Court has held that the articles (publications) taken from the internet portal "Delfi" bear the same evidential value as the traditional written documents. The same line of reasoning was further maintained in the later cases of the Supreme Court.

[982] Noteworthy that, as provided above, the Rules are only obligatory for the institutions of public administration, but do not have any binding effect for the private entities and organisations.

It seems that the administrative jurisprudence also paves the road for alignment with the prevailing case-law authorized by the Supreme Court.

In one of the recent cases (*case No. AS-469-77-06*), heard by the Supreme Administrative Court of Lithuania in the beginning of 2006, the applicant – UAB "Bitė Lietuva" had been arguing that a facsimile statement should not be recognised as proper legal evidence. However, the Supreme Administrative Court took a position that a facsimile has the same legal power as the traditional written document and that the opposite inference would contradict the official case-law prevailing in the Republic of Lithuania.

The Competition Council of Lithuania in its decision dated 5 May 2005 held that electronic correspondence, electronic mails are a proper mean of substantiation, i.e., electronic documents are equated to traditional written documents, which shows that public authorities are not reluctant to applying in the administrative field those general practices, which are developed in the field of commercial law.

E-signature issues

As far as the case-law in connection to e-signatures is concerned, it is worth mentioning the decision of the Supreme Court of 20 February 2002 in the landmark case *Židrūnas Šapalas v. AB "Lietuvos taupomasis bankas".* In this case the Supreme Court accorded to a payment card PIN code the qualities of an e-signature, thus equalising the former with the hand-made signature for the purposes of Lithuanian contract law. In its ruling the Supreme Court emphasised that the burden to ensure reliability and security of e-signature system, used for payment orders, lies with the bank, and not with the user of the payment instrument – payment card, etc. Summarising the above, one may infer that the Supreme Court tries to respond to the needs of the modern trade and commerce and is constantly relaxing those formal qualities which are inherent to traditional written documents.

B.1.2. Transposition of the eCommerce directive

The legal provisions of the eCommerce directive in Lithuania are still undergoing systematic transposition into Lithuanian national legal system (starting with amendments to the Civil Code and ending with passing new/amending the existing laws and secondary legislation). As noted above, the Lithuanian legislator has opted not to address individual barriers to the online contracting. The need for new-brand legal provisions, specifically adjusted to the development of information technologies, is being eliminated by the universal principles of technological neutrality and functional equivalency, which to a substantial extent are the product of legal doctrine and legal reasoning behind the prevailing case-law, coming into play each time the traditional legal rules are being invoked in the context of modern technologies. The general principles of functional equivalency residing within the above-quoted Article 1.73 of the Civil Code serve as an important tool of primary legislation, reasonably avoiding arbitrary differences between online and offline trade.

Ministry of Economy has approved the Regulations on Certain Legal Aspects of Information Society Services[983], in particular electronic commerce, in particular eCommerce, in the internal market, which are aimed at national implementation of eCommerce directive. Most of the legal provisions of the eCommerce directive were transposed into these regulations in a manner of almost precise translation into Lithuanian language.

It is worth mentioning, that as far as the exception within the meaning of Article 9 of the eCommerce directive is concerned, Lithuania has chosen to grant the said exclusion only to contracts, which under the Lithuanian law must be notarised and registered with he public register. However, under Lithuanian civil law, contracts of suretyship granted and on collateral securities furnished by persons acting for the personal purposes are not subject to the above-referred requirement of notarisation or legal registration. Notably, contracts requiring by law the involvement of courts, public authorities or professions exercising public authority also are not barred from conclusion by electronic means.

Since some of the EU member states (Spain, Belgium, Germany, France, etc.) have chosen to transpose eCommerce Directive into their national legal system by virtue of instrument of primary legislation (i.e., national statue, law) or any other legal act of equivalent importance, it was widely debated, whether the said Regulations, adopted by the Ministry of Economy (which is secondary legislation), are transposing the said eCommerce directive in an appropriate manner and form. This doubt is further reinforced by the fact that in principle the said Regulations were never applied the courts or public institutions, let alone the e-commerce players. Taking this controversy into account, on 21 November 2004 Government of the Republic of Lithuania has approved the Conception of the new Law on Services of the Information Society. On the basis of the said Conception already several draft laws were submitted for readings in the national Parliament[984] of Republic of Lithuania. On 21 April 2006 the Committee of the Information Society Development of the Parliament submitted the most recent a draft of the Law on Services of the Information Society (hereinafter – "the draft law") that is aimed for wider transposition of the requirements of the eCommerce directive into Lithuanian legislation. The draft law is limited only to services of the information society only. Noteworthy, the draft law does not include a provision, explicitly exempting certain types of contracts that could not be concluded electronically. However, when adopted by the Parliament, it is anticipated that the law will greatly facilitate conclusion of contracts through the electronic means.

B.2 Administrative documents

As far as electronic documents are concerned, the possibility for greater flexibility has been recognised and has been given a legal framework in the administrative field as well. The Government of Republic of Lithuania confirmed the eGovernment Concept (as approved by the Resolution of the Government of the Republic of Lithuania on Implementation plan of Electronic Government Concept No 307 as of 29 March 2006 (hereinafter – "the eGovernment Concept"). The Concept is aspired to be implemented in all public administration institutions (in the field of social security, tax and customs

[983] Order of the Minister of Economy on Regulations on Certain Legal Aspects of Information Society Services No. 119 as of 10 April 2002

[984] *Seimas*

administration, etc.) at all governmental and municipal levels. Implementation of eGovernment projects is accomplished in parallel to reforms of public administration.

According to the eGovernment Concept, since the year 2005 various state institutions started delivering on–line services, such as online income reporting, on-line tax consultations, social payments and compensations, corporate taxes, eServices on the payment of VAT for the electronic services (hereinafter – "eServices") of non-EU providers providing their services within the EU territory[985], etc. According to the Rules on Income Reporting by Electronic Means (as approved by the Order of the Director General of the Lithuanian Tax Inspectorate under the Government of the Republic of Lithuania No VA-133 as of 9 July 2004 (hereinafter - "the Rules on eReporting on Income"), for the purposes of online income reporting service a consumer has to conclude an electronic agreement (hereinafter – "the eAgreement") with the Lithuanian Tax Inspectorate under the Government of the Republic of Lithuania (hereinafter – "the Tax Inspectorate"). At the moment the said the eAgreement can be concluded only if a consumer is a user of electronic banking. The Rules on eReporting on Income explicitly envisage that the eAgreement bears the same legal force as paper agreement. The eReports are registered with the Data Base Register of the Tax Inspectorate automatically after they were submitted by a consumer and approved by the electronic reporting system.

As for the procedure of eServices on the payment of VAT by non-EU providers for their services within the EU territory, the special form of VAT reporting is to be filled in and sent by electronic mail to the Tax Inspectorate, where it is further processed.
The other electronic service that the Tax Inspectorate provides is on–line consultation, which is governed by the Rules on Preparation and Provision of Individual Consultations (as approved by the Order of the Director General of Lithuania Tax Inspection under the Government of the Republic of Lithuania No. V-119 as of 24 April 2003 (hereinafter referred as to "Rules on Individual Consultations"). Pursuant to the Rules on Individual Consultations, a person can submit queries related to taxation matters by electronic mail (hereinafter – "eQueries"). All eQueries are registered in the database of the Tax Inspectorate. The answers to the eQueries are sent to a consumer by electronic mail, unless a consumer expresses his/her will to receive it by ordinary mail.

Importantly, the Concept of eGovernment envisages that more on-line services should be implemented in the near future (i.e., e-health services, e-employment services (EURES), e-libraries, EUCARIS, etc.). While this reform is proceeding, some problems related to the status of electronic documents may still arise, but, undoubtedly, after the full implementation, the use of electronic documents should become easier in both public and private sector.

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[985] This procedure has been created for implementation of Art. 3 of the Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services. This special scheme is created also in connection to the Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 which lays down the rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange with each other any information that may help them to effect a correct assessment of VAT on supplies of goods and services. Such cooperation covers providing of information on the registration of eService providers, their VAT declarations, payments and money transfers to the competent authorities of other Member States.

C. Specific business processes

In this section of the study, the applicable Lithuanian legislation is analysed, major issues and drawbacks encountered in legal and administrative practice in the field are outlined. The validity and recognition of electronic counterparts of specific documents, along with an analysis explaining the (lack of) prevalence of any allowable electronic document types is ascertained.

The section below comprises the following parts: (i) credit arrangements, (ii) transportation and storage, (iii) cross border trade formalities and (iv) financial/fiscal management.

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

A bill of exchange, as a security, is regulated at the international level by the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, adopted in 1930. This law was incorporated into the Lithuanian Civil Code as well as into the Law on Order Bills (Draft Bills) and Single Bills (Sole Bills) No VIII-1087 of the Republic of Lithuania, as of 16 March 1999 after the restoration of Lithuania's accession to the Geneva Convention in 1992.

According to Lithuanian law, a bill of exchange is an unconditional order in writing addressed by one drawer to another by which the first person pledges himself or entrusts another person to pay directly or indirectly a certain sum of money to the person whose name is indorsed therein. The Civil Code explicitly prescribes a written form for a bill of exchange, which means that a bill of exchange may be either a paper document or electronic document made by employing telecommunication terminal equipment, provided that protection of the text is guaranteed and the signature can be identified (Article 1.73). However, as described above, pursuant to the Lithuanian law, written transactions may be concluded by signing an electronic document, which may be transmitted via means of telecommunication terminal equipment. Such electronic document authorised by the electronic signature is equated to the written or paper document.

The Lithuanian legal system, with respect to the regulation of e-market and e-commerce, has undergone a period of evolution and development. Current Lithuanian legislation provides for the possibility to conclude transactions solely by telecommunication means. The Regulations on Certain Legal Aspects of Information Society Services[986] implementing the eCommerce directive enacted the fundamental principles of *non-discrimination* and *technological neutrality* in respect of electronic documents, which means that commercial contracts, with the exceptions stipulated in the said Regulations, may be concluded via electronic means. The draft Law on the Information Society Services, recently introduced to the Lithuanian Parliament, was

[986] Order of the Minister of Economy on Regulations on Certain Legal Aspects of Information Society Services No. 119 as of 10 April 2002.

designed to remove remaining legal obstacles to the conclusion of contracts online and to further implement the said principles in conclusion of contracts and provision of services. Furthermore, the Law on Electronic Signatures states the validity of secure electronic signatures within the boundaries of its scope of application, including the proof of contracts, and sets the regulatory framework (establishes requirements for the certification centres, providing qualified certificates, *etc.*) for its implementation.

With consideration to the above and notwithstanding that a paper form of a bill of exchange is at present most commonly used in business transactions, Lithuanian law does not preclude the use of an electronic form of a bill of exchange, as it is a transaction made between the drawer of a bill of exchange and a person/subject to whom it is payable.

The Law on Order Bills (Draft Bills) and Single Bills (Sole Bills) provides for a complete list of mandatory requisites to be specified in the bill of exchange. One of such requisites is a signature of a drawer of a bill of exchange. The Law on Order Bills (Draft Bills) and Single Bills (Sole Bills) does not regulate the form of a signature. Therefore one may conclude that a bill of exchange made in electronic form, signed by the drawer, containing all mandatory requisites of a bill of exchange specified in the Law on Order Bills (Draft Bills) and Single Bills (Sole Bills) and transmitted via telecommunication means is to be valid and acceptable under the Lithuanian law.

However, solely the absence of legal obstacles is far from being sufficient for facilitation of online use of bills of exchange. As an electronic document may not bear the qualities of "original", and the Lithuanian law for bills of exchange is premised on the originality of the bill (Article 70), many practical considerations may arise when trying to avoid uncertainties, brought about the fact that infinite number of identical copies of electronic documents may be produced without any significant efforts.

C.1.2. Documentary credit

Rapidly expanding commercial relations between Lithuanian and foreign subjects result in an escalating role of international payments in Lithuania. Documentary credit is the most widely used form of international payments in international trade. Lithuanian commercial subjects conclude more and more international transactions, therefore, the use of documentary credit best suits the needs of today's business. A greater focus on electronic trade determines the need for an electronic substitute for paper credit.

Presently, as far as the Lithuanian legal system is concerned, a letter of credit is governed by Section 3 of Chapter XLVII of the Civil Code, as well as through general rules of contract law, legal doctrine and jurisprudence playing a gap-filling role. However, such regulation is very laconic and is limited to the basic provisions regarding a letter of credit. This regulation is based on the rationale that a letter of credit is quite comprehensively regulated on an international level, i.e., by virtue of the Uniform Customs and Practice for Documentary Credits (hereinafter – the "UCP"), prepared and adopted by the International Chamber of Commerce (hereinafter – the "ICC") and Uniform Rules for Bank-to-Bank reimbursements under Documentary Credits (hereinafter – the "URR"). Consequently, the Lithuanian legislator has taken the view that at a national level there is no need for a separately elaborated framework in respect of the letter of credit, particularly bearing in mind its efforts to avoid collisions between national and international regulation.

It is noteworthy that the Civil Code provisions regarding the letter of credit are in compliance with the present international practices in the field, although they avoid any explicit reference to the international customs or practice norms, such as the UCP, which would enable adherence to international banking and judicial practice as well as to international trade practice in the field of payments. Despite this, Part 1 of Article 1.10 of the Civil Code implies the application of the UCP or the URR in cases where this is provided by agreement between the parties.

Pursuant to the Civil Code, settlements by letters of credit are to be regulated by the laws and by the operational rules of the bank (Part 3 of Article 6.935). To date no such laws were adopted. Moreover, in Lithuania no legal framework for electronic documentary credit agreements has been established by the law. At the international level electronic letters of credit are regulated by the UCP Supplement for Electronic Presentation (eUCP), which was adopted by the ICC and entered into force on April 1st 2002. The eUCP was designated to apply in presentation of electronic records or a mix of electronic records and paper documents, whereas in issuance or advice of letters of credit electronically UCP provisions shall apply, since current market practice and the UCP have long allowed for letters of credit to be issued and advised electronically.

The eUCP is neither an international treaty nor a national law. It is a set of standard rules applied in practice upon mutual agreement of the parties, where so explicitly stipulated in the agreement. Lithuanian legislation does not expressly regulate the use of electronic documentary credits. However, it may be used as means of payment when mutually agreed by the parties in the agreement governing the relationship of the parties. The Lithuanian legal system allows the use of electronic documents in commercial activities, and such documents when used are considered to be valid. According to statistics, documentary credit in electronic form is often used in business transactions in Lithuania.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

Pursuant to Lithuanian law, a bill of lading (CMR consignment note, airway bill, *etc.*), is a document certifying the fact of conclusion of a contract of carriage and its holder's right to receive from the carrier the goods specified therein (the cargo) and the right to dispose of the goods (the cargo) received. According to the Road Transport Code, the irregularity of a bill of lading does not affect the validity of the contract of carriage.

The Civil Code establishes three forms of a bill of lading: (1) bearer, (2) order or (3) straight.

In Lithuania common provisions related to the bills of lading are established in the Civil Code. Provisions as to the form, accounting, ordering, issuance, use, destruction, *etc.* of the bills of lading are regulated by the Codes of particular type of transport, i.e. the Lithuanian Road Transport Code[987] (hereinafter – "the Road Transport Code"), the Lithuanian Railway Transport Code[988] (hereinafter – "the Railway Transport Code") and

[987] No I-1628 as of 19 November 1996

[988] No I-1361 as of 4 June 1996

the Lithuanian Code of Transport of Interior Waters[989] (hereinafter – "the Code of Transport of Interior Waters").

Before 2001 the standard form of bill of lading was established by the Tax Inspectorate and was regulated by a number of legal acts. Importantly, since 2001 such bill of lading form requirements have been annulled and there are no more strict requirements as to the form. This decision lifted the formal requisites in respect of bills of lading and contributed to procedural facilitation of transportation of cargo.

However, statutory requirements as to the content of bills of lading remained unchanged. The Road Transport Code, the Railway Transport Code and the Code of Transport of Interior Waters set forth a number of requirements (such as the date and place of filling of bill of lading; the name and address of the consignor and the consignee; the name and address of the carrier; the type and state registration number of the vehicle; the name and weight or quantity of the goods; the place and date of loading and unloading of the goods; carriage charges, *etc.*) that must be specified in the bill of lading.

The aforementioned legal acts do not expressly address the form of a bill of lading. Nevertheless, the wording of Article 30 of the Road Transport Code stipulates that *"the consignor shall hand the signed bill of lading to the carrier together with the goods"* or that *"one copy shall be handed to the consignor, the second shall accompany the goods and the third shall be retained by the carrier"*. The said provisions imply that a bill of lading must be issued as a paper document, largely due to the fact that the electronic document may not bear the qualities of "original" and/or "original counterpart", which are intrinsically born by paper equivalents.

C.2.2. Storage contracts

Storage contracts are regulated by the Chapter XLII of the Civil Code. Pursuant to the Civil Code there are several kinds of storage contracts (for instance, warehouse contract (Articles 6.851-6.862), deposit of articles in a hotel (Article 6.865), deposit of items with a bank (Article 6.866), deposit of items in left luggage offices of transport companies (Article 6.868), deposit of items in the cloak-room (Article 6.869), *etc.*).

Requirements as to the form of the contract on storage of property are set forth in Article 6.831 of the Civil Code. A contract of storage must be concluded in writing in two cases: (1) if it is concluded by natural persons and the value of the property exceeds LTL 5,000; and (2) if the contract of storage provides for the depositary's obligation to accept the item into possession for safekeeping at some point in the future, the contract must be in writing in all cases.

Pursuant to the Civil Code a contract of storage must be considered concluded in writing, if the delivery of the property to the depositary is certified by: (1) a receipt or any other document issued by the depositary; (2) a token (number) or any other sign.

Failure to abide by the ordinary written form shall not deprive the parties of the right to rely on the evidence presented by witnesses in case of a dispute regarding the identification of the item that has been delivered for safekeeping and that was subsequently restored.

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[989] No I-1534 as of 24 September 1996

Storage of goods as a separate type of contract of storage is regulated in Section 2 of Chapter XLII of the Civil Code. On the basis of a contract on storage of goods (or warehouse contract) the warehouse (the warehouse-keeper) undertakes to safeguard for consideration the goods deposited with it by the owner/depositor of the goods and to restore them to the specified person after safekeeping.

According to the Civil Code the warehouse contract must be executed by issuing a warehouse certificate. Conclusion of the warehouse contract may be certified by one of the following documents: (1) double warehouse certificate; (2) ordinary warehouse certificate; or (3) warehouse receipt. A double warehouse certificate and an ordinary warehouse certificate are securities. A double warehouse certificate is a document of title granting the right to dispose of the goods. The Civil Code provides for the mandatory requisites that must be included in the double warehouse certificate. In case at least one of the requisite items is missing, a document is not to be deemed a double warehouse certificate.

The requirement of a written document is an ever-green leitmotif of this study. It is important to note that the law does not require a *paper* document for a storage contract to be legally binding, so that there is no reason to deny legal validity to storage contracts concluded electronically. For the purposes of evidence, the principles of contract law described above can be applied. As indicated above, written proof is now understood to include both paper and electronic records.

Therefore, generally, as such, there is no legal barrier for the use of electronic contracts in the conclusion of storage agreements.

However, practical considerations related to intrinsic qualities of the electronic document (i.e., lack of concept of originality, etc.) still may pose certain barriers for the use of electronic storage contracts.

An electronic customs declarations system in Lithuania was launched in 2003, when the Lithuanian Customs Department under the Ministry of Finance, in cooperation with the Transekspeditsiya freight forwarding company, launched the installation of an automated customs declaration system (the Automated System for Customs Data (ASYCUDA), which was expected to facilitate customs operations and to reinforce the prevention of smuggling. The ASYCUDA enables Lithuanian companies to submit declarations to the Customs Department electronically. As a result**,** electronic declaration systems operate in the largest territorial customs of Lithuania. It makes it possible for traders to deliver declarations via the Internet by concluding a contract with territorial customs.

ASYCUDA automatically directs goods either to a green channel, where declarations and goods are not checked, a yellow channel, where only documents are checked, or a red channel, where customs will conduct an inspection of shipped goods. The channelling by ASYCUDA reflects the assessments of possible risks posed by various carriers, goods, countries of origin, etc. The customs' violation prevention teams carry out those risk assessments and enter them into the system prior to the channelling.[990]

In Lithuania, the legal framework for electronic customs declarations system is established by the Community Customs Code, which was transposed by the Law on Customs of the Republic of Lithuania (No IX-2183, as of 27 April 2004) (hereinafter –

[990] Source: Lithuania Profile / Export Control Developments in Lithuania. July 2003: LITHUANIA INSTALLS AUTOMATED CUSTOMS DECLARATION SYSTEM. NTI website. http://www.nti.org/e_research/profiles/Lithuania/index_5181.html.

"the Law on Customs") and a number of implementing legal acts approved by the Head of the Lithuanian Customs Department under the Ministry of Finance.

According to Article 56 of the Law on Customs, customs declarations may be filed by means of automatic data processing only upon the consent of the authorized customs institution and in the manner established by the Head of the Lithuanian Customs Department in accordance with the legal acts of the European Communities regulating customs sector.

Electronic submission of customs declarations is regulated by the Regulations on Submission, Acceptance and Inspection of the Customs Declarations Submitted by Means of Automatic Data Processing Systems, approved by the order No 1B-583 of the Head of Lithuanian Customs Department under the Ministry of Finance, as of 30 June 2003. According to the said Regulations, customs declarations may be submitted electronically by means of ASYCUDA system only by Lithuanian subjects, provided that they have appropriate consent of the regional customs department and have concluded agreements on submission, acceptance and inspection of customs declarations, submitted by the technical means of the ASYCUDA data processing system. The standard form of the aforementioned agreement was approved by the order No 1B-585 of the Head of the Lithuanian Customs Department, as of 30 June 2003.

Requirements related to the filing of import and export documents, of General Administrative Documents and other documents that must be submitted together with the customs declarations are set out by the Instruction on Input of General Administrative Document Data into the ASYCUDA System, approved by the order No 728 of the Head of the Lithuanian Customs Department, adopted on 22 July 2004.

Lithuania has joined the Convention on Common Transit Procedure and control performance of customs transit procedure, which is solely based on electronic messages. The New Computerised Transit System (NCTS) has been applied by the Lithuanian Customs as from 1 May 2004 for the control of carriage of goods by transit across the EU member states' territory.

Importantly, this should be considered as an initial stage of functioning of automated customs declaration system in Lithuania. Pursuant to Paragraph 2.6 of the Scheme of Measures Implementing the Concept of E-Government adopted by the Resolution No 1468 of the Government of the Republic of Lithuania, as of 25 November 2003 (as amended on 29 March 2006 by the Resolution of the Government No 307), the goal to improve the system of electronic submission of declarations to the Customs Department by the 4th quarter of 2009 is articulated. Moreover, it is expected that by the 4th quarter of 2012 electronic declarations will be submitted following a "one stop shop" system, which will be connected to the information systems of all European Union member states customs, irrespective in which member state goods will be submitted for the customs proceedings.

In addition, by the 3rd quarter of 2008 it is expected that freight expedition companies will be able to submit electronically declarations of goods carried through the Klaipeda Sea Port (Paragraph 2.6.6 of the Scheme).

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

In Lithuania the legal framework for electronic invoicing in the field of VAT is set by the Law on Value Added Tax (No IX-751 as of 5 March 2002) and the Regulations on the Use of Value Added Tax Invoices Issued and/or Received by the Electronic Means, approved by the Order No VA-82 of the Head of the State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania, as of 30 April 2004. The aforementioned legal acts transposed the requirements of Council Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax (the "eInvoicing Directive") into the national legislation.

The Law on VAT Tax allows invoicing by electronic means upon prior consent of the purchaser, provided that the conditions established by the Directive are secured, i.e. that the authenticity of the origin and integrity of the contents of such invoices are guaranteed. Importantly, until 31 December 2005, the issuing of VAT invoices by electronic means by taxable persons supplying goods or services within the territory of Lithuania were subject to prior notification of the local tax administrator in accordance with the procedure determined by the central tax administrator.

According to Lithuanian law, electronic VAT invoices are subject to the following requirements: (1) they must be issued and/or accepted by the means of electronic signature within the meaning of the Law on electronic Signature; or (2) by means of special electronic data interchange (EDI) software, provided that its EDI specifications comply with the UN/EDIFACT (ISO 9735) standards and requirements spelled out by Council Directive 2001/115/EC; or software of a commercial bank institution registered in the Republic of Lithuania or of another undertaking, institution or organization, provided that the EDI specifications of such software comply with the UN/EDIFACT (ISO 9735) standards and requirements of the Council Directive 2001/115/EC.

It is noteworthy that Lithuania bypassed the provisions of the Directive providing for an option for the Member States to strictly require for the advanced electronic signature to be based on a qualified certificate and created by a secure-signature-creation device in order to ensure the authenticity of the origin and integrity of the contents of invoice.

Moreover, Lithuania did not adopt the requirement that an additional summary document on paper is necessary, where the authenticity of the origin and integrity of the contents of invoice is secured by means of EDI. According to the legislation in force, electronic VAT invoices need not be combined with any paper document.

With respect to the storage of e-invoices, they must be stored in the original form in which they were issued and sent, whether paper or electronic. Where invoices are stored by electronic means, authenticity of the origin, integrity of the content and readability of e-invoices must be guaranteed throughout the whole storage period. Furthermore, full on-line access to the data contained therein, i.e. electronic access, possibility to read them or use them in any other way pursuant to the Law on Tax Administration of the Republic of Lithuania, must be guaranteed.

It must be noted that Lithuania has exercised an option to require that VAT invoices must be stored within the territory of the country unless they are stored in the electronic form. Pursuant to the Lithuanian legislation, e-invoices either may be stored (1) within the territory of Lithuania, or (2) abroad. Where the documents are stored outside the

territory of Lithuania, the local tax administrator must be notified about the storage place of the documents Part 7, Article 78 of the Law on Value Added Tax).

The period of storage of e-invoices has been set at ten years from their issuance (Part 7, Article 78 of the Law on Value Added Tax).

Lithuanian law does not establish any requirements as to the language or currency of the e-invoices. The amounts on the invoice may be expressed in any currency, provided that the amount of VAT to be paid is expressed in the national currency (Paragraph 12, Part 1, Article 80 of the Law on Value Added Tax).

C.4.2. Electronic accounting

Fundamental requirements as to accounting of assets, equity, liabilities, business transactions and events of legal persons were codified by virtue of the Law on Accountancy, which implements the requirements set by the Fourth Council Directive of 25 July 1978 based on article 54 (3) (g) of the treaty on the annual accounts of certain types of companies (78/660/EEC), Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards and Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council.

According to the Law on Accountancy, accounting documents may be issued and kept either in hard or soft copy, and must contain properties that enable to identify the business transaction or event. The Law does not regulate the form, in which accounting of the entities must be conducted, still it must be arranged in such a way that the accounting information should be: (1) relevant, objective and comparable; (2) submitted on time; (3) comprehensive and useful for internal and external users of information.

The Law on Accountancy establishes that the language of the accounting documents and accounting registers must be Lithuanian and, where appropriate, Lithuanian and a foreign language. Received documents, which are issued in a foreign language, must, where appropriate, be translated into the Lithuanian language (Part 4 of Article 6).

The procedure for storing accounting documents, registers and financial statements must be established by the head of the individual legal entity. Accounting documents and registers must be archived, ensuring their safety, until the approval of financial statements. After the approval of financial statements, accounting documents and registers must be stored under the procedure established by the head of the undertaking, observing the time limits as set by the Government in respect of document storage.

The Law does not explicitly prescribe any form for accounting documents and registers in which they must be stored. An electronic form is allowed if it is approved by the head of the economic entity. However, the Law on Accountancy requires that accounting registers may be filled out by electronic means and accounting data may be stored in computer files only provided that hard copies of the registers are available. Thus, under the Lithuanian legislation, it is not possible to solely maintain an electronic accountancy system.

The Law on Financial Statements of Entities[991] establishes a requirement for limited liability profit-seeking legal entities, which are registered in the Republic of Lithuania, to draw up annual financial statements at the end of each financial year (Part 1, Article 15). General partnerships, limited partnerships or individual enterprises are not subject to an obligation to draw up financial statements and may draw up the financial statements at their own discretion.

The approved annual financial statements of entities together with an auditor's report (in cases when audit must be carried out according to the law) must be published by depositing them with the Register of Legal Entities of the Republic of Lithuania in accordance with the procedure established by the law. Deposit of the annual financial statements and accompanying documents may be carried out electronically under the procedure provided for in the Regulations on Submission of Financial Statements and Other Documents by Electronic Means, approved by the order No v-35 of the Head of the State Enterprise Centre of Registers, adopted on 22 February 2006.

The System of Electronic Services of State Enterprise Centre of Registers (hereinafter – "the "CEPS") was launched in the beginning of 2006 under the efforts of Ministry of Justice of the Republic of Lithuania. According to the Regulations on Submission of Financial Statements and Other Documents by Electronic Means, financial statements may be deposited electronically provided that a legal person has concluded an agreement on provision of data by electronic means with the State Enterprise Centre of Registers and is a registered user of the CEPS (Paragraph 4). Financial statements and accompanying documents may be deposited electronically only by an authorised representative of a legal entity, whose data are incorporated into the bank of authorizations kept by the Centre of Registers. The standard form of financial statement documents was approved by the Minister of Justice and may be downloaded at https://www.registrucentras.lt/ceps.

D. General assessment

D.1 Characteristics of Lithuanian eCommerce Law

- As noted above, the eCommerce framework in Lithuania is based upon general norms of private law.
- It shall be noted that general rules of the Civil Code apply with regard to eCommerce relationships. They are rather flexible, relying on the principle of freedom of contract and do not restrict the form of expression of will of the parties, as well as acknowledging virtually all means and methods of conclusion of transactions, as prevailing on the market. Therefore, the parties are accorded a fair amount of freedom to agree on the form they are going to use to elaborate and document their contractual relationships. This naturally implies that business partners may quite freely choose electronic methods, electronic means and etc., as best suited for their business relations.

[991] No IX-575 of the Republic of Lithuania, as of 6 November 2001 (as amended on 18 December 2003, by the Law No IX-1915

- In this respect the Civil Code implements the principle of technological neutrality and functional equivalency, as spelled out by the UNCITRAL Model Law on E-commerce of 1996, and attaches to electronic documents and electronic contracts a legal value and legal effect which is identical to paper based written documents.
- The basic principle is that electronic documents may not be discriminated against paper based written documents exercising the same or equivalent functions solely on the basis of their electronic format.
- In addition, the draft Law on the Services on Information Society is currently undergoing readings in the national Parliament. This law will implement the eCommerce directive and will be designed to facilitate the movement of information society services rendered by modern technologies and eBusiness in Lithuania. Also, it will allow to more effectively provide information society services from other EU member states, and allow Lithuanian undertakings to render these services in other states more easily. It is noteworthy that at this moment information society services fall under the scope of Regulations on Certain Legal Aspects of Information Society Services[992]. However, many concerns may be raised as to whether this legal act is sufficient for proper transposition of the eCommerce directive into the national system. Furthermore, mere transposition has proved to be a rather inefficient and ambiguous way of developing the legal framework of eCommerce relationships in Lithuania.
- However, from a practical perspective, evidentiary issues and admissibility of credible documentation before the courts of law is often a much more acute concern, realised by the parties to a contractual relationship.
- At least formally, the Code of Civil Procedure opens the door for the submission of electronic documents to the court and for their recognition as a proper means of evidence. This ensures both the equation of the electronic environment to the traditional one and the prevalence of legal certainty in the relations based on the information technologies. However, case-law (mostly based on the Supreme Court decisions) serves as an important tool in acknowledging electronic evidence as admissible means of evidence and interpreting various aspects of eCommerce.

D.2 Main legal barriers to eBusiness

Solutions of the Lithuanian legislator with regard to certain aspects of eCommerce are not always ideally chosen and, instead of ensuring legal certainty for undertakings, they could have the effect of hindering eCommerce relationships. A tight regulation method is not suitable in any cases for relationships based on private initiative, commercial activities and competition. The principle of self-regulation which is growing in importance in Lithuania is the principal engine of effective and competitive eBusiness.

- Firstly, it should be noted that the eCommerce directive has not been fully implemented yet. Its transposition into the national system was limited to the adoption of the Order of the Minister of Economy. Even disregarding the formal

[992] Order of the Minister of Economy on Regulations on Certain Legal Aspects of Information Society Services No. 119 as of 10 April 2002.

drawbacks of the regulation, which were already noted above, this Order contains severe defects as far as content is concerned.

Moreover, it does not establish any rules as to the moment when electronic contracts shall be deemed to be concluded, nor does it provide for the possibility to settle disputes between undertakings by electronic means. The aforementioned Order is not in compliance with the provisions of the Civil Code which prohibit the application of administrative regulation methods between undertakings. However, the adoption of the new Law on Information Society Services should result in a positive outcome in respect to these issues and promote eBusiness.

Notwithstanding that, one may still observe that the Lithuanian legislator, choosing a fairly open approach to the transposition of the eCommerce directive, and acknowledging the principle that electronic contracting should be a possibility and thus stressing the importance of functional equivalence, does not seem to offer any more certain guidelines as to how this should be achieved by the parties, seeking to avail themselves of eBusiness opportunities. In that respect, it will be businesses themselves who bear the risk that they will never be sure that a court will find their solutions meeting the legal standards.

- Secondly, it should be mentioned that the eSignature still has not reached all of its potentialities in Lithuania. However, this is not due to legislation obstacles, but mainly due to the lack of infrastructure which has not been brought into being yet.
- Thirdly, administrative barriers still pose a considerable impediment to eCommerce, although during the past few years significant efforts towards removal of formal barriers may be observed. Nevertheless, at least until the adoption of the Law on Information Society Services, several state authorities play a role in promotion of information society services, which lie at the heart of eCommerce (i.e., Ministry of Inferior, Committee of Information Society Development, National Communications Regulatory Authority). The Ministry of Interior is appointed as a national contact point established in line with Article 19 (2) and 19 (4) of the e-commerce directive, although a Committee of Information Society Development performs the national contact functions within the Expert Group on electronic commerce, which was established on 24 October 2005 by virtue of Commission Decision 2005/752/EC. After the adoption of the new law, the institutional framework and currently dispersed functions will be more converged into one national authority – the Committee of Information Society Development.
- Finally, the lack of standards and use of electronic means in practice, as well as the distrust which is still prevailing slows down the development of eBusiness relationships. Thus, from a practical viewpoint one must agree that many of the more serious eCommerce solutions are likely to require the intervention of trusted third parties (TTP). Lithuanian law contains no any rules as to the obligations and responsibilities of such TTPs, and this also may be regarded as an impeding legal factor.

D.3 Main legal enablers to eBusiness

- As noted above, Lithuanian eCommerce legislation tries to provide undertakings with flexibility by allowing them to choose the form and methods in which they want to develop their business relationships. The legal framework is mainly based on the European directives and is designed to liberalise eCommerce in Lithuania.
- An important step towards more effective legal framework for eCommerce in Lithuania will be the final adoption of the Law on Information Society services, which will in its entirety replace the currently existing highly patch-worked and inefficient secondary legislation in the field. It is foreseen that the adoption of this Law will accelerate the development of information society services and eBusiness.
- Although the Lithuanian legal framework still imposes certain legal barriers with regard to the development of eCommerce, at the same time it aims to enable undertakings to benefit from its flexibility, at least in those areas which avoid interaction with public or administrative procedures.

Luxembourg National Profile

A. General legal profile

The Grand-Duchy of Luxembourg is a parliamentary democracy in the form of a constitutional monarchy. The Grand-Duchy consists of 118 communes, a legal entity that manages its own assets and raises taxes through local representatives.

Disputes regarding commercial relations are in most cases dealt in last resort with by the Justice of Peace[993] for matters with a financial value of less or equal than EUR 1,250 and on appeal for matters with a financial value of less than EUR 10,000[994]; or by the County Courts[995] on matters of a higher value[996]. Appeals against the decisions of the Justice of the Peace can be made with the County Courts if the financial value of the dispute is EUR 1,250 or higher. Decisions by the County Courts may be appealed with the Superior Court of Justice[997]. Decisions made on last resort may be examined on points of law by the Superior Court of Justice when sitting as Supreme Court[998].

B. eCommerce regulations

B.1 eCommerce contract law

B.1.1. General principles

Contract law in Luxembourg is based on the principle of autonomy of will and does not require from contractual parties to take into consideration specific formalities regarding the validity of entering into a contract. It is sufficient that consensus exists among parties regarding the elements considered as essential to this consensus. This principle of freedom of autonomy applies equally to (traditional) written as well as electronic documents. Although a written form is not a prerequisite for the validity of an agreement (to the exception of authentic acts), it becomes essential when establishing evidence both in civil and in commercial cases where the proof of consent often depends on the proof of existence of a written expression of that consent.

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[993] *Justice de Paix*

[994] Article 2 of the *Nouveau code de procedure civile* as modified by the law of 25 June 2004 published on *Mémorial A* n° 122, p. 1816

[995] *Tribunal d'Arrondissement*

[996] Article 22 of the *Nouveau code de procedure civile* as modified by the law of 25 June 2004 published on *Mémorial A* n° 122, p. 1816

[997] *Cour Supérieure de Justice*

[998] *Cour de Cassation* ; Article 26 of the *Nouveau code de procedure civile*

At this point, a distinction should be made between commercial contracts and civil contracts. The rules governing an agreement between a professional and a non professional (B2C) are generally less flexible, than the rules governing a relationship in-between professionals (B2B).

Regarding the formation of the contract, the Luxembourg Civil Code provides for the basic rules to be observed by any contract, such as the consent of the parties, capacity of contracting, object of contract and the consideration.

According to the modified Law of 14 August, 2000 on electronic commerce, transposing the EC directive 1999/93 on electronic signature and the directive 91/7/CEE on distant sale of goods and services, (hereinafter "the Law")[999] there is no legal definition of "electronic documents" in Luxembourg. Nevertheless, the definition of "durable medium"[1000] where contract concluded through electronic means rely on, gives certain indications on such definition. According to article 49 of the Law that reproduces the Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC[1001] a "durable medium" means "*any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.*" One may imagine that the most "durable support" used in such cases will be the electronic mail.[1002]

Another indication in approaching a possible definition of the "electronic document" has to be considered, in relation to the notion of "electronic evidence". In order for the electronic document to be brought before a court, it is necessary to prove its origin. The key element to prove the origin of a document is indeed its signature. Electronic evidence is then to be considered with regard to its (electronic) signature. The definition of electronic evidence is thus, very closely linked, however clearly distinct, to the definition of the electronic signature: A system designed to prove the authenticity of a document sent by e-mail[1003], in the context of the Law. In order to avoid confusion and to provide unambiguous answers we will consider questions on "electronic evidence" as regarding the "electronic signature".

According to 1322-1 of the Civil Code (article 6 of the Law), an electronic signature consists of a set of data, connected inextricably to the deed, that guarantees the integrity, identifies the author and manifests his/her adherence to the content of that deed.

According to the same article of the Civil Code (article 6 of the Law), the signature is necessary for the completion of private agreements. Therefore, an unsigned document would not meet this criterion and may not be considered as perfect.

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[999] Law of August 14th, 2000 on electronic commerce, *Mémorial A*, n°96 on 8 September 2000, p.2176.

[1000] Article 49 of the Law

[1001] Official Journal L 271 , 09/10/2002 P. 0016 - 0024

[1002] Stéphan Le Gouëff, *Internet et e-Commerce en droit Luxembourgeois*, édition Portalis, 2003, p.79

[1003] Article 6 of the Law

Rather than identifying certain technologies which would be recognised as "eSignatures", the Law gives a functional definition to the term "electronic signature". However, it introduces uncertainty by not providing for any mechanism to determine what type of electronic signature should fulfil the legal requirements, at any given time, to be recognised as a valid electronic signature. It will therefore be up to the parties to a transaction (and eventually the courts) to determine whether any given digital signature meets the test set forth in the law and can be recognised as an electronic signature.[1004]

While all electronic signatures that meet the requirements of the law can be given legal recognition under the Law, only an electronic signature relying on a qualified certificate will be granted automatic legal recognition, whether or not such certificate is issued by an approved or non-approved certification services provider. The validity of electronic signatures and thus of electronic document in contract law is recognized by the Law. Article 1322-2 of the Civil Code (article 6 of the Law), states that electronic evidence is equivalent to handwritten evidence regarding private agreements (*sous seing privé*). The Law does not make any such statement regarding authentic acts (*acte authentique*). Therefore, Luxembourg does not recognize a legal value to the electronic authentic act[1005].

Due to the principle of consensual entering into contracts and the nature of evidence admissibility procedures, electronic documents will nevertheless be considered even if no specific legal provisions regarding its validity apply. However, in the absence of specific mechanism for ensuring the validity of such documents, the issues remain open and the admissibility is to be judged on a case-by-case basis.

Nevertheless, not all agreements can be entered electronically. According to the Law, electronic evidence is the equivalent to handwritten evidence regarding private agreements. Therefore, contracts that involve an authentic act still have to be drafted on paper. According to article 50 of the Law, contracts that need to be authenticated by a notary public are excluded from the scope of its electronic signature provisions (such as testaments, articles of association etc …).

The consent of both parties being a prerequisite condition for entering into any contract, including contracts entered through electronic means, article 1109 of the Luxembourg Civil code states that "there is no valid consent if it is given by mistake or if it has been obtained through violence or manipulation"[1006]. This principle is obviously also applicable to electronic contracts: if this prerequisite has not been satisfied because one of the parties refuses to accept an electronic agreement, then, that contract may be seen as invalid. Furthermore paragraph 3 of article 18 of the Law states that "No one may be required to sign electronically".

Regarding electronic notifications, Luxembourg has no specific regulations. However, according to article 1322-2 of the Civil code (article 7 of the Law), an electronic private deed is considered as being the original when it presents reliable guarantees regarding the safeguarding of its integrity from the moment when it was first created in a definitive form. This provision could also be applied to electronic notifications, which could thus be accepted if the conditions of the article were to be met.

[1004] Stéphan Le Gouëff, THE NEW LUXEMBOURG E-COMMERCE BILL: GETTING IT RIGHT, http://www.vocats.com/

[1005] Andre Prüm, Y. Poulet, E. Montero, *Le commerce électronique en droit luxembourgeois*, ed. Larcier 2005, par. 151

[1006] Civil Code article 1109

An electronic notification would also have to be considered with regard to the purpose of presenting evidence in a litigation context. An electronic signature is essential when assessing an electronic document. According to paragraph 2 of article 18 of the Law, an electronic signature may not be rejected by a judge solely on grounds that it has been presented under an electronic form, that it has not been secured by a qualified certificate, or that it has not been secured by a qualified certificate delivered by an accredited certification provider, or that it has not been created by a secured electronic signature creation device.

Nevertheless, the certification is not an actual requisite of the Law for the validity of the document it is recommended that the electronic document meet guarantees regarding timestamping certification.

A consensus between the parties to accept electronic notices as valid is not a necessary prerequisite to the admissibility of such notices as electronic evidence. However one may want to evaluate how this admissibility might be affected by the above-mentioned paragraph 3 of article 18 of the Law.

In completing this analysis, the parties remain free to choose their instruments of expression of consent. The text of the Law avoids interferences with the general principle of autonomy of will expressed under article 1134 of the Luxembourg Civil Code. Thus, a framework agreement that states that future contracts among parties of that agreement shall be made in electronic form should be considered as valid in Luxembourg.

Luxembourg has enacted a regime for electronic registered mail, implemented under article 34 of the Law. According to this article, a message signed electronically using an electronic certificate, where the hour and the date of the sending and, where applicable, of the receiving, are certified by a provider in compliance with the conditions determined by a grand-ducal regulation, constitute a registered notification.

The Law does not provide for any further details with regard to electronic registered mails. Therefore any form of mail that may be considered as fulfilling the conditions of article 34 of the Law may be seen as valid. One of the key-conditions under this article is timestamping. Timestamping certification is achieved either through certifying the time of creation of the message, or through certifying the time of sending of the e-mail.

The Trusted Third Parties (TTP) involved in this process may be public or private bodies, regardless of whether or not they are accredited. However a voluntary accreditation authority (*Office Luxembourgeois d'Accréditation et de Surveillance*) has been put in place in order to offer sufficient guarantees to the end users.

The Law does not insist on the acceptance by any party as a prerequisite to the validity of sending registered mail.

Regarding electronic archiving, there is currently no generic (i.e. not limited to a specific sector, particularly invoicing or accounting) framework for the electronic archiving of electronic or paper documents in Luxembourg. However, according to article 15 of the Law, certain commercial documents (with the exception of the annual balance sheet) may be archived as (electronic) copies that will be considered having the same value as the original, in an accounting context. Also, according to paragraph 1 of article 51 of the Law contracts should contain an indication of whether there will be an archiving of the contract once the contract has been entered into, and of how the archived copy can be accessed.

It should be noted that legal practice in this regard is quite limited in Luxembourg, and that no jurisprudence is currently available regarding the principles outlined above.

B.1.2. Transposition of the eCommerce directive

The directive 2000/31/CE of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter the "eCommerce directive") has been fully transposed under Luxembourg law.

The eCommerce directive has been transposed into national legislation in Luxembourg through the Law (as modified by the law of December 19th, 2003 on agreement conditions of accredited organisation to initiate constraint actions on protection of collective interest of consumers[1007] and the law of July 5th, 2004 modifying the Law[1008]).

According to the Law a regulation of June 1st, on electronic signature, payment and creation of an "electronic commerce committee" has been put in place.

Article 2 (1) of the Law excludes from its scope, tax matters (with the exceptions of communications to public administrations in fiscal matters as regulated in article 16 of the Law), representation of a client and the defence of his/her interests before the courts.

Also, with regard to contract law, the following types of contracts are excluded from the scope of the Law: Contracts regarding real estate except leasing, contracts requiring the intervention of courts, public authorities or professions representing public authorities (most notably public notaries).

In compliance with the principles of the eSignatures directive, the Law makes a distinction between signatures that offer certification guarantees with regard to their origin (i.e. advanced and qualified signatures) and signatures that do not offer any certification guarantees (generic signatures).

Signatures that fulfil certain conditions as mentioned hereinafter will be equivalent to handwritten signatures. Signatures that do not fulfil these conditions will be also be considered, but without being assimilated to handwritten signatures.

In order to be regarded as the equivalent of handwritten signatures, article 18 of the Law requires three condition to be fulfilled: 1) the electronic signature must be created through a secured signature creation device, 2) the secured device must be kept under the exclusive control of the electronic signing party and 3) the electronic signature must be secured by a qualified certificate. This notion thus corresponds to what is commonly known as a qualified signature.

B.2 Administrative documents

There is no specific regulation at the time being in Luxembourg regarding the use of electronic documents in relations with public administration to the exception of a few scarce provisions on matters such as VAT and customs as mentioned hereinafter.

On tax issues, electronic declarations are possible for periodic VAT returns and European sales lists, upon specific agreement of the tax authorities. A service of online VAT declaration is available at https://saturn.etat.lu/etva

[1007] Mémorial A – 189, 31 December 2003, p.3990

[1008] Mémorial A – 125, 16 July 2004, p.1848

Article 16 of the Law states that "*any person subject to the obligation to deliver or communicate documents and data upon request of an agent of a tax administration must, where this documents exist only under an electronic form, deliver or communicate, upon request of the agent of a tax administration, on readable and understandable form, certified in conformity with the original, on paper or by exception, following all technical instructions that the tax administration determines*".

Furthermore, the law of 1 July 2003[1009] completing the law of 12 February 1979 on VAT has added in its article 70: "*When books, documents and, in general, all data that must be communicated upon request of the administration, exist only on electronic format, they must be communicated upon request of the administration in a readable and directly understandable form, certified in conformity with the original, on paper or by exception, following all technical instructions that the tax administration determines*".

Doctrinal opinion holds that this last provision should have replaced the aforementioned article 16 of the Law[1010].

Furthermore article 2 of the Law explicitly excludes the provisions of the Law (with the exception of the article 16 hereinabove) from being applicable on tax matters.

Generally speaking, the Luxembourg eGovernment project (see also http://www.eluxembourg.lu) is still at an early development stage.

C. Specific business processes

C.1 Credit arrangements: Bills of exchange

Financial operations that may be achieved thought means of electronic payment are limited to those enumerated on article 64 of the Law: Cash withdrawal or deposit, funds transfer, distant access to the account debiting and crediting of an electronic payment rechargeable instrument.

Any other means that are not part of this list do not fall under the provisions of the Law. This should not be interpreted as other electronic credit arrangements do not exist, but only that their existence and validity is subject to evidence issues as explained hereinabove.

C.2 Transportation of goods: Bills of Lading and storage agreements

There is no specific regulation in Luxembourg regarding electronic documents on transportation of goods. Thus, the general principles outlined above apply.

[1009] Mémorial A – 88, 1 July 2003, p.1634

[1010] Andre Prüm, Y. Poulet, E. Montero, *Le commerce électronique en droit luxembourgeois*, ed. Larcier 2005, par. 240

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

The eInvoicing directive was transposed in Luxembourg by the law of 1 July 2003 modifying and completing the amended Law dated 12 February 1979 concerning the value added tax[1011].

Following the enactment of this law, the legal requirements for eInvoices under Luxembourg law are virtually identical to the criteria proposed under the directive: the authenticity of the origin and integrity of the contents must be guaranteed (art. 62-1 of the VAT Law):

- by means of an advanced electronic signature within the meaning of Article 2(2) of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.
- or by means of electronic data interchange (EDI) as defined in Article 2 of Commission Recommendation 1994/820/EC of 19 October 1994 relating to the legal aspects of electronic data interchange.

The transposition law in Luxembourg did not introduce the third option allowed under the directive, i.e. to accept any other technological means if they achieve the security goals inherent to electronic invoices.

Regarding the electronic storage of invoices, the transposition law copies the general criteria from the directive (guarantee of the invoice's integrity and authenticity, and accessibility throughout the storage period), but provides no further guidance on how these goals should be met.

In fact, our national legislation does not require that invoices on paper are to be signed by a handwritten signature. The notion of advanced electronic signature in this case refers to a technical rather than a legal concept.

Electronic VAT returns are filed with the *Administration de l'Enregistrement et des Domaines*, through the e-VAT application.

Invoices are to be stored for a period of ten years (art. 69 of the VAT Law). Storage outside of Luxembourg is allowed after notification of the VAT authorities, and provided that on-line access of the stored invoices is possible at all times. Storage of invoices outside of the European Union is only allowed if there is a mutual cooperation treaty in place with the country involved.

C.4.2. Electronic accounting

According to article 16 of the Luxembourg Commercial Code (article 15 of the Law) certain documents (with the exception of the annual balance sheet) may be kept as (electronic) copies that will be considered until otherwise evidenced, as having the same

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[1011] *Loi du 1er juillet 2003 modifiant et complétant la loi modifiée du 12 février 1979 concernant la taxe sur la valeur ajoutée ; see* http://www.legilux.public.lu/leg/search/resultHighlight/index.php?linkId=3&SID=d1edb958155844d25846f0960a503246

value as the originals, when they have been achieved under the framework of a method of management regularly followed and corresponds to the conditions set by a Grand-ducal regulation[1012].

Luxembourg does not require the periodic deposit of a company's annual account with the tax authorities.

D. General assessment

D.1 Characteristics of Luxembourg eCommerce Law

- The entry of the Grand Duchy of Luxembourg into the information society was one of the main priorities of the Luxembourg Government. The objectives were to make Luxembourg a frontrunner in eBusiness and to create a secure legal framework in order to generate confidence in cyber-trade and, as a result, develop eCommerce. That is why Luxembourg was one of the first States to transpose the eCommerce Directive through the Law.

D.2 Main legal barriers to eBusiness

- One of the main characteristics of the Law is to grant legal recognition to eSignatures. The Law provides a functional and a technically neutral definition to eSignatures. An e-signature should identify the holder thereof and warrant the integrity (i.e. the non alteration) of the document to which it is attached. In addition, it should be created by a device that the signatory can keep under its exclusive control. Adopting such a definition is good because it prevents a technology-specific definition which could be outdated as soon as the technology changes. However, the downside is that the definition leaves much room for interpretation.
- Under the Law, automatic recognition of the e-signature is only granted if it relies upon a qualified certificate ("*certificate qualifié*") issued by a certification service provider (CSP). Without this, the recognition is always subject to debate.

D.3 Main legal enablers to eBusiness

- Another major achievement of the Law is to give to a digital document bearing an electronic signature the same legal value as an original (paper) document bearing a manuscript signature, provided that the document presents satisfactory guarantees regarding the maintenance of its integrity since the date of its creation. Cryptography can present satisfactory warranties in this regard, however businesses regard it as a rather complicated system.
- The establishment of an e-business consumer protection framework is another important point in the Law. The objective is to achieve more transparency

[1012] Grand-ducal regulation of 22 December 1986 (*Memorial* A - 108 of 30 December 1986, p. 2748) that remains into force according to article 13 of the Law.

regarding commercial communications and transactions by requiring sellers/suppliers to provide certain information on themselves and their products or services, and also, to grant consumers a right of withdrawal (except in certain circumstances).

- These rules concerning consumer protection also cover online financial services to consumers, which without doubt encourage eCommerce (except for the right of withdrawal, due to market-driven price fluctuations).
- The Law does not seem to be perfect but is nevertheless, an important piece of legislation which has far-reaching implications and possibilities for businesses and consumers alike.

Malta National Profile

A. General legal profile

Malta is a Civil Law country with extensive experience with the Common Law system. This is a result of its chequered history involving close contacts with the two legal systems and legal cultures.

The bases, foundations, sources and traditions are rooted far back in the Roman – Byzantine dominion, strengthened with the various occupations from Continental Europe, consolidated with the period of the order of St John. It followed the trend of codifications of the major nations of continental Europe in the nineteenth century and the models were the French Napoleonic Codes.

The bases and sources of the Maltese legal system are therefore Roman *jus comune*, the *droit écrite* and the *droit coutumière,* and the enlightenment values of certainty, stability and predictability.

The Maltese legal system was deeply enriched through its contact with the English Common Law during the years of British colonial domination. This refers to the spheres of public law, constitutional and administrative Law, the strict independence of the judiciary and separation of powers, and a mature appreciation of the English traditions of the rule of law. Malta is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms. This Convention has left a fundamental mark on the legal system and judicial thinking in Malta. It has also been incorporated into domestic law.

The contemporary direct sources of law are the Directives and Regulations of the European Union and the Jurisprudence of the Court of Justice. The European Union Act provides that as from the 1st May 2004, the accession treaty of 2003 and existing and future acts of the European Union shall be binding on Malta and form part of its domestic law. The Law also directs the Courts of Malta to decide on questions arising from the accession treaty or any instrument arising therefrom in accordance with the principles established by the Court of Justice of the European Communities.

B. eCommerce regulations

B.1 eCommerce contract law

B.1.1. General principles[1013]

One of the fundamental principles on which our private law rests is that which holds that Civil Law is the *jus commune* and that consequently it is the Civil Code that lays down and regulates the general notions of private law. More specific circumstances are then to be regulated by *ad hoc* pieces of legislation in line with the principle of *lex specialis derogate generalis*.

The law of contract is rooted in the heart of the Law of Obligations and is as such governed by the *Civil Code*[1014]. Thus Book Second Part II Title IV Sub-title 1 of the Civil Code is the prime source of the Law of Contracts in Malta. This part is modelled almost piecemeal on the provisions of the Continental Codes relating to contract. Whereas under our law the Civil Code is recognised as the *jus commune* that lays down the general notions of private law, more specific circumstances are regulated by *ad hoc* pieces of legislation. It is within this framework that the *Commercial Code*[1015] "*relates to traders and to acts of trade done by any person, even though not a trader."* Thus, when it comes to commercial matters[1016], it is the Commercial Code that would supersede the Civil Code in case where the two Codes lack consensus. This is in accordance with Section 3 of the Commercial Code.

Our law relating to the conclusion of contracts by distance communications is engrained in the Commercial Code which relates exclusively to traders and commercial contracts. Thus, section 110 of the Commercial Code provides that "a contract stipulated by means of correspondence, whether by letter or telegram, between parties at a distance, is not complete if the acceptance has not become known to the party making the offer within the time fixed by him or within such time as is ordinarily required for the exchange of the offer and the acceptance, according to the nature of the contract and the usages of trade generally." The Maltese Commercial Code has not been amended to reflect modern developments in technology and social attitudes.

It is the *Electronic Commerce Act*[1017] (Act III of 2001 – Chapter 426 of the Laws of Malta, hereinafter referred to as the E-Commerce Act) that seeks to regulate on-line

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[1013] Acknowledgement of reference to the LLD thesis submitted to the University of Malta by Paul Micallef-Grimaud entitled "*The offer and acceptance in contract law: a comparative legal analysis in the light of modern developments"*

[1014] Civil Code – Chapter 16 of the Laws of Malta – Available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf

[1015] Commercial Code – Chapter 13 of the Laws of Malta – Available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt13.pdf

[1016] As defined by sections 2 and 5 of the Commercial Code in line with the principle of 'subjective' and 'objective' acts of trade respectively.

[1017] Electronic Commerce Act – Chapter 436 of the Laws of Malta – Available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt426.pdf

contracting. The Maltese E-Commerce Act expressly sets the moment of conclusion of the contract as that of the acknowledgement of the acceptance by the offeror. Thus, offers made by electronic means of communication in effect have the mere effect of invitations to treat under our law. After an offer is accepted, the offeror must necessarily acknowledge the acceptance in order to conclude the contract.

With the exception of those deeds expressly mentioned in the law, contracts may be concluded even verbally. Hence, generally, no specific form is required to make a deed legally binding.

A contractual agreement has two elements: offer and acceptance. The first of the two, the "offer", is not defined in Maltese law.

The Offer

Section 960 of the Maltese Civil Code states that "A contract is an agreement or an accord between two or more persons by which an obligation is created, regulated, or dissolved." The essential requirements of a valid and binding offer are the following[1018]:

a. Intention to be bound

The first essential requirement of a valid and binding offer is that of the intention of the offeror to enter into a contract with the other party immediately upon the latter's acceptance. This intention represents the unilateral nature of the offer. Continental law has greatly influenced the theories of contract applied by our courts when regulating the contractual relationship between the parties. Our courts have constantly treated contracts as the subject of the will of the parties. When interpreting contracts and determining their validity, our courts hold that in case of disparity it is the intention of the parties that is to prevail over the words expressed in the contract. This is, for example, clearly evidenced in the judgement of *Dr Joseph Vella Galea v Joseph Vella*[1019]. Our courts have always adopted an objective test when interpreting the will of the contracting parties. This is evidenced in the case of *Stanislao Cassar et v Chevalier Antonio Cassar*[1020]. This is in line with Article 1003 of the Civil Code which states that "where the literal meaning differs from the common intention of the parties as clearly evidenced by the whole of the agreement, preference shall be given to the intention of the parties."

b. Contemplates acceptance

An offer is not formed unless the offeror intends to be bound by his declaration solely upon its acceptance by the offeree.

[1018] Paul Micallef Grimaud, *The Offer and Acceptance in Contract Law*, LL.D. Dissertation, University of Malta, 2002, Ch.2, p. 25 et seq.

[1019] 1/5/1985, *Kollezzjonijiet ta' Decizjonijiet tal-Qrati Superjuri ta' Malta,* Vol LXIX, sez.1, p.276.

[1020] Court of Appeal, 15/12/1995, *Kollez.* Vol. LXXIX, part2, pp.704-721.

c. Externally manifested / Form

An offer must also necessarily be externally manifested and become known to the offerree. An offer may be both verbal and written. When a contract is required to be made in writing, a private writing would generally suffice to render the contract and its offer valid. In accordance with Articles 4 and 9 of the Electronic Commerce Act, the requisite of writing would be fulfilled by the use of electronic communications, unless the law expressly requires a public deed for the conclusion of the contract, in which case no other form of writing may be used. Article 4 of the Electronic Commerce Act refers to a list in the Fifth Schedule of the Act of activities or areas with respect to which the use of electronic forms of writing cannot apply.

d. Addressed

The offer must necessarily be addressed exclusively to the particular individual with whom the offeror desires to contract. Article 113(1) of the Maltese Commercial Code lays down that "An offer made to the public by means of catalogues or other advertisement is not binding unless it has been expressly declared to be so; it only amounts to an invitation to offer." Our law has accepted the view held by some writers that such offers to the public are not 'complete' because the thing forming the subject of the obligation is not determinate, or to be more accurate the quantity of the thing offered is not specified.

e. Complete

In order to be able to give rise to a contract upon being accepted, an offer must also necessarily contain – or the contents thereof must render possible the determination of – all the essential elements of the contract it aims at forming.

f. Information

With respect to electronic contracts, Article 11 of the Electronic Commerce Act expressly adds another requirement: "Unless otherwise agreed by parties who are not consumers, and without prejudice to any consumer rights under the provisions of any other law, the originator shall provide information in clear, comprehensive and unambiguous terms regarding the matters set out in the First Schedule… Such information shall be provided to the addressee prior to the placement of the order by him."

The second and final legal act required to conclude the contract is that of "acceptance".

The Acceptance

The acceptance has to conform to the offer, be made by the offeree to the offeror, be externalised and be timely. These requirements are complementary to those of the offer so that upon the satisfaction of all the requirements of both the juridical acts there is the meeting of the wills of the two parties and hence the conclusion of the contract[1021].

a. Conform to the offer

The acceptance must correspond perfectly to the offer. Section 112 of the Maltese Commercial Code lays down that "an acceptance subject to conditions, additions, restrictions or alterations shall be deemed to be and shall count as a refusal of the original offer and as a new offer." Article 81 of the *Consumer Affairs Act* provides that "*Any contractual clauses… are not binding on the consumer if such clauses… directly or indirectly waive or restrict the rights available under this Part.*" Thus, if the offer to the contract of sale contains a clause that runs counter to the rights of the consumer established under the Act, the clause would be ignored and the contract concluded when there is the acceptance as to all the other elements and conditions of the offer.

b. Externally manifested

The acceptance ought to be communicated and made known to the offeror. The external manifestation may be either express (written or verbal) or tacit. The Maltese Commercial Code lays down a *juris tantum* presumption of acceptance and states that "If the offer empowers, even impliedly, the other party to carry out the contract without previously communicating his acceptance, the contract is complete as soon as its execution has commenced within the customary or prescribed time." In such cases the commencement of the execution of the offer '*in re perficitur*' implies acceptance and at the same time conclusion of the contract, without the necessity that the offeror should be made aware of it."

The validity of automated forms of acceptance is expressly recognised and provided for in Article 15(3) of the *E-Commerce Act* which provides that an electronic communication between an originator and an addressee is deemed to be of the originator if it was sent by an information system programmed to operate automatically by or on behalf of the originator.

An acceptance made by electronic communications is undoubtedly valid according to the *E-Commerce Act*. Thus, with the exception of those cases expressly stated by law, when the parties agree to have the acceptance communicated in writing, an electronic communication would suffice to satisfy this requirement.

c. Timely

In line with Article 110 of the Maltese Commercial Code, a contract stipulated by means of correspondence between parties at a distance is not complete if the acceptance has not become known to the party making the offer within the time fixed by him or within such time as is ordinarily required for the exchange of the offer and the acceptance, according to the nature of the contract and the usages of trade generally. Furthermore,

[1021] Paul Micallef Grimaud, op.cit., Ch.3, pp. 88 et seq.

Article 112 of the same Code lays down that a delayed acceptance shall be deemed to be and shall count as a refusal of the original offer and as a new offer.

Definition of the notion of electronic documents

The Maltese legislative framework does not include a specific definition of an "electronic document". The Maltese Electronic Commerce Act, however, defines an "electronic communication" as being "information generated, communicated, sent, received, recorded, stored or displayed by electronic means". The E-Commerce Act, therefore, recognizes documents in an electronic form as "electronic communications". Even though "electronic documents" per se are not defined, electronic documents are regulated by the Electronic Commerce Act in many instances including, but not limited to Article 7 (Requirement or permission for production of document and integrity) and Article 8 (Retention of information, documents and communications).

Electronic Notifications

The sending and serving of notifications is explicitly included in the meaning of "giving information in writing" under the provisions of Article 5 of the Electronic Commerce Act which stipulates that if under any law in Malta a person is required or permitted to give information in writing, that requirement shall be deemed to have been satisfied if the person gives the information by means of an electronic communication. Under the general provision contained in Article 5 of the Act, electronic notifications are permitted if they fulfil the formal requirements found in Article 5(1), laid out in detail at page 9 of this document, and the electronic notification is not an area or activity which is listed under the Fifth Schedule of the Act.

For the electronic notification to be valid, the recipient of the notification may require that the notification be given with particular information technology requirements or by means of a particular kind of electronic communication. In cases where the recipient is not a public body, the recipient must consent to the notification being given by means of an electronic communication. Furthermore, the recipient of the notification may require particular actions be taken by way of verifying the receipt of the notification. Only if the requirements set by the recipient are met, would the electronic notification be deemed valid.

Electronic Registered Mail

No system for electronic registered mail has been introduced in Malta. Currently, there are no time stamping or electronic notarial services in Malta. The Government of Malta, however, will soon be launching an ambitious project whereby all citizens will be able to apply for a non-qualified digital certificate v509.3 with 2048 bit strength capable of authentication and digital signing. Nonetheless, even if users will be able to sign their emails, no applications akin to electronic registered mail have been proposed.

Electronic Archiving

The Maltese E-Commerce Act provides for a generic framework for the recording and retention of information, documents and electronic communications.

Recording

Article 8(1) of the Act lays down that if under any law in Malta, a person is required to record information in writing, that requirement is deemed to have been satisfied if the person records the information in electronic form. The law provides that, for the purposes of Article 8(1), in order for the electronic information to be legally considered equal to its paper-based counterpart, such information in electronic form must be "readily accessible so as to be useable for subsequent reference and it complies with such regulations as may be prescribed".

Retention of physical documents

Article 8(2) of the Act provides further that if under any law in Malta, a person is required to retain, for a particular period, a document that is in the form of a paper or any other substance or material, that requirement is deemed to have been satisfied if the person retains an electronic form of the document throughout that period. The retention requirement contained in Article 8(2) of the Act would only be recognised if the following conditions are met:

(a) having regard to all the relevant circumstances at the time of the generation of the electronic form of the document, the method of generating the electronic form of the document, provided a reliable means of assuring the maintenance of the integrity of the information contained in that document; and

(b) at the time of the generation of the electronic form of the document, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useable for subsequent reference; and

(c) it complies with such regulations as may be prescribed.

Retention of electronic communications

Article 8(4) of the Act lays down that if under any law in Malta, a person is required to retain, for a particular period, information that was the subject of an electronic communication, that requirement would be deemed satisfied if that person retains, or causes another person to retain, that information in electronic form. The retention requirement contained in Article 8(4) of the Act would only be recognised if the following conditions are met:

(a) that at the time of commencement of the retention of the information, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and

(b) having regard to all the relevant circumstances, at the time of commencement of the retention of the information, the method of retaining the information in electronic form provided a reliable means of assuring the maintenance of the integrity of the information contained in the electronic communication; and

(c) throughout that period that person also retains, or causes another person to retain, in electronic form, such additional information obtained as is sufficient to enable the identification of the following:

(i) the origin of the electronic communication;

(ii) the destination of the electronic communication;

(iii) the time when the electronic communication was sent;

(iv) the time when the electronic communication was received; and

(d) at the time of commencement of the retention of the additional information specified in (c) above it was reasonable to expect that the additional information would be readily accessible so as to be usable for subsequent reference; and

(e) it complies with such regulations as may be prescribed.

Integrity

For the purposes of Article 8(2) and Article 8(4) described above, the Act stipulates that the integrity of information contained in a document is only maintained if the information has remained complete and unaltered, save for the addition of endorsements or any change not being a change to the information, which is necessary in the normal course of communication, storage or display.

Jurisprudence

There have to date been no reported cases in which the Maltese courts have been faced with questions regarding the validity and recognition of electronic documents.

B.1.2. Transposition of the eCommerce directive

Transposition Status

The Maltese E-Commerce Act came into force on the 10th May 2002 and is modelled on the EU eCommerce Directive[1022] and eSignatures Directive[1023], as well as on the UNCITRAL Model Law for Electronic Transactions.

The E-Commerce Act is a facultative act which is technologically neutral and intended to facilitate the take up of electronic commerce. The E-Commerce Act fundamentally establishes (i) the legal equivalence of paper-based transactions with electronic ones; (ii) the parameters within which electronic contracts are to be concluded; and (iii) the regulatory frameworks for the provision of electronic signature certification and intermediary services.

Several key provisions of the E-Commerce Act are aimed at ensuring that the legal regime in Malta does not act as a barrier to the effective take up of electronic transactions by establishing that electronic transactions have the same legal validity as paper-based transactions.

Article 3 of the E-Commerce Act lays down the principle that:

[1022] Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

[1023] Directive 1999/93/EC of the European Parliament and of the Council of 13th December 1999 on a Community framework for electronic signatures

"For the purposes of any law in Malta and subject to the other provisions of this Act, a transaction is not deemed to be invalid merely because it took place wholly or partly by means of one or more electronic communications."

At the time of writing, subsidiary legislation in the form of Regulations aiming at a more complete transposition of the E-Commerce and E-Signatures Directives is expected to complement the E-Commerce Act in the coming weeks. To this effect, a public consultation document entitled "Proposed regulations under the Electronic Commerce Act (Cap 426)" was launched by the Ministry for Competitiveness and Communications[1024] in tandem with another consultation document entitled "Regulating the Information Society Services Sector – Consultation Document" launched by the Malta Communications Authority[1025] (the authority that regulates e-commerce in Malta) in September 2005. Comments from the public were sought with respect to a set of draft regulations intended to complete the transposition of Directive 1999/93/EC and Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market.

Contract Types and Excluded Laws

The Fifth Schedule of the E-Commerce Act provides a list of activities or areas which are excluded from the scope of the Act and to which Articles 5 to 15 of the Act do not apply. The activities or areas listed in the Fifth Schedule in accordance with Article 4 of the Act are:

(a) the field of taxation;

(b) matters in relation to information society services covered by any laws relating to data protection including the Data Protection Act, the processing of Personal Data (Telecommunications) Regulations, 2003 and the Telecommunications (Personal Data and Protection of Privacy) Regulations, 2003;

(c) questions in relation to agreements or practices governed by competition law;

(d) the following activities of information society services:

  (i) the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,

  (ii) the representation of a client and defence of his interests before the courts,

  (iii) gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions;

(e) contracts that create or transfer rights over immovable property other than leasing rights;

(f) contracts of suretyship granted and on collateral security furnished by persons acting for purposes outside their trade, business or profession;

(g) the law governing the creation, execution, amendment, variation or revocation of:

  (i) a will or any other testamentary instrument;

  (ii) a trust; or

[1024] http://www.mcmp.gov.mt/pdfs/ecommerce_cons_doc.pdf

[1025] http://www.mca.org.mt/library/channel.asp?lc=3&ch=98&t=0

(iii) a power of attorney;

(h) any law governing the making of an affidavit or a solemn declaration, or requiring or permitting the use of one for any purpose;

(i) the rules, practices or procedures of a court or tribunal however so described;

(j) any law relating to the giving of evidence in criminal proceedings;

(k) any law relating to the protection of public health or consumer interests in so far as this protection does not restrict the freedom to provide information society services.

Article 4 of the Act, however, provides that the Minister responsible for communications may, after consultation with the Malta Communications Authority, amend the Fifth Schedule or extend the application of the Act where the Minister is of the opinion that:

(a) technology has advanced to such an extent, and access to it is so widely available, or

(b) adequate procedures and practices have developed in public registration or other services, so as to warrant such action, or

(c) the public interest so requires

Article 4 (2) of the Act also gives power to the Minister responsible for communications to extend the application of the Act or a provision of the Act to or in relation to a areas and activities listed in the Fifth Schedule including "…the applicability to a particular area or subject, or for a particular time, for the purposes of a trial of the technology and procedures, subject to such conditions as he thinks fit."

Formal requirements

As already stated, article 5(1) of the Act stipulates that if under any law in Malta a person is required or permitted to give information in writing, that requirement shall be deemed to have been satisfied if the person gives the information by means of an electronic communication. Article 5 continues that in order for the formal requirements to be fulfilled in an electronic context, the following criteria must be met:

(a) that at the time the information was given, it was reasonable to expect that the information
would be readily accessible so as to be useable for subsequent reference; and

(b) if the information is required to be given to a person, or to another person on his behalf, and the first mentioned person requires that the information be given with particular information technology requirements, by means of a particular kind of electronic communication, that person's requirement has been met; and

(c) if the information is required to be given to a person who is neither a public body nor to a person acting on behalf of a public body, then the person to whom the information is required or permitted to be given, consents to the information being given by means of an electronic communication;

(d) if the information is required to be given to a person, or to another person on his behalf, and the first mentioned person requires that a particular action be taken by way of verifying the receipt of the information, that person's requirement has been met.

The Act further provides a non-exhaustive list of activities and transactions that would fall under Article 5 and would be construed as "giving information" according to Article 5(1). These include making applications, making or lodging claims, giving, sending or serving a notification, lodging a return, making a request, making a declaration, lodging or issuing a certificate, lodging an objection and making a statement.

For the purposes of Article 5, a requirement or permission in relation to a person to give information extends to and is equally applicable to the requirement or information which is stated to be sent, filed, submitted, served or otherwise transmitted.

Signature requirements

Article 6 of the Act transposes Article 5 of the eSignatures Directive. The Act also lays down the same requirements contained in Annex I, II and III of the eSignatures Directive. These requirements are available as Schedules 2, 3 and 4 respectively in the Act. The Electronic Commerce (General) Regulations that are expected to come into force within the weeks following the drafting of this report, as mentioned above, further enhance the provisions of the Act, bringing Maltese legislation on e-signatures in line with the EU framework.

B.2 Administrative documents

During the past two years Malta saw a strong increase in the introduction and adoption of electronic services within Government. These include a myriad of services and applications, both directed to the business community as well as to the general public, which can be accessed both through the internet as well as through mobile telephony. Many permits, licences and other official forms can be submitted or renewed online thus enabling citizens and the business community to interact more quickly and efficiently with central administrations of government. Most notably, eGovernment services which can be deemed to make use of electronic administrative documents include:

- matters related to Income Tax and falling under the Department of Inland Revenue including electronic Income tax returns, tax reduction forms, corporate tax returns, Employers' Social Security Contributions.[1026]
- The sending of official examination results by the Department of Education to students via mobile telephony as well as online applications for exams[1027]
- Online submission of VAT returns as well as facilities to view balances for tax periods, registration of VAT numbers through the VAT Department[1028]
- Online application and renewal of passports[1029]

[1026] http://www.ird.gov.mt

[1027] http://www.exams.gov.mt

[1028] http://www.vat.gov.mt

[1029] http://www.passaporti.gov.mt

- Online filing of reports to the Police[1030]
- Online application and renewal of vehicle licences[1031]
- Online application for building permits issued by the Maltese Environment and Planning Authority (MEPA)[1032]
- A number of Social Services applications and statements launched by the Ministry for Family and Social Solidarity[1033]
- Online Registry of Companies launched by MFSA which also caters for electronic incorporation of companies and the electronic filing of company accounts[1034]

Some of these systems require an electronic identity (e-id) which is an electronic version of the paper-based ID Card and which will in 2006 be augmented by a digital certificate issued by the Certification Authority of the Government of Malta. E-id adopts a single sign-on mechanism which enables the user to authenticate himself/herself once in the official government portal to which e-gov services are all connected securely within the web framework of the Government of Malta. The different service providers are responsible to set the level of authentication required. The eid and the digital certificate registrations are carried out through a face-to-face registration process at the Local Council offices.

The Maltese legislator has not introduced any ad hoc legislation governing e-government services in light of the fact that the Maltese E-Commerce Act is a facultative act and the activities carried out through these e-government services are covered by the said Act.

Some Governmental departments, however, have been more proactive and have introduced subsidiary legislation in order to regulate further the activities offered electronically by that Department as well as the procedures involved in these services. The Electronic Communications (Income Tax) Regulations[1035] (hereinafter referred to as SL.372.23), which came into force on the 13th August 2002, regulate some of the electronic services launched by the Inland Revenue Department including Income Tax Returns, payment of provisional tax as well as electronic submission of Payee Statement of Earnings (FS3) and Payer's Annual Reconciliation Statements (FS7).

SL372.23 requires users to have an e-id and to register electronically with the Department of Inland Revenue. Regulation 9 of Sl.372.23 stipulates that "returns, forms and other documents to which these regulations apply and which are delivered by means of electronic communications shall be treated as having been delivered, in the manner or form required by any provision of the Income Tax Act or the Income Tax Management Act as the case may be…". Regulation 9 further stipulates the Commissioner of Inland Revenue may require that applicants present paper copies of their submissions within 48 hours from the electronic submission.

[1030] http://www.police.gov.mt

[1031] http://www.licences.gov.mt

[1032] http://www.mepa.org.mt

[1033] http://www.msp.gov.mt

[1034] http://www.mfsa.com.mt

[1035] The Electronic Communications (Income Tax) Regulations – Subsidiary Legislation 372.23 – Available at http://www.docs.justice.gov.mt/lom/Legislation/English/SubLeg/372/23.PDF

Regulation 9 of SL372.23 contains an interesting provision laying down that any return of income, form or other document delivered electronically to the Commissioner and received on the official computer system of the Inland Revenue Department shall not be required to bear the physical signature of the person who is filing electronically. Regulation 10 of SL372.23 further regulates the proof of identity of sender or recipient of information and states that the identity of the sender or recipient is presumed to be that recorded in the official computer system of the Commissioner of Inland Revenue, unless the contrary is proved. Similarly, Regulation 11 states that information is to be considered as having been delivered to the Commissioner, if the delivery of the information has been recorded on the official computer system.

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and Promissory Notes

Credit instruments, including bills of exchange, are regulated in Malta by virtue of Part 1 of the Commercial Code, Chapter 13 of the Laws of Malta. The Commercial Code lays down the formal requirements in relation to the form which the bill of exchange must take. Article 123 of the Commercial Code stipulates that:

"A bill of exchange must be dated, and must specify the place where it is drawn, the sum to be paid, the name of the person who is to pay, and the name of the person to whom or to whose order payment is to be made, the time and place of payment, and the value given, whether in cash, in goods, in account, or in any other manner, and must be signed by the drawer."

The provisions relating to bills of exchange are also applicable to promissory notes.

The E-Commerce Act does not explicitly exclude electronic bills of exchange or electronic promissory notes, as credit instruments are not laid down in the Fifth Schedule of the Act. The generic principles contained in Article 5 of the E-Commerce Act can surely be extended to electronic bills of exchange and promissory notes.

The introduction of electronic forms of bills of exchange is more barred due to technological constraints rather than legal restrictions. Due to the fact that the signature is one of the formal requirements for a valid bill of exchange, it is very improbable that any real development in this area will be registered before a wide adoption of and reliance on electronic signatures takes place. It is debatable whether a simple electronic signature based on a non-qualified certificate would suffice or whether an advanced electronic certificate would be required for the future introduction of bills of exchange in electronic form.

C.2 Transportation of goods: Bills of Lading

Sub-title IV of the Maltese Commercial Code and the Carriage of Goods by Sea Act[1036] regulate Bills of Lading in Malta.

Maltese law stipulates that the carrier (or master, or agent) of goods must, after having received the goods and on demand of the shipper, issue to the shipper a bill of lading showing, amongst others, the leading marks necessary for identification of the goods, either the number of packages or pieces, or the quantity, or weight of the goods as well as the apparent order and condition of the goods.[1037]

Bills of lading are *prima facie* evidence of the receipt by the carrier of the goods[1038]. They are conclusive evidence between all persons concerned in the cargo, as well as with the insurers, saving any proof to the contrary.[1039] If there is a variance between bills of lading of the same cargo, the bill of lading which is in the hands of the master shall be conclusive evidence if it is filled out by the shipper or his agent, and that presented by the shipper or by the consignee is conclusive evidence, if filled out by the master.

Maltese law also stipulates that the bill of lading must be signed by the master, and given to the shipper, and a duplicate must be signed by the shipper, and given to the master.[1040] It may be drawn to order or to bearer, or in favour of a party named therein and may be transferred by endorsement even in blank.

Maltese law does not explicitly specify that bills of lading must be in paper form and the Maltese E-commerce Act does not expressly exclude Bills of Lading from its scope. Moreover, whilst Maltese law neither expressly authorises nor prohibits electronic contractual bills of lading, it does not restrict the parties and therefore allows to contract them electronically on a purely contractual basis, for instance by means of private initiatives such as those under the *Comite Maritime International Scheme* [CMI) [which provides for a private registry system] or the *Bolero* scheme [which is available to all those who subscribe to the Bolero Rulebook, a multilateral contractual framework for paperless transactions between members of the Bolero Association].

In reality, many legal obstacles to the electronic bill of lading have been overcome in many countries including Malta. However, Bills of Lading are endemic to a much wider reality, requiring an overall change in culture and business practices that would mean international acceptance and application by all stakeholders of new technologies in e-commerce.

The Maltese Customs Authority has implemented a system of electronic filing for custom-related documentation which caters for import, export and manifest documents.[1041] An upgraded export system is currently being developed and is to be implemented in the near future.

[1036] Carriage of Goods by Sea Act – Chapter 140 of the Laws of Malta – Available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_4/chapt140.pdf

[1037] Art.III (3) - *Schedule- Chp.140- Laws of Malta*

[1038] Art.III (4) - *Schedule- Chp.140- Laws of Malta*

[1039] Art.325 - *Chp.13 Laws of Malta*

[1040] Art.321- *Chp.13 Laws of Malta*

[1041] http://www.ces.gov.mt

The Maltese legislation that provides for the use of electronic customs declarations is *Legal Notice 244 of 2002 (Subsidiary Legislation 337.45 Customs [Implementation of Provisions of customs Code] Regulations)* [1042], modelled on the various European regulations on customs including Council Regulation (EEC) No 2913/92 establishing a Community Customs Code (1992), Commission Regulation (EEC) No 2787/2000 and Commission Regulation (EC) No 3665/93 amending Commission Regulation (EEC) No 2454/93.

Article 89 of the SL 337.45 specifies that:

"Under the conditions and in the manner which they shall determine, the customs authorities may also authorize the documents required for the entry of goods for a customs procedure to be made out and transmitted by electronic means."

Customs Authorities may also provide that formalities shall be carried out by a data-processing technique under the conditions and in the manner which they shall determine, and with due regard to the principles laid down by customs rules. Conditions laid down for carrying out formalities by a data-processing technique must include *inter alia* measures for checking the source of data and for protecting data against the risk of unauthorized access, loss, alteration or destruction.[1043]

The customs authorities must also determine the rules for replacement of the handwritten signature by another identification technique which may be based on the use of codes[1044]. This facility shall be granted only if the technical and administrative conditions laid down by the Comptroller are complied with.

The Comptroller may also provide that declarations produced using customs data-processing systems may be directly authenticated by those systems, instead of the manual or mechanical application of the customs office stamp and the signature of the competent official[1045].

A customs declaration made by EDI shall be considered to have been lodged when the EDI message is received by the customs authorities. Acceptance of a customs declaration made by EDI shall be communicated to the declarant by means of a response message containing at least the identification details of the message received and/or the registration number of the customs declaration and the date of acceptance[1046].

[1042] Available at http://docs.justice.gov.mt/lom/legislation/english/subleg/337/45.pdf

[1043] *Legal Notice 244 of 2002;* Chp.3, Art.4(a)

[1044] *Legal Notice 244 of 2002,* Art.4(a)

[1045] *Legal Notice 244 of 2002,* Art.65(2)

[1046] *Legal Notice 244 of 2002,* Art.87(2)

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

Invoicing is regulated under the Value Added Tax (VAT) Act[1047]. The VAT Act was updated in 2004 and specifically permits electronic invoicing. Invoicing in general is governed in terms of Article 50 and as set out in the 12th Schedule.

Item 11 of the 12th Schedule of the VAT Act provides that invoices containing the details required under this schedule, and subject to the acceptance by the customer, may be sent by electronic means, provided that the authenticity of the origin and the integrity of the contents are guaranteed as may be provided for by national legislation with regard to the use of electronic signatures, or as may be required and approved by the Commissioner of VAT. So far, the VAT office has not handled any applications for any such approvals.

The archiving of records (including electronic invoices), is governed according to the terms of Article 48 of the VAT Act which provides that, in general, records shall be kept and stored in such manner, contain such details and be supported by such information, documents and accounts as set out in the 11th Schedule and such records, information, documents and accounts shall be retained for a period of at least six years from the end of the year to which they relate.

The Commissioner may at any time within the period prescribed request any person to produce the records, documents and accounts required to be kept by him in virtue of the said article. It is therefore understood that provided that the taxable person complies and provides the documents when requested, he may keep them wherever he likes.

Article 53(e) of the VAT Act stipulates that when a taxable person established in Malta stores invoices which he issues or receives by an electronic means guaranteeing on-line access to the data and when the place of storage is in a Member State other than that in which he is established, the Commissioner shall have the right to access by electronic means, download, and use such invoices for the purpose of ensuring compliance with the provisions of this Act.

C.4.2. Electronic accounting

Chapter X of Title 1 of the Companies Act[1048] regulates the keeping of Accounts of companies whilst Title 2 of the Commercial Code, Chapter 13 of the Laws of Malta, regulates the duties of Traders to keep Trade Books. Neither the Companies Act nor the Commercial Code explicitly exclude the keeping of books and accounts in an electronic form.

Annual accounts of companies have to be submitted to the Registry of Companies. The Maltese Registry of Companies is part of the Malta Financial Services Authority (MFSA). MFSA is currently finalising testing on a new electronic system for the Registry of Companies which enables the online incorporation of companies as well as the submission of documents and other forms in an electronic fashion to the Registry. Electronic documents submitted electronically will require electronic signing through the

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[1047] VAT Act – Chapter 406 of the Laws of Malta – Available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_12/chapt406.pdf

[1048] The Companies Act – Chapter 386 of the Laws of Malta – Available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_11/chapt386.pdf

use of digital certificates. For this purpose, MFSA has developed its own electronic signing application within the system. The new electronic Companies Registry system should be publicly available during summer 2006.

Article 401 (1) of the Companies Act, stipulates that the Registrar of Companies has the obligation and duty "to retain and register any document which is required to be delivered or given to or served on him for registration…and any such delivery, submission or service to the Registrar, may be carried out in such manner and by such means and in such format, including electronic communication within the meaning of the Electronic Commerce Act, as the Registrar may deem appropriate."

Maltese law as well as the technology currently available in Malta therefore shall ensure that the provisions contained in Article 3 of Directive 68/151/EEC as amended by Directive 2003/58/EC will be met prior to the deadline stipulated in Article 3 being January 2007.

D. General assessment

D.1 Characteristics of Maltese eCommerce Law

The Maltese Electronic Commerce Act came into force in 2002 with two main objectives:

(a) to ensure that electronic data, records, transactions and signatures were given the same legal recognition as their traditional counterparts in writing, thus removing legal barriers to eCommerce; and

(b) to put in place a minimum set of provisions aimed at safeguarding consumer rights in the on-line environment in order to stimulate trust in information society services.

Together with the Data Protection Act (Chapter 440 of the Laws of Malta) and the provisions related to Computer Misuse within the Criminal Code, the Electronic Commerce Act has provided a workable legal environment for the success of electronic business.

D.2 Main legal barriers to eBusiness

- The introduction of digital certificates and the setting up of Certification Service Providers in Malta will facilitate the adoption of more advanced e-Commerce practices running on electronic signing. Due to the fact that many documents still require the signature element, a wide dissemination of digital certificates should translate in an increased usage and acceptability of electronic documents. The setting up by government of a national Certification Authority is a welcomed step towards this direction.
- Even though the Maltese Electronic Commerce Act recognises the legal validity of electronic signatures, no local accreditation schemes for certificate service providers offering qualified digital certificates have been introduced. The draft regulations on E-Commerce that are expected to be adopted within the coming weeks are expected to increase the level of trust in e-signatures by enhancing the regulatory framework.

D.3 Main legal enablers to eBusiness

- The Maltese legislator favoured the introduction of a generic legislative electronic commerce framework which is technologically neutral and which provides the main building blocks for e-business. The fact that the Maltese Electronic Commerce Act caters for an identical recognition of electronic documents when compared to paper-based models (except the excluded areas and activities listed in the Fifth Schedule of the Act) facilitated the adoption of common legal principles within areas of business which are slowly shifting to the adoption of electronic documents within their processes, minimising the need for further legislative intervention within other laws. The Government believes that, in principle, electronic commerce should be regulated in the same manner as traditional commerce.
- E-Commerce is high on the Government's agenda. This is indicated by the fact that the progress achieved by Malta in the provision of e-Government services has been highlighted in a survey conducted by the European Commission[1049]. Malta was reported to have achieved the most outstanding progress ever recorded, moving from 16th to 2nd place in the ranking of 28 European countries.

  In September 2005, the Ministry for Competitiveness and Communications launched a public consultation in relation to proposed E-Commerce Regulations[1050] intended to ensure the continued uptake of eCommerce.

  The proposed regulations establish a light but effective supervisory regime that will serve to ensure that regulatory obligations are complied with whilst reinforcing the consumer rights already enshrined in the Electronic Commerce Act.

  In drafting these Regulations the Ministry has sought to avoid the introduction of unnecessary regulatory burdens and has only included measures strictly necessary to encourage undertakings to provide on-line services whilst ensuring that the rights of consumers are adequately protected.

[1049] The survey was carried out for the European Commission by consultants Capgemini in 2006 and examined 14,000 web sites in the 25 EU Member States plus Norway, Iceland and Switzerland. http://europa.eu.int/information_society/eeurope/i2010/index_en.htm

[1050] Proposed regulations under the E-Commerce Act – Available at http://www.mcmp.gov.mt/pdfs/ecommerce_cons_doc.pdf

Norway National Profile

A. General legal profile

Norway is a constitutional monarchy with a parliamentary democratic system of governance. Both democratic governance and the monarchy were established in the Constitution of 1814. The parliamentary system was introduced in 1884.

State power is formally distributed between three institutions: the *Storting* (the legislative power), the Government (the executive power) and the courts (the judicial power). There is also a geographical distribution of political power into state, county and municipal levels. The powers of the country and municipal councils for self-government are delegated from the State, and are set out in legislation, not in the Constitution.

Norway is one of the three EFTA countries, and as such is also a part of the European Economic Area (EEA) since May 2004. Thus, it is not a European Member State, and E.U. regulations do not always apply directly to Norway, insofar as they are not related to the four EEA freedoms (free movement of goods, services, capital and persons, in an open and competitive environment)[1051].

The main courts of justice in Norway are: the District Courts[1052], the Jury Courts / the Courts of Appeal[1053], and the Supreme Court[1054], including the Interlocutory Appeals Committee of the Supreme Court[1055]. All these courts can rule on both civil and criminal cases.[1056] In addition there are Conciliation Boards[1057] allocated to each commune, consisting of three laymen (common citizens) and an equal number of deputies elected or appointed by the commune council for terms of four years. Conciliation Boards are to mediate between disputing parties and are widely authorized to pronounce a verdict. The majority of civil disputes are resolved by the Conciliation Boards. Conciliation Boards do not hear criminal cases.

Commerce and contract law is regulated on state level. The general principles of contracting are incorporated in the Act relating to conclusion of agreements, etc. from 1918[1058]. As a result, eCommerce is also regulated at the state level. As a general principle traditional commerce and contract law also apply to eCommerce, electronic

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[1051] Specifically, pursuant to Art. 7 of the EEA Agreement, the European Union legislation in force at the time of the entry into force of the Agreement, as well as that which is decided by the EEA Joint Committee, is also applicable in the countries parties to the EEA which are not Members of the European Union. See also http://secretariat.efta.int/Web/EuropeanEconomicArea/introduction

[1052] *Tingrettene*

[1053] *Lagmannsrettene*

[1054] *Høyesterett*

[1055] *Høyesteretts kjæremålsutvalg*

[1056] More information about the Norwegian courts of law – also in English – can be found on www.domstol.no

[1057] *Forliksråd*

[1058] Lov 31. mai 1918 nr. 4 om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer (avtaleloven)

contracting etc. but in addition there are laws and regulations[1059] regulating certain legal aspects of these areas, e.g. the eCommerce Act[1060] and the Regulation on electronic communication with and within public sector[1061].

B. eCommerce regulations

To be able to understand the regulation of electronic communication - including eCommerce, electronic contracting and electronic communication with the government - one has to commence with the eRegulation-project. In 1999 the Norwegian government established a project ("the eRegulation-project"[1062]) with the goal to adapt the Norwegian legal system - including all acts, regulations and governmental instructions - to electronic communication and to omit any unnecessary legal impediments for electronic communication in the legal framework.[1063]

The scope of the project went further than what is required pursuant to Article 9 of the eCommerce Directive (hereinafter referred to as "the ECD"). The goal of the eRegulation-project was to omit any unnecessary legal barriers for electronic communication within the whole legal system including all legal areas, and not only to ensure that the legal system allows contracts to be concluded by electronic means. In June 2000 the Ministry of Trade and Industry finalized a report, where a multitude of formal legal requirements constituting barriers or possible barriers for electronic communication were presented, e.g. "in writing", "original", "signed".[1064] The report presented various rationales behind these formal requirements; in many cases tacit due to the fact that draftsmen of the regulations never really had contemplated what functions paper based communication provide. With the use of an approach akin to UNCITRALs functional equivalence approach[1065], the report suggests how regulation with formal requirements should be amended to open up for electronic communication. The report also contains a statement from the Ministry of Justice concerning the admissibility to enter into agreements electronically and the legal validity of electronic documents:[1066]

[1059] *Lover og forskrifter*. Translations of some Norwegian acts and regulations to English can be found on http://www.lovdata.no/info/lawdata.html

[1060] Lov av 23. mai 2003 nr. 35 om visse sider av elektronisk handel og andre informasjonssamfunnstjenester (ehandelsloven).

[1061] Forskrift av 25. juni 2004 nr. 988 om elektronisk kommunikasjon med og i forvaltningen (eForvaltningsforskriften).

[1062] Further information in Norwegian concerning this project ("eReglprosjektet" now "VideRe-prosjektet") can be found at http://odin.dep.no/nhd/norsk/tema/VideRe-prosjektet/bn.html

[1063] Myhr, T., "Kartleggingsprosjektet", Arkivråd, 4/00, s. 17 ff

[1064] Cf. "Kartleggingsprosjektet - Kartlegging av bestemmelser i lover, forskrifter og instrukser som kan hindre elektronisk kommunikasjon", utgitt av Nærings- og handelsdepartementet, 01/2001. (http://odin.dep.no/nhd/norsk/publ/rapporter/024011-220007/index-dok000-b-n-a.html)

[1065] Cf. UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998 and Guide to Enactment.

[1066] Cf. http://odin.dep.no/nhd/norsk/dok/andre_dok/rapporter/024011-220007/#fotnote_123

"*We are referring to a letter of 23 March 1999 where the Ministry of Trade and Industry ask us to submit our opinion concerning the following questions:*

1. *Is it admissible to enter into contracts electronically?*
2. *Is there a difference in legal validity between an electronic document and a paper based document, even if they contain the same information?*

The principle of freedom to contract, including the principle of freedom of form, is a central principle in Norwegian legislation. Pursuant to the principle of freedom of form there are normally no formal requirements that have to be met in order to enter into an agreement. As a starting point the parties themselves choose in what form they want to enter into a binding agreement; orally, in writing or electronically. The form on which the parties agree as such has no legal consequences as to whether the agreement is binding and shall be upheld.

A distinctive feature of a legally binding agreement is that it can be enforced through the help of the courts. Such help to enforce an agreement presupposes that there is a binding agreement, which again presupposes that the parties can prove that to the court. To secure evidence, many decide to enter in to an agreement in writing signed by all involved parties. An important question in relation to electronic agreements is how the parties shall be able to ensure their need to safeguard evidence that an agreement has been met, and thus safeguard that the courts will help them to uphold their rights pursuant to the agreement.

Norwegian civil procedural law is based on the principle of the parties' freedom to produce evidence and the courts freedom of assessing the evidence produced. This means that the parties as a general principle can produce any evidence they find appropriate, and that the judge after a thorough assessment of the case decides what fact his judgment shall be based on. It is thus no legal obstacles to produce electronic documents as evidence before a Norwegian court of law. The question is what weight the court will give such documents in its assessment of the evidence.

It is not possible to give a general answer to the question on what weight evidence produced in electronic form shall be given. It will depend on the specific case at hand. This uncertainty is, however, not specific for electronic agreements, but applies to all types of agreements regardless of how they have been entered into. A written document's weight as evidence will turn upon many different conditions; e.g. if it appears to be genuine, and whether it coincides or is inconsistent with other documents or other evidence called upon. It is not possible to give an exhaustive enumeration of the conditions that influence the assessment of evidence's creditability. In a civil case, the court normally bases its ruling on the facts it finds most probable.

In theory the parties of an electronic agreement will probably in normal circumstances produce a printout of the agreement before the court. If the opposite party does not challenge the printout, no further proof has to be made on this issue. If there should be a need for it, evidence on the fact that technical security measures have been used can be established with the use of an expert witness. We assume that printouts of electronic documents in combination with a declaration of an expert witness stating that security measures with high evidential value have been used, will be very convincing." (a non-official translation)

The report from the Ministry of Trade and Industry was sent to all Ministries to be used in identifying legal impediments within their field and drafting proposals on lifting barriers for electronic communication. On 31 August 2001 the Government proposed a

bill to the Parliament, comprising inter alia amendments in 39 different acts from eight different Ministries, eliminating legal impediments for electronic communication. The Parliament passed the bill in December 2001, and the amendments entered into force 1 January 2002.

In addition to the amendments of 39 acts the bill concludes that, as a general principle, regulation on private civil law does not prevent parties to enter into agreements electronically. It mentions particularly that the Act relating to conclusion of agreements, etc. from 1918 does not contain restrictions on electronic communication.[1067] In addition the bill contains clarifications regarding several acts, stating that these acts do not hamper the use of electronic communication and thus do not need to be amended. The bill also contains amendments to acts within the area of private civil law, where exemptions from the right to communicate electronically is explicitly stated, e.g. acts on family law and acts on succession. The bill finally adopts a general legal clarification, stating that the formal legal requirement "in writing" in any regulation shall from now on be interpreted to also cover electronic communication.

B.1 eCommerce contract law

B.1.1. General principles

Regarding the validity of electronic contracts, Norwegian law is – as a general rule – quite flexible. Barring certain more formal types of contracts, Norwegian contract law typically only demands that a consensus exists between parties regarding the essential elements of a contract; a written document is not typically required.

Pursuant to Article 1 of the Act relating to conclusion of agreements, etc. from 1918[1068] (hereinafter referred to as "the Contract Act") contracting parties may deviate from the rules and regulations of the Contract Act referring to commercial practice or other custom. Contracting parties may also deviate from the Contract Act by explicit regulation in the contract; such deviation may also take place in pre-contractual documents. However, it is not very common in a contract to regulate issues that are already regulated in the Contract Act, and subsequently there is a limited use of commercial practice or other custom diverging form the regulations in the Contract Act.

There are in general no formal requirements when entering into an agreement. I.e. there is in general no requirement that the contract has to be signed to be legally admissible and enforceable, nor does it have to be in writing. An oral agreement is normally as valid as a written contract. This principle applies to all types of contracts, including consumer contracts and commercial contracts.[1069] This general principle must

[1067] Cf. also Røsæg, E., "IT: avtaleslutning og behovet for lovreform", Festskrift til Gunnar Karnell, Stockholm, Norstedts, 1999, s. 657. Professor Erik Røsæg concludes in this article that the Contract Act does not hinder electronic contracting and does not need to be changed in that perspective.

[1068] The Contract Act (avtaleloven av 31. mai 1918 nr. 4) regulates inter alia: on the conclusion of contracts (offers, acceptance and time limits), proxy / power of attorney (including power of position) and invalid declaration of legal intent (due to force, fraud, deception etc.).

[1069] There are, however, some special acts and regulations providing additional mandatory protection for consumer. Cf. also Torvund, O., "Kan forbrukerkjøpslovens regler anvendes for digital ytelser?", Yulex 2004, IRI, Oslo, s. 25 ff.

be seen in correlation with civil procedural law and two of its principles: (i) that a party may bring any relevant evidence before the court and (ii) that the court is free to assess the value of the evidence brought before it. This means that also electronic documents may be brought before the court, unless there is a specific regulation that disallows it. This set of regulations influences parties when and how they enter into contracts. In this connection it could also be mentioned that in the eSignature Act[1070] Section 6[1071], a "qualified electronic signature"[1072] will always be put on par with a handwritten signature, provided the relevant regulation requiring the signature admits that the transaction can be made electronically.

Given this situation it has not been deemed necessary to have a general legal definition of an electronic document within the domain of private civil law. It should, however, be noted that one party can usually not unilaterally decide that a contract shall be concluded electronically. This is a general principle ensuring that a party cannot be forced to make use of electronic communication unless he wants to. All parties involved have to give their consent to the use of electronic communication. An "ordinary consent" usually suffices, but sometimes the regulation requires an "explicit consent", which means that the burden of proof that the parties have agreed on using electronic communication lies with the party that claims that such an agreement has been made.[1073]

As mentioned above, cf. the eRegulation-project, there is no general provision indicating which types of contracts can not be concluded electronically. Whether there is a barrier to communicate electronically or not can only be determined by referring to the specific regulation and its *travaux préparatoires*. As an example of contracts/documents that still need to be concluded on paper, the following documents can be mentioned: testaments/wills, certificates of incorporation for joint-stock companies (Ltd and PLC) – they can be drafted electronically to be filed with the Register of Business Enterprises[1074] but the original has to be on paper to be kept by the company - and documents for debt collection.[1075]

The eRegulation-project also covered registered mail. With the use of the functional equivalence approach, legal requirements on registered mail in various acts were amended in such fashion that when electronic communication is used, the sender has to use a secure method that ensures that the message is properly received and ensures the integrity of the message. It will then be up to the sending party to use a method he seems fit to fulfil these requirements. The regulations does not give any further requirements, such as the use of a specific trusted third party or the use of an electronic signature on a certain security level.

[1070] The Act is a transposition of the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.

[1071] Lov 15. juni 2001 nr. 81 om elektronisk signatur (esignaturloven) § 6.

[1072] A qualified electronic signature is defined in the eSignature Act as: an advanced electronic signature, based on a qualified certificate and is created by a secure-signature-creation device. Cf. Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, Article 5 (1).

[1073] Cf. Ot.prp. nr. 108 (2000-2001) om lov om endringer i diverse lover for å fjerne hindringer for elektronisk kommunikasjon, kapittel 2.5.

[1074] Brønnøysundsregistrene (www.brreg.no).

[1075] Further information on requirements on contracts etc. that need to be on a paper document cf. Ot.prp. nr. 108 (2000-2001) om lov om endringer i diverse lover for å fjerne hindringer for elektronisk kommunikasjon.

Electronic archiving is for most companies a question relating to accounting, which also covers archiving of contracts etc. The Accounting Act allows electronic bookkeeping and also the archiving of electronic invoices etc. Cf. answers to question C 4 below.

B.1.2. Transposition of the eCommerce directive

The eCommerce Directive (ECD) has been transposed in a new eCommerce Act[1076], at two different stages.[1077] On 1 July 2003 the transposition of all Articles except Articles 12 to 15 (Section 4: Non-Liability of intermediary service providers) entered into force. The transposition of Articles 12 to 15 entered into force on 1 March 2004.

The transposition has been true to the directive, and only minor national adjustments have been made except when it comes to the transposition of Article 15 where adjustments to national law were deemed necessary. The eCommerce Act regulates information society services as defined in Directive 98/34/EC[1078], amended by Directive 98/48/EC[1079]. The exemptions in Article 1 (5) of the ECD have been transposed into the Act, and have not been extended to comprise any additional fields. As already mentioned above, the Norwegian government has made a mapping of the legal system to identify any regulation hampering electronic communication, and to undertake necessary amendments to eliminate any unnecessary obstacles for electronic communication in the legal system. Pursuant to the ECD Article 9 (2), Member States may lay down that the general rule - that the legal system allows contracts to be concluded by electronic means - shall not apply to one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;

(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(d) contracts governed by family law or by the law of succession.

Not all of these exceptions are relevant to the Norwegian legal system, and have thus not been used when amending the legal system, eliminating legal barriers for electronic communication. E.g. there are no formal requirements when transferring rights of real estate. A sale of real estate can, under Norwegian law, be made orally. This is, however, probably very rare, and besides the transfer has to be registered with the state and that

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[1076] Lov 23. mai 2003 nr. 35 om visse sider av elektronisk handel og andre informasjonssamfunnstjenester (ehandelsloven).

[1077] Ot.prp. nr. 31 (2002-2003) om lov om visse sider av elektronisk handel og andre informasjonssamfunns-tjenester (ehandelsloven) og Ot.prp. nr.4 (2003-2004) om lom om endring i lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester (ehandelsloven)

[1078] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations.

[1079] Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations.

procedure requires that a sales document – on paper – is filed with the Registration Authority. Until now the Registration Authority has been the local District Courts, but this task is now being transferred to the Norwegian Mapping Authority (*Statens Kartverk*).[1080] However, the government has realized that electronic title registration will make the registration procedure much simpler for the public, and also make entries in the property register safer and simpler. Subsequently, this work has a high priority and the Ministry of Justice has appointed a working group, with the aim of starting a pilot of electronic title registration in the first half of 2006.[1081]

In the Financial Contract Act[1082] - which contains specific regulation on contracts and commissions of financial services with a financial institute (bank, insurance company etc.) – Section 8, it is explicitly stated that requirements in or pursuant to the Act that information or messages/notifications shall be given in writing, is not a barrier for the use of electronic communication provided that the client gives his consent. The same Section also allows electronic contracting, provided that the client gives his consent, and provided (i) the content of the agreement in its totality is available for the client before entering into the agreement, and (ii) a secure method for authenticating the parties and to secure the content of the agreement is used. Pursuant to the Financial Contract Act Section 61, contracts of suretyship can also be made electronically with the exception of contracts of suretyship granted by a consumer[1083].

[1080] More information cf. www.tinglysning.no.

[1081] Information from the web-site www.tinglysning.no (1 Mai 2006).

[1082] Lov om Lov 25. juni 1999 nr. 46 om finansavtaler og finansoppdrag (finansavtaleloven)

[1083] Cf. the Financial Contract Act Section 57 (3) defines a "consumer" as: a physical person who stands security for another persons debts, (i) provided the guarantor does not stand security for a debt connected to his own business activities, or (ii) the security consist of a collateral security, where the collateral in principal is not connected to the guarantor's business activities.

B.2 Administrative documents

As a result of the above-mentioned eRegulation-project the Public Administration Act[1084] was also amended.[1085] In Section 2 litra g of the act, the definition of "in writing" was amended to also include "an electronic report when the information it contains is also subsequently available". The definition of "noting, writing down and recording" in Section 2 litra h was amended to also include "electronic noting when this fulfils the purposes of noting equally well as noting on paper". The act already contained a technically neutral definition on document; "a logical limited amount of information stored in a medium for subsequent reading, listening, presentation or transfer." [1086]

As mentioned above there are very few mandatory legal requirements of using a signature to make the transaction legally valid and enforceable. However, pursuant to the Public Administrative Act Section 32 a plaintiff must sign a complaint before it can be processed/tried by the body of appeal. Prior to the eRegulation-project this Section was interpreted in the sense that a complaint had to be filed on paper, duly signed. After the amendments in connection with the eRegulation-project the Act also allows complaints to be signed electronically. In addition a new Section 15a of the Public Administration Act comprises a statutory basis for drafting secondary regulation on electronic communication with and within the public sector.

The Regulation on Electronic Communication with and within the Public Sector[1087] first entered into force on 1 July 2002.[1088] The regulation contains inter alia the following: (i) requirements for the use of electronic communications with the public administration, (ii) the administrative agency's strategy for information security, (iii) acquisition and use of security services, and (iv) the administrative agency's handling of encrypted or signed messages. In Section 27 of the regulation a body is appointed with the responsibility to inter alia co-ordinate the public sector's use of security services and products to be used in electronic communication with and within the public sector. This body can also decide that when using electronic communication with or within the public sector only certificates publicly posted by the Norwegian Post and Telecommunications Authority[1089] pursuant to the requirements of a Regulation on voluntary self-declaration scheme for certification service providers[1090] can be used. This self-declaration scheme is based on

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[1084] Lov 10. februar 1967 om behandlingsmåten i forvaltningssaker (forvaltningsloven)

[1085] The Public Administrative Act applies to all administrative agencies, both on national level and county and municipality level. The Act does not apply to courts of law.

[1086] Cf. forvaltningsloven § 2 bokstav f. Cf. The Opens Files Act (Lov 19. juni 1970 nr. 69 om offentlighet i forvaltningen (offentlighetsloven)) Section 3 which have the same definition of "document". Cf. Bing, J., "Offentlighetslovens dokumentbegrep", Lov og Rett nr. 10 2004, s. 606 ff – with suggestions on how this definition could be improved.

[1087] Forskrift 25. juni 2004 nr. 988 om elektronisk kommunikasjon med og i forvaltningen (eForvaltningsforskriften)

[1088] Cf. Riisnæs, R., "Sikker elektronisk samhandling med og i forvaltningen – eForvaltningsforskriften", Informasjonssikkerhet – Rettslig krav til sikker bruk av IKT (red. Jansen og Schartum), Fagbokforlaget 2005, s. 172 ff.

[1089] *Post- og teletilsynet;* Cf. the publications made on the authority's web-page: http://www.npt.no/

[1090] Cf. forskrift 21. november 2005 nr. 1296 om frivillige selvdeklarasjonsordninger for sertifikatutstedere, §11 første ledd.

the eSignature Act[1091] and offers certification service providers a possibility of self-declaration in accordance with "Requirements Specification for PKI for the Public Sector" (issued by the Ministry of Modernisation)[1092] with three different profiles/certificates, named: Personal-Standard, Personal-High (based on a qualified certificate) and Enterprise.

The Ministry of Modernisation (now the Ministry of Government Administration and Reform) has sent out an order making it mandatory for public agencies on a national level that use PKI for electronic authentication and electronic signatures when communicating electronically with the public (including companies) to take use of the above-mentioned Requirements Specification. It is so far only voluntary for public agencies at a local and municipality level.[1093]

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The bill of exchange represents either a method of payment or a credit instrument. The bill of exchange is a negotiable instrument that is subject to strict formal requirements. The detailed regulation shall ensure the legal position of the creditor, ensure him swift and effective payment, and also simplify the transfer of the bill.[1094]

Bills of exchange in Norway are regulated by an Act on Bills of Exchange from 1932.[1095] This act is more or less a copy of the German act, and is also based on the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes in 1932.[1096] Section 1 of the Act on Bills of Exchange states that the document has to be in writing and in addition that it shall contain the following detailed mandatory formal requirements; i.e. date and place of issuance, the amount, date of maturity, the word "Bill of Exchange", name of creditor, name of debtor, place of settlement and the

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[1091] Lov 15. juni 2001 nr. 81 om elektronisk signatur (esignaturloven). Further information on this Act; cf. Myhr, T., "Elektroniske signaturer – regulering og rettsvirkning", Revisjon og Regnskap, nr. 8/2003, s. 10 ff and Riisnæs, R., "Digital Certificates and Certification Services", IT Law (ed. Wahlgren, P), Scandinavian Studies in Law, Volume 47, Stockholm Institute for Scandinavian Law (2004).

[1092] In English: http://odin.dep.no/filarkiv/250615/Kravspekk-engelsk-versjon.pdf (In Norwegian: Kravspesifikasjon for PKI i offentlig sektor, cf. http://odin.dep.no/filarkiv/234033/Kravspek_PKI_v102.pdf)

[1093] In the new regulation on public procurement (has not yet entered into force), there are similar requirements. For the use of electronic signatures, the signatures must be self-declared pursuant to the "Requirements Specification for PKI for the Public Sector". (Forskrift 7. april 2006 nr. 402 om offentlige anskaffelser § 7-3 (1) bokstav a.)

[1094] Nordisk Lovkommentar 2005, del 1, s. 441 ff.

[1095] Lov 27. mai 1932 nr. 2 om veksler

[1096] The regulation of bills of exchange are more or less identical worldwide, with the exception of anglo-american law. Cf. information from Innovation Norway; http://www.eksportaktuelt.no/public/a.xml?artikkelid=1174&sideid=33

signature of the issuer. If these information requirements are not upheld, the document will normally not be deemed a bill of exchange, cf. Section 2 of the Act on Bills of Exchange.

This Act was one of few that were exempted from the eRegulation-project. This means that the Ministry of Justice, responsible for this act, did not mention this Act in the *travaux préparatoires* of the government eRegulation-project bill (see "B. eCommerce regulations" above). The legal doctrine does not deal with the question as to whether a bill of exchange can be in electronic form or not,[1097] and this issue was not considered in the transposition of the ECD.

However, the regulation concerning promissory notes, especially negotiable promissory notes, were mentioned in the eRegulation-project and in its government bill. In the report drafted by the Ministry of Trade and Industry, a few formal requirements were presented as obstacles for electronic communication that may not be omitted, at least not very easily. One of those requirements were negotiable documents that grant the holder of the document a certain legal position. Given the fact that an electronic document is not unique by nature, a regulation that allows the use of electronic communication in these legal areas needs to ensure the rights of the holder by other means. One possible solution would be to create a register for such documents, where the "legitimate holder of the document" at all times is recorded in a register and the debtor can, with liberating effect, pay to the registered holder.[1098] However, the Ministry of Justice deemed such an amendment to be too comprehensive and complex to be done within the confines of this project. Subsequently, the Ministry of Justice decided explicitly to exempt the Act on promissory notes[1099] from the eRegulation-project.[1100]

Given these circumstances – extensive formal requirements for bills of exchange, that regulations on bills of exchange are based on an international convention, and that the issue of electronic bills of exchange was not discussed in connection with the eRegulation-project, nor is mentioned in national legal doctrine or in the process of transposing the ECD – there are many circumstances that point to the conclusion that the Norwegian legal system does not allow electronic bills of exchange. The rules on the multiplicity of bills of exchange also support this assumption.[1101]

In addition it should be noted that the mandatory requirements of a bill of exchange – including the requirement of a signature – are formal requirements for the legal existence of the bill. This can not be compensated by e.g. the use of a qualified electronic signature pursuant to the eSignature Act Section 6, since the regulation on

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[1097] Cf. Krüger, Kai, Pengekrav, 2. utg., Bergen, 1984 s. 186-201.

[1098] Karleggingsprosjektet – Kartlegging av bestemmelser i lover, forskrifter og instrukser som kan hindre elektronisk kommunikasjon, utg. av Nærings- og handelsdepartementet, K-0628 B, 01/2001, kapittel 8.4 - http://odin.dep.no/filarkiv/112654/kartlegging.pdf

[1099] Lov 17. februar 1939 nr. 1 om gjeldsbrev.

[1100] Cf. Ot. prp. nr. 108 (2000-2001), kapittel 3.2: "Som *Finansnæringens Hovedorganisasjon* påpeker, behandlet ikke departementet lov 17. februar 1939 nr. 1 om gjeldsbrev i høringsbrevet. Det er særlig reglene om omsetningsgjeldsbrev i lovens annet kapittel, med dets krav til skriftlighet, ihendehavelse, påskrift mv., som reiser spørsmål i tilknytning til bruk av elektronisk kommunikasjon. Som med konnossementsreglene i sjøloven er dette en problematikk som etter *departementets* mening bør behandles på eget grunnlag. Gjeldsbrevloven vurderes derfor ikke nærmere i denne proposisjonen."

[1101] Cf. Lov 27. mai 1932 nr. 2 om veksler §§ 66 til 68.

the legal effects of a qualified electronic signature only applies when the relevant regulation accept the use of electronic communication. This is not the case here.

C.1.2. Documentary credit

The extensive use of documentary credit is based on the fact that this type of document is regulated by a widely accepted international regulatory regime. Regulation concerning documentary credit is to a large extent based on international regulations adopted by the International Chamber of Commerce (ICC) in Paris, Uniform Customs and Practice for Documentary Credits (abbreviated UCP, or more precisely UCP 500, where UCP 500 is the prevailing regulation). A new regulation will probably enter into force in 2007, the UCP 600.[1102] As in most countries, Norway does not have an explicit regulation on documentary credit. However, adjacent issues to documentary credit can be governed by general rules on national contract law etc.

An increasing number of major companies in Norway are using a stand by letter of credit, also called a stand by documentary credit.[1103] A stand by documentary credit is a close relative to the bank guarantee and is issued by the banks, but is governed by a special regulation. This type of document has been used for a long time in the USA, since its regulation disfavours the use of bank guarantees. The reason behind the growing use of stand by documentary credit is that a payment instrument independent from the sales contract is more flexible, especially in the eyes of the beneficiary who is interested in getting paid quickly. The stand by documentary credit is regulated in the International Standby Practice (ISP98). A stand by documentary credit is as similar to an on demand guarantee as a normal documentary credit. A statement from the seller that he has not received the agreed settlement can in principle be sufficient to the bank. This document can be accompanied by a bill of exchange or possibley a declaration by a third party that confirms that the goods have been shipped and that the claim is valid. As opposed to a normal documentary credit the parties have to have an agreement that a negotiable document, e.g. a bill of lading, must be produced. In other words, the seller only has to present only a few documents, as opposed to a normal documentary credit, where 10 to 15 different documents typically have to be presented.

A lot has happened between 1993, when the current regulations on documentary credit were adopted, and 1999, when the ISP98 regulation entered into force, especially in relation to the possibility to communicate electronically. The ISP98-regulation is quite clear on the fact that an "electronic record" is put on par with a traditional paper document. If a party disagrees on that fact, he has to give an explicit statement to the fact that he does not recognise the use of electronic documents. However, it should be mentioned that in 2002 the current regulations on documentary credit were amended with the eUCP, which permits electronic presentation of documentary credits. But there is little doubt that the regulation on documentary credits is fixated on paper documents,

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[1102] http://www.eksportaktuelt.no/public/a.xml?artikkelid=2131&sideid=32

[1103] Statoil - an integrated oil and gas company with considerable international activities, with 25,644 employees in 33 countries, owned to 70 per cent by the The Norwegian State - is already a large user of stand by documentary credit. The Hydro Group – a Fortune 500 energy and aluminium supplier with 33,000 employees in nearly 40 countries - and the Kongsberg Group - an international technology corporation headquartered in Norway, with 3,400 employees in 15 countries – are starting to take this type of document in use. (Information from Innovation Norway, in its newsletter http://www.eksportaktuelt.no/public/a.xml?artikkelid=1301&sideid=33)

inter alia due to its formal requirement on signature, original, presentation of negotiable documents etc. In general the ISP98-regulation has a much more relaxed relation as to whether such formalities are necessary or not. Thus, an exporter has better possibilities to avoid such time and costs consuming thieves by using a stand by documentary credit.[1104]

As concerns the understanding and interpretation of the eUCP, we refer to the Belgian national profile.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

Regulations concerning bills of lading can be found in the Maritime Code[1105] Chapter 13, Sections 292 to 309. The Maritime Code (Section 296) provides detailed regulation on what information is to be included in the bill of lading. The list is, however, not obligatory and even if some of the information mentioned in Section 296 is not included, the document can still be deemed to be a valid bill of lading. In Section 296 there is a requirement that the transporter or someone on his behalf shall sign the bill. The signature may be produced "mechanically or electronically".[1106] An electronic signature here is a machine-readable electronic signature on a paper document, normally a magnetic strip, and not e.g. a PKI based electronic signature.

When the draft government bill based on the findings in the eRegulation-project was sent on public hearing, it was questioned why the issue on bills of ladings and electronic communication was not touched upon. The Ministry of Justice answered that the issues on electronic communication and bills of lading is too comprehensive and too complex to be dealt with within the frame of the eRegulation-project. Subsequently the regulations on bills of ladings were not made part of the project's government bill.[1107]

There has not been made any clarification concerning electronic bills of lading in Norway after that. At best, this means that the legal situation is unclear when it comes to electronic bills of lading. It should be noted that in the eRegulation-project report, drafted by the Ministry of Trade and Industry, negotiable documents such as bills of lading were used as an example of a legal obstacle where it is not enough to omit the formal legal requirement hampering electronic communication, but that it will require a change on the whole system, in this case establishing a centralized register.[1108]

[1104] http://www.eksportaktuelt.no/public/a.xml?artikkelid=1301&sideid=33

[1105] Lov 24. juni 1994 nr. 39 om sjøfarten (sjøloven)

[1106] Cf. Sjøloven § 296 in fine; "Konnossementet skal være underskrevet av transportøren eller noen som handler på dennes vegne. Underskriften kan være fremstilt på mekanisk eller elektronisk vis."

[1107] Cf. Ot. prp. nr. 108 (2000-2001), kapittel 3.16.1, jf. kapittel 3.2.

[1108] Karleggingsprosjektet – Kartlegging av bestemmelser i lover, forskrifter og instrukser som kan hindre elektronisk kommunikasjon, utg. av Nærings- og handelsdepartementet, K-0628 B, 01/2001, kapittel 8.6.

UNCITRAL (WG III) is at the moment working on a new convention on transport of goods on the sea. The aim of this work is inter alia to open up for the use of electronic transportation document.

As concerns the Bolero system, we refer to the Belgian National Profile.

C.2.2. Storage contracts

Pursuant to Norwegian regulation there are no formal requirements regarding storage contracts. They are usually drafted in writing, but there are no legal requirements on the content of the contract to make it legally valid and enforceable. The contract can thus also be concluded electronically.

In the case of purchase of goods, which are to be stored with the seller/manufacturer, and the seller/manufacturer enters in involuntary liquidation (bankruptcy) before the purchaser has collected the goods, the purchaser needs to be able to prove his right to the goods to third parties having claim in the estate.[1109] This is usually safeguarded through a "storage agreement" between the seller/manufacturer and the purchaser, giving the purchaser property law protection against third parties in the event of an involuntary liquidation. There are, however, no legal restrictions on drafting such an agreement in an electronic form.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

The use of electronic invoicing has increased these past years, but with different regulation in different countries it has been difficult to take electronic invoicing into use across borders. The adoption of the Directive 2001/115/EC[1110], which entered into force 1 January 2004, has probably made the use of electronic invoicing easier. The Directive states that an electronic invoice has the same legal validity as a paper based invoice. However, since the VAT-system in EU is not a part of the EEA, the directive will not be transposed into Norwegian law.

However, Norway has bilateral tax information exchange agreements with Sweden, Denmark and Finland. On that basis, the electronic invoices issued by Norwegian enterprises may be accepted in these Member States of the EU.

Additionally, since many Norwegian companies are also VAT-registered in a country within the EU, they will enjoy the benefits of the harmonisation of electronic invoices anyhow.

[1109] Cf. the Enforcement Act Section 7-13 (Lov 26. juni 1992 nr. 86 om tvangsfullbyrdelse og midlertidig sikring (tvangsfullbyrdelsesloven) § 7- 13 første ledd) Andenæs, M H., "Konkurs", Oslo, 1999, s. 112 ff.

[1110] Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax.

Pursuant to the Accounting Act[1111] an original voucher must support all posts in the accounts. An electronic invoice is accepted as an original voucher. The electronic invoice must however be made in a non-editable format; this means that electronic invoices in Word or Excel are not accepted since the receiver can easily edit them.[1112] There are several types of electronic invoices; eInvoice used in B2C situation, where the consumer can reach the invoice by his Internet bank, and EDI-invoice used in B2B situation with the use of an agreed message standard, normally EDIFACT.

There are several initiatives regarding electronic invoicing in B2B. One of them is the "e2b Forum", which is a non-profit, user driven organisation run by a group of major Norwegian companies. The objective of e2b Forum is to increase the use of electronic invoicing. The main activity of the Forum is to develop an XML-based eInvoicing Format.[1113] Public authorities, such as the Patent Office, also use this solution.[1114] There are other solutions on the market, offered by e.g. the Norwegian Post, EDB Business Partners and BBS[1115].

The Standardisation Organisation in Norway, Standard Norway,[1116] has appointed a committee for electronic invoicing, with the task to draft a standard on electronic invoices for B2B, based on requirements and needs in Norway and in the EU. This work shall be finalized before the end of 2006.

As a final remark it can be mentioned that the Ministry of Justice has in a letter dated 16 November 2005 stated that a creditor who uses electronic invoices – as opposed to paper based invoices – cannot resort to the simplified procedures for debt recovery. A written statement ("*skriftstykke*") sent by the creditor to the debtor, which shows the basis for the claim and the amount to be paid, is normally a basis for enforcement of debt, cf. the Enforcement Act[1117] Section 7-2 litra f. However, the Ministry of Justice has stated in its letter that the legal requirement "written statement" ("*skriftstykke*") does not comprise an electronic invoice. This issue has not been tried in a court of law.

C.4.2. Electronic accounting

Pursuant to the Act on Accounting[1118] a company must keep accounts, books etc. and letters from the auditor for 10 years, as well as agreements, important correspondence, lists of contents and overviews of prices that have to be compiled pursuant to national laws and regulations for 3 ½ years. However, recorded information that originally is available in electronic form must be stored in electronic form for at least 3 ½ years.

[1111] Lov 19. november 2004 nr. 73 om bokføring (bokføringsloven)

[1112] Cf. lov 19. november 2004 nr. 73 om bokføring (bokføringsloven) § 10.

[1113] Cf. www.e2b.no

[1114] http://www.patentstyret.no/templates/Page____1746.aspx

[1115] BBS is an IT based knowledge enterprise owned by Norwegian banks, cf. http://www.bbs.no/bbs/english/about_bbs.htm

[1116] www.standard.no

[1117] Lov 26. juni 1992 nr. 86 om tvangsfullbyrdelse og midlertidig sikring (tvangsfullbyrdelsesloven)

[1118] Cf. lov 19. november 2004 nr. 73 om bokføring (bokføringsloven) § 13

After that period, the company may print out the documents and keep it on paper instead for the remaining part of the mandatory storage period of 10 years.

Pursuant to the Regulation on Accounting[1119], the accounting records, including vouchers etc., and accounting data shall be kept on a medium that maintain the reading quality throughout the whole preservation period, normally 10 years. A back-up of electronic accounts shall be kept, and the back-up shall be stored separated from the original. Accounting records etc. shall be stored in Norway.[1120] However, pursuant to the Regulation on Accounting[1121] there are some exceptions from this requirement, inter alia companies that conduct business abroad, which can keep original accounting records related to the business in that state, provided the company is subject to keep accounting records pursuant to the regulation of that state. However, the company shall without undue delay be able to present accounting records etc. to the public control authority in Norway during the whole preservation period.

Annual accounts, annual report (director's report) and the auditor's statement shall annually be filed with the Register of Company Accounts. This can be done on paper or through the use of the governmental Internet portal Altinn.[1122] Any company with an Internet access can file its annual accounts etc. with Altinn. The easiest way to do that is to transfer the data directly from the company's annual settlement data program to Altinn. Over 20 of the most used annual settlement data programs are integrated with Altinn.[1123]

A pin-code is at the present stage used to authentication the person in the Altinn-system. The system is connected to the Register of Business Enterprises[1124], affirming that person's authorisation to act on behalf of the company. Work is now being done to change the system and start using digital signatures (PKI) instead, for authentication and also for signature (non-repudiation). This will probably be in production at the beginning of 2007.

The Altinn is also used when companies (and private persons) file their tax return. If the company files its tax return on paper the deadline is 15 February, but if the company uses Altinn the deadline is 31 May.

[1119] Cf. forskrift 1. desember 2004 nr. 1558 om bokføring §§ 7-1 og 7-2

[1120] Cf. lov 19. november 2004 nr. 73 om bokføring (bokføringsloven) § 13

[1121] Cf. Forskrift 1. desember 2004 nr. 1558 om bokføring § 7-4

[1122] Altinn is a common Internet portal for public reporting. In 2002 the Norwegian Tax Administration, Statistics Norway, and the Brønnøysund Register Centre joined forces in order to create a common Internet portal for public reporting. The portal was launched in December 2003 under the name Altinn, and has been in full operation throughout 2004. Altinn is a 24/7 solution and is built on a .NET platform, but there is no demand in most cases for the users to change their hardware or software. Regular access to the Internet is usually sufficient. The solution builds on a standard interface based on an open standard (XML, SOAP), and integration towards the IT systems for the enterprises is implemented through the help of web services. Altinn is designed for any security level. Cf. https://www.altinn.no/cms/1044/altinn/Mer+om+Altinn/Altinn+in+English.htm

[1123] Cf. the Register of Company Accounts (Foretaksregisteret, Brønnøysundsregistrene), http://www.brreg.no/altinn/index.html

[1124] Cf. The Brønnøysund Register Centre and its Register of Business Enterprises (http://www.brreg.no/english/registers/business/)

D. General assessment

D.1 Characteristics of Norwegian eCommerce Law

- Norwegian commerce legislation allows trade partners a fair amount of flexibility on how to enter into agreements and how to prove the content of the agreement before a court. The transposition of the ECD has not made any changes in that respect, and probably has had a very small impact overall on commercial activities, and their use of electronic means.

D.2 Main legal barriers to eBusiness

- Even after the eRegulation-project and the transposition of the ECD, there are still some legal barriers to eBusiness. The Norwegian legal system acknowledges the principle that electronic contracting should be a possibility and stresses the importance of functional equivalence, and has thus amended the regulations by only offering guidelines as to how electronic communication can be achieved. Contracting parties must therefore determine on their own how this requirement is to be met. While this allows a great degree of flexibility, it also increases the risk of uncertainty of what is "good enough".
- There are also some white spots in the Norwegian legal system concerning electronic commerce. Either it is unclear whether the regulation hampers electronic communication, or one is waiting for a revision of the regulation that will eliminate any barriers for electronic communication. However, the perceived legal uncertainty among companies is probably larger than the actual legal uncertainty concerning electronic communication. This can be a barrier for the use of new technology or at least delay the use of it. This perceived uncertainty is most likely based on lack of knowledge of what the legal system really means when it comes to electronic communication, and trust in new technologies.

D.3 Main legal enablers to eBusiness

- Norwegian commerce legislation allows trade partners a fair amount of flexibility on how to enter into agreements and how to prove the content of the agreement before a court. The transposition of the ECD has not made any changes in that respect, and probably has had a very small impact overall on commercial activities, and their use of electronic means. The one single "legal project" with the most impact on electronic commerce is the eRegulation-project, cf. chapter B above. Not only did the project amend several acts and regulations, but it also put the issue on electronic communication on the legal map. This means that any new law proposal after this project has to look into the question as to whether the proposal hampers the use of electronic communication or not.

Poland National Profile

A. General legal profile

Poland is a constitutional republic, consisting of sixteen *voivodeships*[1125]. At a lower administrative level, Poland comprises 324 Counties[1126] and 2478 Municipalities[1127].

Commerce and contract law is generally incorporated into the Civil Code[1128], which largely follows traditions of the Napoleonic *Code Civile* and the German *Bürgerliche Gesetzbuch* (BGB).

Additionally, eCommerce is also regulated by a number of specific ordinances[1129].

Disputes regarding commercial relations are typically dealt with by District Courts[1130] for matters with a financial value of ZŁ 100.000 or less; or by the Circuit Courts[1131] for matters of higher value[1132]. Appeals against the decisions of District Courts can be lodged with Circuit Courts, and with Courts of Appeal[1133] for the decisions of Circuit Courts. The Supreme Court[1134] only hears points of law.

B. eCommerce regulations

Most questions regarding the validity and recognition of electronic documents must be answered on the basis of the doctrine, at least in cases where legislation does not offer a clear rule. In this section, the main tenets of the Polish doctrine regarding the legal value of electronic documents are briefly commented.

[1125] No standard translation exists for this administrative-territorial unit; common translations for *voivodeship* include province, district, or palatinate.

[1126] *Powiats*

[1127] *Gminas;* Główny Urząd Statystyczny, *Powierzchnia i Ludność w Przekroju Terytorialnym w 2005 r.*, 25.07.2005, available at http://www.stat.gov.pl/index.htm.

[1128] *Kodeks cywilny*

[1129] *Rozporządzenia*

[1130] *Sądy Rejonowe*

[1131] *Sądy Okręgowe*

[1132] Art. 479^3 of the Civil Code.

[1133] *Sądy Apelacyjne*

[1134] *Sąd Najwyższy*

B.1 eCommerce contract law

B.1.1. General principles

Regarding the validity of electronic contracts, the Polish law is – as a general rule – quite flexible. This feature is a consequence of the 'free form of expressing will' principle, set forth in art. 60 of the Civ. Code. The principle derives from the concept of the 'autonomy of the will' (*autonomia woli*) – a precept of the Polish civil law[1135].

Article 60 of the Civ. Code currently states: "unless otherwise provided in an act, the will of a person undertaking a legal action can be expressed by any behaviour of the person, which manifests the will in a sufficient manner, including manifestation of the will in an electronic form"[1136]. Therefore the 'free form of expressing will' principle covers every legal action, including contracts. The Polish contract law typically demands only that a consensus (agreed expression of will, which establishes common rules of conduct or other uniform legal consequences) exists between parties[1137]. Neither a written document nor even a verbal expression is usually required – expressing will *per facta concludentia* generally suffices, especially in the professional trade[1138]. On the other hand, the validity (the '*ad solemnitatem* form') of some contract kinds may require a written form. Besides the '*ad solemnitatem* form', exceptions to the "free form of expressing will" include the '*ad eventum* form' - in cases where a written form is demanded for attaining certain legal consequences[1139] - and an '*ad probationem* form' – the one reserved for evidential purposes[1140]. The written form comprises an 'average written form'[1141] or one of the qualified written forms – a notary act[1142], a written form with a date certification[1143] or a written form with an officially certified signature.

[1135] See e.g. D. Szostek, Czynność prawna a środki komunikacji elektronicznej, Zakamycze, Kraków, 2004, p. 194 and the literature quoted there.

[1136] The part of the article which relates to the electronic form was added as a transposition of the art. 9.1 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O. J. L 178, 17.07.2000, p. 1. As stressed in the Polish legal literature, the acceptability of using electronic means for expressing one's will had been implicitly allowed even before and therefore the amendment was not necessary – W. Kocot, Wpływ Internetu na prawo umów, LexisNexis, Warszawa, 2004, p. 82 and the literature quoted there. Others submit that the amendment aims at preventing the potential judicial option for interpreting the 'free form of expressing will' principle narrowly, excluding from its scope electronic expressions of will not fulfilling the requirements of the art. 78 § 2 Civ. Code (see *infra*, this point) – Z. Radwański, Elektroniczna forma czynności prawnej, Monitor Prawniczy 2001, nr 22, p. 1111.

[1137] See Z. Radwański [in:] Z. Radwański (ed.), System Prawa Cywilnego, Vol. II, C.H. Beck, Warszawa, 2002, p. 323.

[1138] Id., p. 324.

[1139] E.g. see art. 660 Civ. Code.

[1140] See e.g. art. 511, 809 § 1, 860 § 2 Civ. Code.

[1141] E.g. see art. 522, 876 § 2 Civ. Code.

[1142] E.g. see art. 158, 234, 237, 245 Civ. Code.

[1143] E.g. art. 590 Civ. Code.

The Polish Civ. Code[1144] defines an (average) written form as a document covering contents of an expression of will and a handwritten signature. The expression of one's will in an electronic form is considered equivalent to this if a secure electronic signature is appended, verified with the use of a qualified certificate[1145]. A written form of a contract originates when parties exchange signed documents covering all the elements of their expression of will or when they exchange the documents, each of which embraces signed contents of only one party's expression of will[1146].

Parties to a legal action (e.g. a contract) may reserve its form (*pactum de forma*), when no specific legal provisions require otherwise. In this case subsequent actions will not be valid when the obligations concerning the form are not fulfilled. If, however, the 'average written form' is withheld, it is presumed, in case of doubt, that the form was reserved only for evidential purposes ('*ad probationem*')[1147], unless the parties defined the consequences of its lack otherwise. If a contract is concluded in a written form, its supplements, changes to it, suspension or withdrawal should also be communicated in writing[1148].

In case of the average written form reserved for evidential purposes (*ad probationem*) – the potentially negative procedural consequences have been clearly limited since the Civil Code was amended in 2003[1149].

After the amendment, in case the obligation to respect the *ad probationem* average written form is not maintained, witness testimonies or explanations of the parties are allowed before the court only when both parties to a contract agree so, if a consumer demands so in a dispute with an entrepreneur or if the fact of undertaking the legal action is lent credence in writing[1150]. The last category, called the 'inception of evidence in writing' (*początek dowodu na piśmie*) is broader than the (average) written form in the meaning of art. 78 of the Civil Code. The civil law doctrine includes e.g. bills or unsigned drafts of a contract into the category of inceptions of evidence in writing[1151]. Therefore, no obstacles excluding average modes of written (typed) modes of electronic communications (e.g. e-mails) from the category seem to exist, although neither courts

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[1144] Art. 78.

[1145] Requirements for a secure electronic signature verified with the use of a qualified certificate are set forth in the Act on Electronic Signature - *ustawa z dnia 18 września 2001 r. o podpisie elektronicznym, Dz. U. 2001, Nr 130, Poz. 1450, ze zm*. Generally the signature equals to the 'advanced electronic signature which is based on a qualified certificate and which is created by a secure-signature-creation device' according to the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, O. J. L 13, 19.01.2000, p. 12.

[1146] Art. 77 Civ. Code.

[1147] Art. 76 Civ. Code.

[1148] Art. 77 Civ. Code.

[1149] *Ustawa z dnia 14 lutego 2003 r. o zmianie ustawy - Kodeks cywilny oraz niektórych innych ustaw, Dz. U. 2003, Nr 49, Poz.408.*

[1150] Art. 74 Civ. Code.

[1151] K. Pietrzykowski (ed.) Kodeks cywilny. Komentarz, 4th edition, C.H. Beck, Warszawa, 2005, p. 346.

nor the legal doctrine have explicitly elucidated this point[1152]. Bearing that in mind and considering that no other proofs but witness testimonies or explanations of the parties are disqualified according to the aforementioned provision, the negative consequences of omitting the *ad probationem* written form should not be deemed particularly onerous.

Moreover, the 2003 amendment deleted art. 75 of the Civil Code. Before it had been stated in its § 1: 'a legal action covering a disposal of a right, a value of which exceeds ZŁ 2.000, and a legal action which provides an obligation to provide a value exceeding Zł 2.000 should be recorded in writing'. The legislator, when deleting this provision, significantly limited the range of cases when the *ad probationem* average written form needs to be maintained in practice.

The professional trade also benefits from another provision, which further facilitates the use of electronic documents in the civil procedure. Pursuant to art. 74 § 3 Civ. Code, no provisions on the *ad probationem* written form should apply to legal actions between entrepreneurs. As a result, no negative procedural consequences may occur for commercial contracts when the written form is reserved but the claim is based on an electronic document not equipped with a secure electronic signature verified with the use of a qualified certificate instead of the written form[1153].

The Civil Procedure Code[1154] prefers documents over other evidential means. Most importantly, it establishes a significant presumption: of authenticity and compliance with the truth of what is certified in the document - in case of official documents[1155] - and a presumption that the person who signed the document produced a statement therein – in case of private documents[1156]. The question whether these provisions can apply to electronic documents was answered by the Polish Supreme Court in December 2003[1157]. The Court explained that "on the basis of the procedural law, a document done and recorded on an electronic data carrier should be recognised – equally to a statement recorded in writing on a traditional carriers (on paper) - as a document in the meaning of art. 244 and subs. Civ. Proc. Code". This elucidates the generally accepted position that a document is an object recording a human thought in writing[1158] and goes in line with the recently adopted Act on Informatisation[1159] (which entered into force on 21.07.2005). The Act on Informatisation introduced a definition of the 'electronic document'[1160]. According to art. 3§2 thereof, 'an electronic document' means: 'the entire

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[1152] The characteristics of written (typed) electronic communications are different than audio and video recordings, which, according to the equivocal position, can not be deemed as the 'inception of an evidence in writing' – Id.

[1153] Unless the written form is reserved for purposes other than evidential.

[1154] *Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, Dz. U. 1964, Nr 43, Poz. 296, ze zm.*

[1155] Art. 244 and 245 Civ. Proc. Code.

[1156] Art. 253 Civ. Proc. Code.

[1157] The decision of 10.12.2003, V CZ 127/03.

[1158] K. Piasecki (ed.) Kodeks postępowania cywilnego, Vol. I, C.H. Beck, Warszawa, 2001, p. 1023-1024.

[1159] *Ustawa z dnia 17 lutego 2005 r. o informatyzacji działalności podmiotów realizujących zadania publiczne, Dz. U. 2005, Nr 64, Poz. 565, ze zm.*

[1160] The Act is particularly relevant for the category of 'official documents', as it regulates relations governed by the public law.

set of data forming a separate meaning, arranged in a defined internal structure and recorded on an informatics data carrier'.

Another reason for recognising electronic documents as 'documents' in the meaning of the Civ. Proc. Code is established in art. 8 of the Act on Electronic Signature[1161]. The aforesaid article states that "the validity and legal effectiveness of an electronic signature shall not be denied solely on the grounds that it is in electronic form, or the signature-verification data have no qualified certificate, or that it has not been put with the use of a secure signature-creation device". Consequently, there are no reasons for deteriorating the legal status of an electronic document provided with any kind of an electronic signature, solely on the ground that the signature is not handwritten or is not secured with a qualified certificate.

B.1.2. Transposition of the eCommerce directive

The eCommerce Directive is implemented into the Polish legal system by two different acts. Its Section 3: "Contracts concluded by electronic means" is transposed by amendments to the Civ. Code. Art. 9 of the Directive is covered by amendments to art. 60 Civ. Code (see supra, point B.1.1), art. 10 and 11 – by amendments to articles 61 § 2 and 66^1 Civ. Code[1162]. The remaining part of the eCommerce Directive was transposed by the Act on Providing Services by Electronic Means[1163], which does not significantly influence general commercial relations. The Act is limited to services provided by electronic means (a notion generally equivalent to the category of 'information society services', according to the e-Commerce directive terminology) and regulates three areas. First – obligations of the service provider, related to providing services by electronic means. Second – principles of excluding the responsibility of service provider for providing services by electronic means. Third – rules of protecting personal data of service recipients[1164]. In principle, the Act follows the Community patterns, with some differences referring to its scope. For instance, contrary to the e-Commerce Directive, telecommunications operators are not covered by its provisions[1165], which has a practical

[1161] *Ustawa z dnia 18 września 2001 r. o podpisie elektronicznym, Dz. U. 2001, Nr 130, Poz. 1450, ze zm.*

[1162] The Polish legislator generally transposed the e-Commerce Directive provisions using broader concepts than the Community patterns. For instance, according to art. 11.1, first hyphen of the e-Commerce Directive: "a service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means", while, according to art. 66^1 § 1 Civ. Code the obligation refers to all oblates, not only service providers, and does not provide that the acknowledgement should be done by electronic means; similarly, informational obligations (art. 10 of the Directive) refer, according to art. 66^1 § 1 Civ. Code, not only to service providers but also to all enterpreneurs.

[1163] *Ustawa z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną, Dz. U. 2002, Nr 144, Poz. 1204, ze zm.*

[1164] Contrary to art. 1.5.b of the e-Commerce Directive ('This Directive shall not apply to questions relating to information society services covered by Directives 95/46/EC and 97/66/EC') the Act on Providing Services by Electronic Means transposes some provisions of the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), O. J. L 201, 31.07.2002, p. 37.

[1165] Art. 3 § 3 of the Act.

impact on their responsibility for providing services by electronic means. On the other hand, contrary to the wording of the e-Commerce Directive, gambling activities are not in its entirety excluded from the scope of the Act. Only its provisions referring to the quality of commercial communications[1166] do not embrace these activities.

B.2 Administrative documents

The conditions for the validity of electronic documents in the administrative procedure were introduced to the Polish legal system by the Act on Informatisation.

First of all, the act aims at strengthening coordination of activities undertaken by public authorities with regard to ICT investments. Relevant implementations should obey the requirements[1167] set by the Act and therefore become 'information projects of public application'. Nevertheless, it also extensively deals with principles of data exchange between public bodies themselves[1168] and between public bodies and third parties (including enterprises, citizens and foreign public authorities). The act introduced a legal definition of an 'electronic document'[1169], as a notion more appropriate for describing relations governed by the Act than a simple term of data exchange.

The provisions of the Act most relevant to the subject of the study refer to:

1. minimal requirements for public tele-informatic systems,
2. the obligation, put upon public bodies, to enable communication by means of electronic documents,
3. the regime for interface software[1170] auditing,
4. amendments to the Administrative Procedure Code[1171].

Ad 1.

Teleinformatic systems covered by the Act should realise the technical requirements set, according to art. 18.1 of the Act, by the Ordinance of the Council of Ministers on minimal requirements for teleinformatic systems[1172]. This issue is of particular importance to validity and recognition of electronic documents originating in, and accepted by, public

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[1166] Art. 9 of the Act.

[1167] Predominantly they relate, first, to minimal technical requirements of the relevant systems and, second, to checks and controls in that regard. In principle, the projects covered by the Act should also realise the 'Informatisation Plan of the State' (*Plan Informatyzacji Państwa*). According to the Act, the Council of Ministers is empowered to issue the Plan.

[1168] A broad but complex definition of "public entities" (*podmioty publiczne*) is established in art. 2 of the Act.

[1169] See *supra*, point B.1.1.

[1170] Software enabling communication between systems.

[1171] *Ustawa z dnia 14 czerwca 1960 r. - Kodeks postępowania administracyjnego, Dz. U. z 2000 r. Nr 98, poz. 1071(tekst jednol.), ze zm.*

[1172] *Rozporządzenie Rady Ministrów z dnia 11 października 2005 r. w sprawie minimalnych wymagań dla systemów teleinformatycznych, Dz. U. 2005, Nr 212, Poz.1766.*

bodies systems. The systems should be able to use at least one of the standards in each of the following groups:

1. Communicating and ciphering protocols enabling the exchange of data with other teleinformatic systems used for fulfilling public tasks (appendix 1 to the Ordinance):

- for the exchange of data with teleinformatic systems: IP v. 4, TCP, UDP, ICMP, HTTP v. 1.1;
- for the exchange of data with teleinformatic systems, conducted by means of communication between a client and a server of electronic mail: SMTP/MIME, POP3, IMAP;
- for ciphering the exchange of data with teleinformatic systems: SSL v. 3/TLS, S/MIME v. 3;
- for the exchange of data with teleinformatic systems in the area of other network services: DNS, FTP, SOAP v. 1.2, WSDL v. 1.1;

2. Communicating and ciphering protocols enabling the exchange of data with other teleinformatic systems used for fulfilling public tasks:

- for information coding and ciphering: Unicode UTF-8 v. 3.0, XMLsig, XMLenc;
- for data containing textual or textually-graphic documents – at least one of the following data formats, enabling browsing and printing with popular browsers and editors: .txt, rtf v. 1.6, .pdf v. 1.4, .doc, Open Document v. 1.0;
- for data containing graphic information - at least one of the following data formats: .jpg, .gif v. 98a, .tif, . png, .svg;
- for compression of big dimension electronic documents: .zip, .tar, .gz, .rar;
- for creating and modifying www pages - at least one of the following data formats: HTML v. 4.01; XHTML v. 1.0, HTML v. 3.2, CSS, WAP;
- for defining information layout (establishing information elements and their relations): XML, XSD, GML;
- for processing documents recorded in the XML format - at least one of the following data formats: XSL, XSLT.

Ad. 2

The obligation, put upon public bodies, to enable the communication by means of electronic documents is established in art. 16.1 of the Act and developed by the Ordinance of the President of the Council of Ministers on organisational and technical conditions for submitting electronic documents to public bodies[1173]. The Ordinance, which entered into force on 14.01.2006, regulates organisation-technical conditions for delivering electronic documents to public bodies and the form of the officially certified reception of electronic documents by their addressees (§ 1). It provides an obligation to establish electronic contact points (*elektroniczne biura podawcze*) for the purposes of the delivery of electronic documents[1174]. Moreover, electronic documents submitted on 'informatic data carriers'[1175] should be accepted, provided they enable recording of the official confirmation of reception.

[1173] *Rozporządzenie Prezesa Rady Ministrów z dnia 29 września 2005 r. w sprawie warunków organizacyjno-technicznych doręczania dokumentów elektronicznych podmiotom publicznym, Dz. U. 2005, Nr 200, Poz. 1651.*

[1174] The obligation enters into force on 17.08.2006 – § 7 of the Ordinance.

[1175] According to art. 3.1, "informatic data carrier" means any material or appliance used for recording, storing and reading data in digital or analogue form.

The Ordinance covers the delivery of electronic documents to 'public bodies'. Polish public bodies, authorities from other EU Member States or EU citizens are embraced by its provisions when they submit an electronic document to a Polish public body. On the other hand, the Ordinance does not cover the delivery of documents sent by a public body to entities not recognised as 'public bodies' by the Act, e.g. public authorities in other EU Member States or EU citizens[1176].

Ad. 3

An interface software creator, at his own expense, should examine the proper functioning of software before the system fulfilling public tasks starts using it in communication with users. The examination should be undertaken by means of 'acceptance tests'. The issue is further regulated in the Ordinance of the Minister of Science and Informatisation on acceptance tests and examining interface software and verification of the examination[1177].

In principle, the acceptance tests, electronic documents structures combinations, data formats, communication and ciphering protocols used in the interface software should be published in the Public Information Bulleting[1178] - art. 13 of the Act on Informatisation.

Ad. 4

The Act on Informatisation aims at enabling the use of ICT technology in the general administrative procedure. It therefore establishes amendments to the Adm. Proc. Code in the following areas:

- delivery of electronic documents (bound only to delivery of official documents to entities other than public sector bodies[1179]) – this issue, crucial for the ability of the EU citizens, enterprises and public authorities to communicate with Polish public sector bodies, is to be regulated by an Ordinance of the Minister responsible for informatisation (Minister of Internal Affairs and Administration), which has not been issued yet[1180],
- ways of calculating dates in the administrative procedure, when documents are submitted electronically,
- formal requirements for applications and other requests submitted in the electronic form; contrary to the traditional principle of limited formalism for application requirements, the Adm. Proc. Code as amended allows only these applications which are equipped with a secure electronic signature verified with

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[1176] For the legal status of electronic documents in this communication channel see *infra*, ad. 4.

[1177] *Rozporządzenie Ministra Nauki i Informatyzacji z dnia 19 października 2005 r. w sprawie testów akceptacyjnych oraz badania oprogramowania interfejsowego i weryfikacji tego badania, Dz. U. 2005, Nr 217, Poz. 1836.*

[1178] *Biuletyn Informacji Publicznej* - Public Information Bulletin (http://www.bip.gov.pl/) is "an official teleinformatic publicatior" established on the basis of art. 8 of the Act on Access to Public Information - *ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej, Dz. U. 2001, Nr 112, Poz.1198, ze zm.*

[1179] To the reciprocal communication: body outside the Polish public sector → public sector body – remarks ad. 2 apply.

[1180] Pursuant to art. 39^1 § 2 of the Adm. Proc. Code (as amended), the Minister shall regulate, by means of an Ordinance, the structure and modes of making up electronic documents, organisationally-technical conditions for their submission, including the form of the official confirmation of receipt, and ways of making their copies available.

the use of a qualified certificate. A body outside the range of the Polish public sector can not therefore initiate the administrative procedure using other means of authorising the request, which is expected to have negative effects on the use of electronic communications in the realm of public sector services for citizens and enterprises.

As for practical implementations, an advanced ICT system in the area of social security is worth mentioning. The system – *KSI ZUS* - Complex Computer System[1181] (KSI) for the Social Insurance Institution (ZUS) was awarded a winner of the eEurope Awards for eGovernment – 2005.

The system is designed to file pension information. It involves citizen-to-government and business-to-government applications, which form a multi-channel secure system. The system allows intermediaries to work on behalf of citizens and businesses. Over 250 million documents are processed each year with the system. About 90% of transmission involves eFiling.

The jury assessed the initiative as "extremely impressive, involving large scale institutional change. Despite the short time period, it has already had a high impact on the agencies, employers and insured persons, and has a high potential for transfer to other sectors and countries"[1182] even though the costs and technical problems in the incipient phase of its implementation are still massively criticized in Poland[1183].

Furthermore, the Polish government is currently planning an implementation of a far-reaching electronic fiscal system – *e-Deklaracje*[1184] - to enable and facilitate electronic communication in fiscal matters. The following matters shall be covered by the project: acceptance of fiscal documents (especially CIT, PIT, VAT, NIP, PCC declarations) and their complex support, information portal and dedicated information, checking the case status, access to the information on the status of a taxpayer account, updating the data about a tax obligations subject, confirmation of taxpayer identification data, the Central Registry of taxpayers as a reference register. The project, with a budget of ZŁ 150 million,[1185] is planned to be fully functional in 2012.

[1181] See http://www.zus.pl/english.pdf

[1182] Source: www.e-europeawards.org.

[1183] S. Kosieliński, Nagrodzeni, a krytykowani, Computerworld 6.12.2005.

[1184] See http://www.e-deklaracje.pl/

[1185] Most of the costs will be covered by the EU Structural Funds.

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The Geneva Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes of 1930 became a part of the Polish legal system on 19 March 1937, after being published in the Official Gazette on the 6 April 1937[1186]. Incorporating the Geneva Convention into the Polish law was preceded by the Law on bills of exchange[1187], based on the conventional standard.

Bills of exchange must contain the drawer's signature (art. 1 § 8 of the Law on bills of exchange). Moreover, bills of exchange are expressly recognised as documents by the act (art. 2 § 1).

As the wording of the Law does not mandate the use of a handwritten signature for validity of a bill of exchange[1188], art. 8 of the Act on Electronic Signature should apply (see supra, point B.1.1). Furthermore, as mentioned before, the Polish legal system currently in force does not confine the term "document" only to a paper one. Since "electronic documents" should be regarded as a part of the broader notion of "document", there exist no legal obstacles for recognising the validity of electronic bills of exchange. As a consequence, the requirements of a signature and a document may be fulfilled electronically.

Nevertheless, electronic bills of exchange do not exist in Polish practice. Not legal problems, but rather technical and financial considerations play the major role in that regard. An abstract obligation of paying a sum of money is linked with a bill of exchange as a document filled up in a formal way prescribed by law. The whole tradition is built upon how the formal arrangements of its contents are related to the paper documents. Tremendous practical changes would therefore be needed if bills of exchange were to be recorded on 'informatic data carriers'. Integrity and authenticity of the document are absolutely crucial for the very far-reaching obligations ensued from signing a bill of exchange. ICT provides technical solutions to overcome the related problems, but the relevant technologies are by no means much more expensive than a simple piece of paper. Moreover, the main functions of bills of exchange recognised in the Polish jurisprudence[1189] – credit, paying, circulating, guaranteeing and refinancing - can be properly fulfilled by a bunch of modern financial services, related to a tangible carrier

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[1186] *Nr 26, Poz. 177*.

[1187] *Ustawa z dnia 28 kwietnia 1936 r. Prawo wekslowe, Dz. U. 1936, Nr 37, Poz. 282*.

[1188] Differently: M. Czarnecki, L. Bagińska, Prawo wekslowe i czekowe. Komentarz. 4 wydanie, C.H. Beck, Warszawa 2005, p. 22. The authors point: „the contents of a bill of exchange may be put down by type, by hand or by stamp, with an exception of a signature, which must be handwritten". Presumably following the practice, this statement rather ignores electronic signatures than rejects the possibility of using them.

[1189] M. Czarnecki, L. Bagińska, Prawo wekslowe i czekowe. Komentarz, 4th Edition, C.H. Beck, Warszawa, 2005, p. 26-31.

less intrinsically than bills of exchange. One can not also ignore the adjacent fiscal problems which may arise in case electronic bills of exchange are used in practice. When a bill of exchange is written out, the revenue stamp should be affixed to it. The Ordinance of the Minister of Finance on the mode of collecting, paying and returning the administrative actions tax (*opłata skarbowa*) and registering the tax[1190] requires, however, that in the event of cashless pay the tax receipt may have an electronic form, but only if it is equipped with a secure electronic signature verified with the use of a qualified certificate; the signature should be placed by an authorised employee of the bank or other financial institution realising the transaction (§ 3.5). Such a provision makes the procedure extremely arduous and defunct in practice.

C.1.2. Documentary credit

Documentary credits are regulated by art. 85 of the Banking Law[1191]. Pursuant to the definition established in art. 85 § 1 of the Bank. Law, a documentary credit is a **written** undertaking by a bank (issuing bank) given to a third party (beneficiary), done at the request of a client but in the name of the bank, to pay the beneficiary a stated sum of money, after the beneficiary fulfils all the conditions prescribed in the documentary credit.

As documentary credits are mostly used in international trade, the role of the Polish legal system in that regard is limited[1192]. Nevertheless, discussing it in this place gives an opportunity to investigate the status of electronic documents in the Polish Banking Law.

Documentary credits are recognised as a category of banking actions (*czynności bankowe*)[1193]. According to art. 7 §1 Bank. Law, expressions of will related to banking actions may be done electronically. Moreover, if an act provides a written form for a legal action, it is presumed that an action done electronically fulfils the requirements of the written form even when the form was provided *ad solemnitatem*[1194].

The documents related to banking actions may be done on electronic data carriers, if the documents are properly created, recorded, transferred, stored and secured[1195]. Details of how the requirements should be understood are laid down in the Ordinance of the

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[1190] *Rozporządzenie Ministra Finansów z dnia 5 grudnia 2000 r. w sprawie sposobu pobierania, zapłaty i zwrotu opłaty skarbowej oraz sposobu prowadzenia rejestrów tej opłaty, Dz. U. 2000, Nr 110, Poz. 1176, ze zm.*

[1191] *Ustawa z dnia 29 sierpnia 1997 r. Prawo bankowe. Dz. U. 2002, Nr 72, Poz. 665 (tekst jednol.), ze zm.*

[1192] According to the Judgement of the Polish Supreme Court of 22.04.1999 II CKN 204/98, if parties do not agree otherwise, the Polish law is applicable to relations between the issuing bank and the beneficiary, if Poland is the state where the bank is seated.

[1193] Art. 5 § 1.4 Bank. Law

[1194] Art. 7.3 Bank. Law. The same pattern is used in several adjacent acts, most notably in art. 7.a of the Law on the Public Trade in Securities (*ustawa z dnia 21 sierpnia 1997 r. Prawo o publicznym obrocie papierami wartościowymi, Dz. U. 2005, Nr. 111, Poz. 937 (tekst jednol.)*.

[1195] Services related to securing the documents may be provided by banks, ventures established by banks with other subjects and banking services auxiliary undertakings - art. 7.2 Bank. Law.

Council of Ministers on the mode of creating, recording, transferring, storing and securing the documents related to banking actions, done on electronic data carriers[1196].

The system established by the Ordinance is very liberal. The requirement of a signature is fulfilled when a plain electronic signature or agreed identifying data are put to an electronic document (§ 3.1). Electronic documents must be recorded in a way providing integrity, ability to verify the signatory and readability (§ 5). Integrity must be provided during the document transfer (§ 6). Storage of recorded data must fulfil the conditions of durability, erasure after the prescribed period of storage (§ 7) and specific requirements concerning multiplication (§ 8). Security requirement is fulfilled (§ 9.1) when:

- accessibility is restricted to the authorised persons,
- the document is protected against random or unauthorised destruction,
- relevant protecting methods and means are respected, the efficacy of which is commonly recognised.

This very flexible, technologically neutral and functionally oriented regulation works very well in practice and is appreciated by the market. Different solutions are applied by banking institutions, depending on the risks-costs calculation in case of particular services.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

According to the Polish Maritime Code[1197], a bill of lading is generally defined as a document proving: 1) the reception of the goods to be transported and 2) authorisation to dispose and to receive the transported items (art. 131 § 1). It should be issued after reception of the goods aboard (art. 129 § 1 Mar. Code).

The Mar. Code details the form which bills of lading should fulfil. They should be equipped with a signature of the carrier, the captain of the ship or other carrier's representative – art. 136 § 1.13 Mar. Code. As a signature, not a written form is prescribed, the Act on Electronic Signature (particularly its art. 8[1198]) should apply. In consequence, there are no legal obstacles to use electronic signatures in that regard.

However, the Code establishes that the cargo data should be placed in the bill of lading accordingly to the *written* declaration of the loader – art. 132 § 1 Mar. Code. Since, according to the art. 1 § 2 of the Mar. Code, the civil law provisions should apply to the civil relations deriving from the maritime sailing in case the question is not regulated in the Mar. Code, the written form requirement demands that either handwritten signature

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[1196] *Rozporządzenie Rady Ministrów z dnia 26 października 2004 r. w sprawie sposobu tworzenia, utrwalania, przekazywania, przechowywania i zabezpieczania dokumentów związanych z czynnościami bankowymi, sporządzanych na elektronicznych nośnikach informacji, Dz. U. 2004, Nr 236, Poz. 2364 ze zm.*

[1197] *Ustawa z dnia 18 września 2001 r. Kodeks morski, Dz. U. 2001, Nr 138, Poz. 1545, ze zm.*

[1198] See *supra*, point B.1.1.

or an electronic one equipped with a secure electronic signature verified with the use of a qualified certificate is used (art. 78 Civ. Code).

In practice no domestic initiatives in the field of electronic bills of lading are undertaken in Poland. One of the reasons for that situation may be the fact that Poland does not rank among the well recognised centres of international maritime trade.

C.2.2. Storage contracts

From the legal perspective, storage of goods in Poland is mainly regulated by the Book III, Title XXX Civ. Code[1199] (which also applies to commercial contracts). A storer (*przedsiębiorca składowy*) might obtain a 'qualified' status of a storing house after fulfilling additional requirements established in the Act on Storing Houses and Amending the Civil Code, the Civil Procedure Code and Other Acts[1200] (abbrev.: Act on Storing Houses).

Storage agreements are consensual contracts in the Polish law, in the sense that the physical transfer of the stored items is not a precondition for concluding them[1201]. The contract does not require a written form. This form is not prescribed even for a receipt - a document which the storer is obliged to issue when the storing party (*składający*) demands so (art. 853 § 2 Civ. Code). As such, there are no legal barriers for the use of electronic contracts in the conclusion of storage agreements.

Still, some legal actions concerning storage contracts must be done on paper. The storer may terminate the contract, if it is agreed for an unlimited period of time, only by a registered mail (this notion refers only to paper mail in the Polish law) – art. 853^5 Civ. Code. The same form stands for notifying in advance the storing party that the storer will entrust the stored items to a third party, at the storing party's expense, if they are not taken back by the latter one despite the termination of the agreed period (art. 853^6 Civ. Code).

In addition, storing houses are obliged to issue a specific kind of securities – a storing evidence (*dowód składowy*), when requested by a storing party (art. 23.1 of the Act on Storing Houses). Storing evidences consist of two parts (art. 2.1 of the Act on Storing Houses) [1202] and are transferable by endorsement. The features favour the use of paper documents over electronic ones in the way similar to bills of exchange[1203].

Poland joined the NCTS-network (New Computerised Transit System), which is particularly vital in case of a country with the longest EU external border. The system is used by custom officers for processing customs declarations and monitoring transit operations. Enterprises use it at the stage of declarations submission, revoking, providing security, releasing the goods from transit, completing transit operations in the destination office and closing the operations in the exit office. User interfaces – MCC

[1199] *Umowa składu*.

[1200] *Ustawa z dnia 16 listopada 2000 r. o domach składowych oraz o zmianie Kodeksu cywilnego, Kodeksu postępowania cywilnego i innych ustaw, Dz. U. 2000, Nr 114, Poz. 1191, ze zm.*

[1201] J. Napierała [in:] System Prawa Cywilnego, Vol. 7, C.H. Beck, Waszawa 2001, p. 494.

[1202] One of them – reverse – certifies the possession of the items stored, the other – warrant – certifies the establishment of the pledge right upon the items.

[1203] See *supra*, point C.2.1.

applications – are installed only on computers of customs posts (offices and agencies). Enterprises use commercial software built on an XML specification, made available by the customs administration[1204].

Originally, in order to facilitate the customs declarations processing, the CELINA system was implemented in all the customs posts. Its functionality was extended afterwards, including, among others, registering and processing the data of the INTRASTAT declarations used for statistical purposes. Unlike other customs systems[1205], CELINA is an initiative with a prevailing national conceptual background. The communication with declarants is provided by web pages[1206], after obtaining an identification code. For that purpose, a written application must be submitted ahead to the geographically relevant custom chamber director. The web-pages constitute a so called 'customs gateway', the functionality of which is enriched with the supporting calculation of customs and tax dues application.

CELINA system also allows declarations by e-mail, recorded on diskettes or CDs. The system was awarded the eEurope Awards for eGovernment – 2005 Nominee, Theme 2: Government readiness (Transformation of the organisation and innovation in the back office.). According to the jury, "The project demonstrates the smart and comprehensive use of modern technology in building a new customs system. It is used to support the transformation of the customs operations in a very significant way. The case demonstrates high take up, strongly growing revenues and efficient business processes for government and businesses."[1207]

[1204] Available at http://www.mf.gov.pl/sluzba_celna/dokument.php?dzial=396&id=50336.

[1205] E.g. ISZTAR - http://isztar.mf.gov.pl:7080/taryfa_celna/web/main_PL.

[1206] CELINA WEB-CEL (for standard procedures) - https://www.celina.krakow.uc.gov.pl/AppCel/index.jsp - and CELINA OPUS (for simplified procedures) - https://www.celina.krakow.uc.gov.pl/Celina/index.jsp.

[1207] Source: www.e-europeawards.org.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

The e-Invoicing directive[1208] was transposed into the Polish national law by the Ordinance of the Minister of Finance on issuing, sending and storing invoices in an electronic form and making them available to a tax authority or a fiscal control authority (abbrev.: Ordinance on e-invoices)[1209].

Before its standard is presented, a broader picture should be drawn. The Polish law does not require a signature placed on paper invoices. This requirement is not stated among the obligatory invoice elements, which, for tax purposes, are established in § 9.1 of the Ordinance of the Minister of Finance on tax returning to some of taxpayers, advance tax returning, invoice issuing, mode of storing them and a list of goods and services, to which exemptions to tax on goods and services do not apply[1210]. Nor the accountancy provisions demand it. Under art. 21.1.a of the Polish Act on Accountancy[1211], accounting evidences may lack a signature of the evidence issuer and a person who obtained the relevant elements of assets or from whom they were received, if so provided by law or the appropriate accounting records documentary technique.

According to a very popular practice of long-term commercial agreements, parties sign a framework consent (with a handwritten signature) authorising the issuance of invoices with no signature on them. The framework consents are concluded for civil procedure evidential purposes. An unsigned invoice is, according to art. 485 Civ. Code, a justified legal basis for a claim before civil courts[1212], if it fulfils the requirement of "a bill accepted by a debtor". Framework consents are considered as acceptance documents. This flexible and liberal practice works well in practice.

Due to all the considerations, according to the very common practice prior to the enactment of the Ordinance, parties used to send invoices to each other by a plain e-mail, after concluding the preliminary consent.

This is no longer legal, as the Ordinance on e-invoices recognises only secure electronic signatures verified with the use of a qualified certificate and, under some conditions, EDI as legitimate options of guaranteeing authenticity and integrity of the contents (§ 4).

[1208] More formally known as Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax, O. J. L 15, 17.01.2002, p. 24.

[1209] *Rozporządzenie Ministra Finansów z dnia 14 lipca 2005 r. w sprawie wystawiania oraz przesyłania faktur w formie elektronicznej, a także przechowywania oraz udostępniania organowi podatkowemu lub organowi kontroli skarbowej tych faktur, Dz. U. 2005, Nr 133, Poz. 1119.*

[1210] *Rozporządzenie Ministra Finansów z dnia 25 maja 2005 r. w sprawie zwrotu podatku niektórym podatnikom, zaliczkowego zwrotu podatku, wystawiania faktur, sposobu ich przechowywania oraz listy towarów i usług, do których nie mają zastosowania zwolnienia od podatku od towarów i usług, Dz. U. 2005, Nr 95, Poz. 798, ze zm.*

[1211] *Ustawa z dnia 29 września 1994 r. o rachunkowości, Dz. U. 2002, Nr 76, Poz. 694 (tekst jednol.), ze zm.*

[1212] Most recently this interpretation was sustained by the Supreme Court on 23.02.2006, case II CSK 129/05

The change has been heavily criticized since the moment the Ordinance on e-invoices was issued[1213], particularly when one considers that its issuance took place only 1,5 month after the much more liberal general Ordinance mentioned earlier in this point.

The latest experiences show that the new e-invoices have not been accepted by the market, especially SMPs, due to the costs of the technical infrastructure in the event of using advanced signatures. In the majority of cases enterprises still send invoices by plain e-mails, printing them afterwards for fiscal control purposes[1214]. This practice is illegal, but cheaper and undetectable in practice.

C.4.2. Electronic accounting

The Act on Accountancy states that books can be kept 'with the use of a computer', if they are "arranged in the form of separate computer data collections, database or its distinguished parts, regardless the place of their inception and storage" – art. 13.2[1215].

Books must be kept honestly, correctly, verifiably and currently – art. 24.1 of the Act. In consequence, software used must enable the undertaking using it to "obtain readable information regarding the records made in accounting books, by printing them or transferring to other computer data carrier" – art. 13.3 of the Act. It must also provide automatic records continuity control and control of sales volumes and balances. The printouts should include an automatic page numbering feature, including the first and the last page, summing them up on each single of them in a continuous manner, separately for the relevant accounting year – art. 13.5 of the Act. The books should be printed out not later than by the end of every accounting year or transferred to another computer data carrier which guarantees durable information records, for a time-period not shorter than required for purposes of the accounting books retention[1216] - art. 13.6 of the Act. In case of daily transaction books, electronic accounting records should have an automatically given issued number, under which they were introduced to the book and enclose the data indicating a person responsible for the record content (art. 14.4 of the Act). Furthermore, records in the books, entered automatically by means of communications, computer data carriers or created accordingly to an algorithm on the basis of information contained in books are equal to source evidences, if the following recording conditions are fulfilled (art. 20.5):

1) they are of a durably readable form consistent with the content of the relevant accounting evidence;
2) establishing their source of origin and a person responsible for their entering into the system is possible;
3) the procedure used ensures the control of the data processing accuracy, record completeness and identity;

[1213] See e.g. Restrykcyjna faktura, Teleinfo 29.08.2005, p. 24-25.

[1214] Faktury przez Internet to drogie udogodnienie, Rzeczpospolita, 17.02.2006.

[1215] An example of the most commonly used software is Symfonia - http://www.symfonia.pl

[1216] The period amounts to 5 years – art. 74.2 of the Act.

4) source data in the place of its origin is appropriately protected, in a manner providing their undeniability, for a period required in the event of a given kind of accounting evidence.

The Act also provides basic requirements for electronic accounting data security (art. 71-73).

A written form (handwritten signature or an electronic one equipped with a secure electronic signature verified with the use of a qualified certificate) is required in case of documentation which describes accounting policy chosen by the relevant undertaking (art. 10.2). The documentation should cover a detailed description of data collections used by the relevant IT system (art. 10.1.3.c), the system itself, including security measures and basic details about the software used (art. 10.1.3.c) and its data security measures (art. 10.1.4).

Similarly, annual reports can only be drawn up in a written form (art. 52). In consequence, submitting them electronically to the National Court Register[1217] is not possible, which is one of the most striking disadvantages of the Polish accountancy system.

D. General assessment

D.1 Characteristics of Polish eCommerce Law

- The Polish civil law legislation has traditionally allowed trade partners a fair amount of flexibility in arranging methods of contract conclusion and evidence of commercial relationships. The 2003 amendment, to some extent motivated by the eCommerce directive, is a natural continuance and reinforcement of this general principle. The same is true for accounting activities, but not for e-invoices, where the legislator, prescribing only two, hardly used in practice, possible ways of guaranteeing authenticity and integrity forecloses the broader use of the regulated instrument.

D.2 Main legal barriers to eBusiness

- The Polish example demonstrates that legal barriers to eBusiness occur when sufficient simplicity and flexibility are lacking both in case of legal environment and IT systems designed for the practical use.
- As for the legal environment, the obligatory use of advanced electronic signatures is a good example. The shift from their voluntary use towards an obligatory one took place in the year 2005, when it became quite obvious that the market demands do not meet the expectations of certification providers. In two areas discussed in the study (e-invoices, e-applications in the area of general administrative law) the shift has already brought negative practical consequences. Moving the standards of integrity and authenticity up by using the technologically advanced (but also proportionally expensive) tools is particularly questionable when taken into consideration that the liberal rules concerning

[1217] http://www.ms.gov.pl/krs/informacje_ogolne_ang.shtml.

paper invoices do not cause any practical problems. Similarly, in the area of e-applications the long standing principle of limited formality of this administrative procedure phase has been brought to an end, regardless of the fact that the principle worked very well in practice.

- The same pattern was applied in the area of social security. Pursuant to the current wording of the Act on the Social Security System[1218], which is to be changed due to the amendments brought about by the Act on Informatisation from 21.07.2008, the payers which account social security contributions of more than 5 persons generally have an obligation to transfer to the abovementioned *KSI ZUS* system[1219] the documents necessary for current calculation of social security accounts with the use of a 'data teletransmission in the form of an electronic document from the updated software'. Electronic signatures used do not qualify as the 'secure ones verified with the use of a qualified certificate' but work very well in practice. Moreover, the Social Security Institution covers the costs of the public key certificates, which, even though much cheaper than the qualified ones, causes significant costs for the budget of the state. From 21.07.2008 only more advanced electronic signatures verified with qualified certificates will be allowed[1220] and all the relevant costs will be directly covered by the payers themselves. From the vantage point of organisation and cost-effectiveness, the change is a step backwards.
- In all the areas where more technologically advanced solutions are pushed forward, they are not in a position to facilitate the market growth as they provide security and reliability standards which are higher and more expensive than necessary. In fact, however, this is the risk of pointing any particular solution common for any bunch of different applications (services). They may simply require different levels of security and technological advancement, according to the costs effectiveness considerations. This requirement is not realised where the legal environment lacks the necessary flexibility, openness and technological neutrality.
- The main public IT registers with a commercial dimension[1221] could have a very positive impact on trade, facilitating it and increasing its reliability. Still, there exists no direct link between the basic principle of openness[1222] and the way the appropriate systems are implemented. As a consequence, none of the systems is available on-line, even if their technical architecture allows it. One of the main reasons are the obstacles occurring when issuing a particular document or making it available results in fiscal obligations. No legal concepts to overcome the

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[1218] *Ustawa z dnia 13 października 1998 r. o systemie ubezpieczeń społecznych, Dz. U. 1998, Nr 137, Poz. 887, ze zm.*

[1219] See *supra*, point B.2.

[1220] Art. 40 of the Act on Informatisation in conj. with art. 47.a of the Act on the Social Security System.

[1221] E.g. the National Court Register, which contains the main legal data concerning particular enterprises and the National Register of Pledges.

[1222] Set forth in the art. 8.1 of the Act on the National Court Register (*ustawa z dnia 20 sierpnia 1997 r. o Krajowym Rejestrze Sądowym Dz. U. 1997, Nr 121, Poz. 769, ze zm.*); art. 37.1 of the Act on the Registered Pledges and the Register of Pledges (*ustawa z dnia 6 grudnia 1996 r. o zastawie rejestrowym i rejestrze zastawów, Dz. U. 1996, Nr 149, Poz. 703, ze zm.*).

ensuing hindrances, which are very often of major practical significance, have been developed in Poland so far.

- Finally, inconsistencies in the legal terminology used in the area of electronic documents do not enable eBusiness. The liberal perception of the term 'in writing' as defined by the Banking Law[1223] is different than the stricter notion of 'in writing form' phrased by Civ. Code[1224]. This impinges the way in which the notion of 'signature' is perceived and has an impact on the stability and consistency of the legal system, especially in the areas where the stricter meaning of 'in writing' determines the validity of a particular legal action[1225]. The ignorance of the international standards and good examples in other EU countries[1226] should be deemed responsible for that effect.

D.3 Main legal enablers to eBusiness

- As noted above, the Polish civil legislation allows trade partners a good deal of flexibility. This is especially true in the financial sector, where electronic channels of doing business are particularly heavily used and the pattern for legitimating electronic documents has got flexible indeed, allowing the solutions possibly simplest (and cheapest), which are secure enough.
- This type of regulation demands, however, that clear functional requirements concerning broadly perceived security are established, allowing, in case a dispute over the appropriateness of a given technology for a particular financial service arises, to verify whether the technical solutions are appropriate, in other words, whether the institution is liable for any possible loss. First of all, yet, the functional requirements indicate what a financial institution should take into account when choosing any technological solution. This concept works well in practice and seems to have the ability of reconciling applicable laws with the inevitable technological progress. It appears to be particularly worth considering when the ways to overcome barriers to eBusiness are pondered.

[1223] See *supra*, point C.2.2.

[1224] See *supra*, point B.1.1.

[1225] Eg. in the area of public procurement law the Civ. Code concept was adopted *ad solemnitatem*, which raises costs of the relevant solutions, makes them less flexible and more difficult in the practical implementation.

[1226] Like the general principle of functional equivalence established in art. 16 §2 of the Belgian law of March 11th 2003 transposing the eCommerce directive.

Portugal National Profile

A. General legal profile

Portugal has been an independent country since 1143 and its frontiers have remained moderately unchanged since 1249. The republican regime was established in 1910 and between 1926 and 25 April 1974 endured a dictatorship – democracy being restored in 1974.

The country is made up of mainland Portugal and the Azores and Madeira islands (11 of them in total). At a lower administrative level, Portugal comprises 18 Districts and 308 Municipalities.

Commerce and contract law is a federal matter, which is generally incorporated into the Civil Code[1227].

As a result, eCommerce is also regulated at the federal level, through specific laws, decree-laws and administrative regulations[1228].

Commercial disputes are generally resolved by the Courts[1229] — Civil Courts[1230], in major cities with specialised jurisdictions — regardless of the economic importance of the case. Appeals can be filed before the Court of Appeal[1231], the Supreme Court[1232] — again depending of the economic importance of the case, but only for issues concerning facts or points of law. The Portuguese system of jurisprudence does not include any binding power of precedent, although the decisions of the Supreme Court are highly authoritative and only very rarely disregarded (even in cases when the Supreme Court issues two different decisions, having only to stipulate which resolution is to be adopted in the future).

[1227] *Código Civil*

[1228] *Leis, Decretos-Leis, Decretos-Regulamentares e Portarias*

[1229] *Tribunais*

[1230] *Tribunais Cíveis*

[1231] *Tribunal da Relação*

[1232] *Supremo Tribunal de Justiça*

B. eCommerce regulations

Portugal has a long tradition in the enactment of regulations concerning the use of electronic devices and e-platforms. Nevertheless, in many cases this has not been followed by market trends (meaning that such gadgets have not been implemented), thus forming matters not being subject to court decisions. In addition, very few studies have been carried out on the subject of eCommerce in Portugal and there is very little information in this regard.

B.1 eCommerce contract law[1233]

B.1.1. General principles

In accordance with Portuguese law, a contract is a manifestation of two or more wills. In other words, it is a meeting of minds under which the parties regulate their interests by endowing them with legal effects. Contracts executed by electronic means shall usually be binding on the parties[1234]. However, it is the principle of contractual freedom which governs contract execution as set forth in Art. 405 of the Civil Code. Under this principle the parties are free to execute any contract (freedom to execute contracts); they are also responsible for determining the content and effects of a contract (freedom to specify).

With regard to contracts which are executed orally, some problems may arise as a consequence of the lack of evidence proving their existence and more specifically their content. Thus, in business, parties tend to adopt formal procedures, by signing written agreements or by tacitly adhering to a proposal.

Problems also arise in the electronic environment. Electronic transactions include the execution of contracts. Since the abovementioned principle applies to most legal business deals and by all means to contracts executed electronically, Internet providers may propose any kind of business deal which the user can choose to enter into, unless it is illegal. This wide scope is further reinforced by the principle of 'freedom of form or consensus' set forth in Art. 219 of the Civil Code, through which contracts may be executed in any form unless a specific form of contract is mandatory. Since no formal pre-formatting is necessary, contracts may even be orally executed. Therefore, all legal transactions concluded through the Internet or via other electronic means, constituting a mere declaration of will, regardless of whether they are carried out by the operators, shall be valid and binding. In addition, there are two other structural principles

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[1233] See António Lourenço Martins, José Garcia Marques and Pedro Simões Dias, *Portugal*, *Cyber Law*, International Encyclopaedia of Laws, Kluwer Law International, 2004, José de Oliveira Ascensão, *A Contratação Electrónica*, *Direito da Sociedade da Informação*, vol. IV., Coimbra Editora, p. 43 *et seq*. and Paula Costa e Silva, *A Contratação Automatizada*, *Direito da Sociedade da Informação*, vol. IV., Coimbra Editora, p. 289 *et seq*.

[1234] In Portugal as in other countries the obligation of establishing the existence of real effects in contracts (concerning its constitution, modification or extinction of a right in rem) does not to apply to those executed through electronic means; since it is difficult to analyse and accept personal effects in this area. In fact, this is why these contract constitute exceptions to Section 2 of Art. 9 of the Directive.

governing contract law: the principle of good faith (Art. 227 of the Civil Code) and the principle of binding force (art. 406, No. 1 of the Civil Code) under which contracts must be executed on time.

This is obviously a significant issue with regard to electronic documents. It is essential to point out that according to art. 2/a) of Decree-Law no. 290-D/99, dated 2 August[1235] an electronic document is created through electronic data processing and shall be regarded a private document (*see* Art. 363/1, 2nd half, of the Civil Code). Therefore, the general rule establishing that all private documents are to be signed by their author will apply. Failure to comply with this obligation, will mean that the contract is void due to a lack of evidence (set forth in Art. 376/ 1 of the Civil Code). In short. private documents must comply with the regulations on signatures and may not be subject to challenge for fraud.

Nevertheless, the content of the contracts cannot be completely disregarded on the basis of a formality. In fact, Portuguese law includes an exception to these situations: Art. 336 sets forth that a court may assess the probative force of a written document lacking a particular formality. For instance, a court may decide that a document is not to be set aside on the basis that it has not been signed. The bottom line is that by providing sufficient evidence, the court may decide that an electronic document is valid, and even establish the document's effects; or conversely may deem that the document is insufficiently supported by reliable evidence.

The use of electronic signatures has been recognised under Portuguese law since 1999[1236] and according to art. 7 of the Decree-Law no. 290-D/99 electronic signatures constitute valid proof of contracts.

Despite the long tradition of the Portuguese legal framework on electronic documents and digital signatures, many of the deadlines to enact the regulations have not been met, thus electronic signatures cannot be considered a reality within the market yet.

By means of Decree-Law No. 62/2003[1237], Portugal formally transposed Directive No. 1999/93/CE of the European Parliament and the Council of 13 December into its legal framework. This Directive addressed the issue of a community legal framework for electronic signatures. Portugal has been dealing with electronic certification for quite some time. In fact, it was through Decree-Law No. 290-D/99 of 2 August that the legal regime for digital signatures was set up. Although it did not formally mirror the Directive, major frameworks and much of the Directive's terminology were already contained in said statute (at that time digital certification in Portugal was governed

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[1235] *Decreto-Lei n.º 290-D/99, de 2 de Agosto*

1236 *Decreto-Lei n.º 62/2003;* Decree-Law no. 290-D/99, of 2 August (legal regime for electronic documents and electronic signatures).

[1237] For a more detailed analysis of this matter, Miguel Pupo Correia in M.L. Rocha, M. F. Robrigues, M.A. Andrade, M.P. Correia and H. Carreiro. *As Leis do Comércio Electrónico. Regime jurídico da assinatura e da factura electrónica anotado e comentado* (Coimbra, Coimbra Editores, 2001), p. 14 *et seq,* António Lourenço Martins, José Garcia Marques and Pedro Simões Dias, *Portugal*, *Cyber Law*, International Encyclopaedia of Laws, Kluwer Law International, 2004, pp. 169-176, Miguel Almeida Andrade, *As insondáveis razões de uma mudança necessária, Direito na Rede*, No. 1 (March-April 2003) available at http://www.oa.pt/direitonarede/detalhe.asp?idc=11741&scid=11762&ida=12748 and Francisco C. Pacheco Andrade, *A assinatura dinâmica face ao regime jurídico das assinaturas electrónicas*, Scientia Ivridica, n. 13, 299, p. 347.

under the heading of "digital" signature[1238] which was not as technologically neutral as Directive 1999/93/CE[1239]. This Directive came into force some months after the enactment of the Decree-Law no. 290-D/99, which gave rise to some "discomfort"[1240]. Therefore, this statute was never as thoroughly enforced as expected and Portugal considered that it would have to enact a legal document formally transposing the EU Directive: on 3 April 2003, Decree-Law No. 62/2003 changing the aforementioned Decree-Law No. 290-D/99 was published.

With regard to whether eAgreements are binding, it should be noted that agreements should be signed by digital/electronic signatures, and that the law also states the legal effect of the digital signatures, providing a combination of the "legal evidence" and the "free evidence assessment" systems. The system is as follows:

1. Merging a digital signature with electronic documents that may be submitted as a written declaration is equivalent to a hand-written signature (Art. 7)[1241].

2. Only electronic documents, considered to be a written declaration and including an advanced electronic signature that an accredited certifying entity has granted, will have the probative force foreseen under Art. 376 of the Civil Code (having the same effects as a document backed by sufficient evidence) (Art. 3/2).

3. The use of a digital signature issue by a non-accredited certification authority may be deemed valid: the evidential value of these electronic documents "shall be assessed under the general terms of the law" (Art. 3/4). Thus, they are considered a written and signed document which probative effects to be freely assessed by a judge (Art. 366 of the Civil Code). In this regard, the evidence provided with regard to such document and the relevant signature will not necessarily be the same as that provided for a document bearing an advanced electronic signature granted by an accredited certifying entity.

Furthermore, in accordance with Portuguese law, under certain circumstances the requirements for the use of digital signatures must be complied with in order to make a given electronic communication valid.

[1238] Such statute had thus been conceived around the notion of digital signature and not around the generic concept of electronic signature.

[1239] Portuguese law was thus developed from the following principle: digital signature is a type of advanced electronic signature. In those days science was at a stage where it was the only reliable type of electronic signature. The statute was initially based on a certain type of electronic signature and subsequent legal frameworks were based on it (although the statute included and exception whereby the regime `could apply to other types of electronic signature provided that they meet security requirements similar to those governing digital signature´, and that the `authorizing authority supervises technological development in order to do so´).

[1240] António Lourenço Martins, José Garcia Marques and Pedro Simões Dias, *Portugal*, cit., pp. 171.

[1241] This Article 7 creates a triple legal presumption (refutable) concerning the three functions of the advanced electronic signature: (i) identifying function: the person who provided the qualified electronic signature is the holder thereof or the entitled representative of the legal person holder of the qualified electronic signature; (ii) confirming function: the qualified electronic signature was provided for the signing of an electronic document; (iii) Function of Inalterability: the electronic document has not been altered since the qualified electronic signature was placed therein.

For instance, Decree-Law no. 104/2002, of April 12[1242] which enacted the regime on the acquisition of goods by public bodies particularly in Portugal, sets forth the obligation to include digital signatures in the notifications to courts and counterparts.

Moreover, in accordance with Art. 150 of the Civil Procedure Act[1243] procedural steps can be carried out by electronic mail or other "electronic transmission of data". This matter is governed by administrative regulations and has been subject to several amendments since 2000[1244].

Order in Council no. 642/2004, of June 16[1245] sets forth that notices by e-mail must be sent to the competent court and that the e-mail must contain the "electronic signature" of the person in question. Furthermore, the certificate of the electronic signature must denote the professional classification of the signatory (Art. 2). Reference to "electronic signature" can also be found in Art. 3, which sets forth that the use of electronic communications only requires an advanced electronic signature.

Furthermore, Portuguese law also sets forth that communications to courts by electronic mail should be carried out by means of time stamps, issued by competent third parties (i.e., the certification service providers). Non-compliance with said requirements (digital signatures and time stamps) means that the document in question will be treated as a mere fax, thus requiring all documents in paper to be also sent to the court and to the counterparts.

Finally, the use of digital signatures is also enacted in the electronic invoicing (see below).

[1242] *Decreto-Lei nº 104/2002, de 12 de Abril*

[1243] *Código de Processo Civil*

[1244] Initially regulated by Administrative Regulations no. 1178-E/2004, of December 15 (*Portaria n.º 1178-E/2004, de 15 de Dezembro*), and 8-A/2001, of January 3 (*Portaria n.º 8-A/2001, de 3 de Janeiro*), and amended by Decree-Law no. 320-B/2002, of December 30 (*Decreto-Lei n.º 320-B/2002, de 30 de Dezembro*). This framework has been substantially modified by Administrative Regulation no. 337-A/2004, of March 31 (*Portaria n.º 337-A/2004, de 31 de Março*), which was revoked by Administrative Regulation no. 642/2004, of June 16 (*Portaria n.º 642/2004, de 16 de Junho*).

[1245] *Portaria n.º 642/2004, de 16 de Junho*

B.1.2. Transposition of the eCommerce directive[1246]

Following long discussions and two draft bills, the Portuguese legal framework governing eCommerce is Decree-Law no. 7/2004, of January 17, 2004[1247]. This act aims to transpose Directive 2000/31/EC of the European Parliament and of the Council dated 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (Directive on electronic commerce). This act, which also transposed Art. 13 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), was enacted also with a didactic ratio, by providing legal orientation through several provisions that were previously based on doctrine. Furthermore, this act goes far beyond the scope of the eCommerce Directive.

This legal framework covers almost all "information society services"[1248,1249], but some areas are expressly excluded[1250].

Needless to say, contracts executed in other frameworks do not benefit from this clause and thus formal requirements stipulating the use of hard copies still apply. The main rule is that contracts can be freely executed by electronic means, and their effectiveness or validity shall not be prejudiced on the basis of the means used (art. 25/1). However, only those who have agreed to do so shall be bound to use electronic means to execute a contract, hence a party cannot require that an agreement be executed by electronic means.

In accordance with our law, statements issued by electronic means shall meet the legal requirements on written form when contained in a support with the same guaranties on reliability, clarity and storage. Furthermore, this act needed to deal with the issue concerning the signing of electronic documents: the electronic document shall be deemed signed when it meets the requirements set forth by the law governing electronic

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[1246] Please see *VVAA*, "O Comércio Electrónico em Portugal_ O Quadro Legal e o negócio em Portugal", ANACOM - Autoridade Nacional de Comunicação, 2004.

[1247] *Decreto-Lei n.º 7/2004, de 17 de Janeiro*

[1248] Which means any service provided at a distance by electronic means, for remuneration or at least in the scope of an economic activity at the individual request of a recipient of services.

[1249] Art. 24 states that eContratual legal framework applies to all types of contracts that are concluded by electronic means or by means of a data-processing technique, whether or not they are deemed as commercial contracts.

[1250] The following areas fall outside the scope of the Decree-Law n. 7/2004:(ii) the field of taxation; (ii) the competition regulation; (iii) the processing of personal data and privacy protection regimes; (iv) legal aid; (v) games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; (vi) the activities of notaries or equivalent professions to the extent that they are characterized by public faith or other manifestations of public authority; (vii) contracts governed by family law or by the law of succession; (viii) Contracts requiring the involvement of courts, public entities or other entities exercising public authority, in particular where such involvement is a condition for such contracts to have an effect with regard to third parties, as well as contracts required by law to be certified or authenticated by a notary; (ix) contracts concerning rights over real estate, except for rental rights; (x) contracts of surety ship granted and on collateral securities, where they are not part of the professional activity of the person who provides them.

signature and certification, which in turn refers to Decree-Law 290-D/99 as amended by the Decree-Law no. 62/2003 (please see above).

Please note that within the scope of eAgreements, our law has the following particularities:

— Definition of contract offer and invitation to treat: the online offer of products or services shall be deemed a contract offer when it includes all the necessary elements for the contract to be executed through the mere acceptance by the recipient; otherwise, it shall constitute an invitation to treat. Please note that under Portuguese law, the mere acknowledgement of receipt of the order has no legal significance when determining the moment of execution of the contract.

— Designation of a legal framework for contracts executed without a person's involvement: execution of contracts through computers, without a person's involvement, shall be subject to the general regime, unless otherwise stated. Namely, the following elements shall constitute errors in contracting in those cases: (i) the nature of intention, in the event of a programming error; (ii) the statement of intention, in the event that the machine is malfunctioning; (iii) the transmission, in the event that the message reaches its destination with errors. In addition, Decree-Law no. 7/2004 also includes another doctrinal definition in this regard: "the other party shall not oppose an appeal based on a mistake, when he/she ought to have been aware of the mistake, namely through the use of devices for identifying input errors".

— With regard to dispute settlements by electronic means, "online processes for the out-of-court settlement of disputes between information society service providers and recipients shall be permitted, provided that the provisions on document validity set out in this chapter are complied with". Obviously, this also applies to the general legal framework, in which case these out-of-court entities must not only observe the rules on the validity of the contracts, but also the manner in which the parties have assumed their responsibilities.

Finally, we would just like to point out that Portugal does not have any specific provision on electronic registered email or electronic filing (with the exception of eInvoicing matters to which we will refer below) and, as previously mentioned, courts have yet to issue a decision stipulating the parity between electronic documents and traditional written documents.

B.2 Administrative documents

The Green Book of the Information Society[1251] developed in Portugal, identified the necessity of implementing and developing electronic commerce as well as the electronic transfer of data, even within the Public Administration.

After the publication of said Book, the Resolution of the Council of Ministers no. 94/99[1252] approving the Orienting Document of the National Initiative for Electronic Commerce provided the first legal-governmental reference to the subject. This resolution covered areas such as the legal certification and recognition of electronic commerce, to

[1251] *Livro Verde para a Sociedade da Informação*, adopted in 1997; see http://www.acesso.umic.pcm.gov.pt/docs/livroverde_rtf.zip

[1252] *Resolução do Conselho de Ministros n.º 94/99*

encourage the harmonization, interoperability and security of payment methods as well as guidelines on the modification of tax systems. It also dealt with the need for the State to encourage the use of electronic commercial transactions, as well as to take active part, together with traditional economic sectors, in the promotion of electronic commerce as a vehicle for improving competition within the global market.

The application of said principles in the Public Administration would represent an important move in the market, as the State plays an important role in the business of companies. Conversely, the need to exchange information within the relevant Public Administration will increase the efficiency of resources. Moreover, the use of some of the paradigms of electronic commerce - such as EDI - as vehicles to increase the effectiveness of exchanging information from one ministry to another, would enable a re-analysis of the transfer of information mechanisms.

This Resolution included several measures to be adopted and led on one hand to the implementation of rules on the use of electronic signatures by administrative entities, and on the other to the use of electronic solutions by entities in their business activity.

With regard to the use of electronic signatures, Decree-Law 290-D/90 expressly states that public entities may issue electronic documents bearing a qualified electronic signature pursuant to the provisions of this statutory instrument for; "*operations that concern the creation, issue, storage, reproduction, copying and transmission of electronic documents, which formalize administrative acts through computer systems, including the transmission thereof by telecommunications means. The data relating to the interested entity and the person who carried out each administrative act shall be indicated in clearly identifiable language and in a manner that will enable verification the functions or the position of each document's signatory*" (Art. 5). From this statement, it is clear that Portugal intended to provide a legal solution for the use of electronic signatures in the general act on electronic documents.

Similarly, the government issued several resolutions to improve the implementation of eGovernment platforms and to create the legal framework for the acquisition of goods and services by the Public Administration. The Resolution of the Council of Ministers no. 36/2003 pointed out the need to adopt and generalize electronic platforms within the scope of the transactions of Public Administrations. In this regard, the Resolution of the Council of Ministers no. 111/2003 stated that *Unidade Missão de Inovação e Conhecimento* (UMIC[1253]) should elaborate the National Program of Electronic Purchases (*Programa Nacional de Compras Electronicas*) to implement a firmer approach, which brought about the enactment of Decree-Law no. 255/2003, of October 21 (adopting the special regime of the National Program of Electronic Purchases, the citizen's portal and related projects for the allocation of public funds).

[1253] See http://www.umic.pt/UMIC/

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The bill of exchange is a traditional instrument used in business for various purposes, originally as a method of payment (the original function) which has since evolved into an instrument for debt collection, credit and investment. As is the case in other countries, bills of exchange have a long history and their importance for international trade was confirmed by the execution of the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes in 1930. This international document was incorporated into the Portuguese legal framework by Decree-law no. 23.721, of March 29, 1934[1254]. This act enacted the Bill of Exchange and Promissory Note Uniform Act (LULL, after the Portuguese name[1255]).

A bill of exchange is an instrument which ought to be in writing and include several mandatory statements, but which can be used in several ways (since it is not limited to a payment from the drawee to the drawer).

With regard to said statements, the bill of exchange must contain the signature of the drawee (Art. 1/8).

In my opinion and as sustained in this analysis, the full application of Art. 3 and 7 of Decree-law no. 290-D/99 should lead us to the conclusion that this requirement is met even if the bill of exchange is issued by electronic means and signed by a digital signature[1256].

Furthermore, LULL makes no mention of the fact that the bill of exchange must be in paper from. It is important to bear in mind that when the act was enacted in 1934, the legislator could not have foreseen any solution concerning the use electronic means. Nevertheless, in recent years with the emergence of the e-environment in commerce, LULL did not have to be amended in order to impose such a restriction. Moreover, no other requirements set forth in Art. 1 of LULL limit the use of an electronic document, since this type of document can fall within the scope of the wording of the bill of exchange requirements. Hence, there are no restrictions on using a bill of exchange by electronic means. Finally, although the issuance of bills of exchange is subject to stamp

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[1254] *Decreto-Lei n.º 23.721, de 29 de Março de 1934*

[1255] "*Lei Uniforme relativa às Letras e Livranças*" or "*LULL*". In relation to the concept of the bill of exchange, we follow Ferrer Correia, "Lições de Direito Comercial - Letra de Câmbio", vol. III, Universidade de Coimbra, 1975.

[1256] Although this the signature might be seen as a formal requirement, doctrine in Portugal does not considers that the a problem with the signature in all situation leads to the legal in*existence* of the bill. In fact, Ferrer Correia considers that if a signature is forged and if it is not obvious, determines only that the obligation of the bill of exchange is null (cit., p. 121). It seems nevertheless that the lack of the signature provides denies the existence of the bill of exchange. Even though, in all cases, the general provision of Art. 7 of the Decree-Law n. 290-D/99 ("the placing of a qualified electronic signature on an electronic document shall be equivalent to a handwritten signature on a printed document") is enough to allow us such a conclusion.

duty, this duty is not met with the incorporation of the stamp[1257] on the bill thus, this tax obligation does not limit the use of electronic documents.

Problems arise from three other areas:

— The bill of exchange in paper form is a unique document, since any copies do not incorporate the original written signature. The complete opposite occurs with electronic documents, since copies are undistinguishable from the original. It is true that the bill of exchange can be drawn in the form of a copy (Art. 64 LULL), but in order to be considered so, it must be numbered. If not, they will constitute different bills of exchange (Art. 64 LULL). The law also sets forth that the bearer of the bill "has the right" to make copies (Art. 67 LULL), but in doing so must make reference to the person who owns the original document. Thus, the regime on copies stipulates that indications concerning title must be made at all times.

— All bills of exchange, according to LULL, may be used for several operations: it can be endorsed to a third party (in this case, the drawer must make reference to this fact in the bill of exchange); it can include a guarantee (this would not be problems if the guarantee is granted when the bill is issued, but in this case the cosignatory would have to digitally sign the document); if the bill of exchange is partially paid, this fact should be stated in the title. Again, the bill of exchange must be in written form.

— Finally, Administrative Rule no. 28/2000, of January 27[1258] sets forth several requirements that the bill of exchange must comply with, all of which concern the issue of the title in paper form or printed (format, size format, and even typographies that may be used for the printed versions). Therefore, this constitutes an unequivocal limit to the use of electronic documents with regard to bills of exchange.

Rather than the limitations and theoretical problems related with the use of electronic copies — namely that it could lead to the creation of several bills of exchange and consequently to the lack of security of this title in commerce[1259]— it seems that according to Portuguese law, the flexibility in the use of bills of exchange and the framework of the Administrative Rule no. 28/2000 leave hardly any leeway for electronic solutions.

[1257] Since the Law n. 150/99, of September 11 ("*Lei n.º 150/99, de 11 de Setembro*").

[1258] *Portaria n.º 28/2000, de 27 de Janeiro*

[1259] We could go beyond this limitation with the use of a third party acting as a trustee, that storages the bill of exchange and provides it when owed to the drawee (similarly to the escrow agreement of the source code of a software).

C.1.2. Documentary credit[1260]

A documentary credit operation constitutes a "three-way relationship"[1261]: the agreement between a salesperson and purchaser; the obtaining of a loan; and the documentary credit performance. It is a method of payment, sustained in a convention among three parties.

There are no provisions regulating this matter in Portugal, since it relies on the will of the parties concerned or on the adoption of certain softlaw solutions.

One of the most common and analysed documents in Portugal is the "*Regras e Usos Uniformes relativas aos Créditos Documentários*" ("Règles et Usances relatives aux Crédits Documentaires"), issued by the Chambre de Commerce Internationale, Paris[1262].

These Rules mainly define a conventional framework to be adopted by the parties, and even though there are some mentions to be included in the document (including the electronic signature), there is no restriction of these agreements with regard to the use of electronic formats, namely by the use of digital signatures (if the applicable law is Portuguese, according to the Decree-Law n. 290-D/99).

Should the document be deemed valid in accordance with this act, then the bank cannot reject such document for reasons of validity.

These rules also contain some strict provisions concerning the use of documents in paper form, particularly because they were drafted during a more traditional period. Some of them even discourage the recipient of the message from using electronic documentary credits, since the parties may wish to use safe and non-disputable documents. Furthermore, doctrine in Portugal tends to consider that these documents constitute titles to merchandise. Therefore, we need to decide whether a copy (an electronic copy) can be used and whether it is safe to do so.

Hence, it is very difficult to provide a clear answer on whether e-formats can be applied to the documentary credit. The lack of major and specific regulations in Portugal means that we will have to rely on judicial decisions.

1260 Please see João Calvão da Silva, "Estudos de direito comercial : pareceres", Almedina, 1999, and José Simões Patrício, "Direito bancário privado", Quid Juris?, 2004.

1261 João Calvão da Silva, cit., p. 66.

1262 And also the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation or "eUCP". See http://www.dcprofessional.com/content/eucp.asp

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

In the transportation of goods by any means, various documents are issued during the various steps of the process, starting with a receipt (non-negotiable or negotiable) issued by the entity receiving the goods to the owner of the good. Other documented steps include the loading and unloading of goods.

For the purpose of this section, we will examine the use of the so-called "bills of lading". These bills are an internationally accepted fundamental tool for facilitating the transportation of goods, most notably in maritime transportation (as we shall refer to below).

Portugal issued Decree-Law 239/2003, of October 4[1263] that establishes the legal regime governing the national contract for the road transportation of merchandise.

A transportation contract is executed by a transporter and dispatcher by virtue of which the former undertakes to transport merchandise by road, from one place to another within the Portuguese territory, delivering such goods to the relevant addressee.

According to the said act, the bill of lading proves the execution, terms and conditions of the contract (Art. 3/1)[1264].

In addition, it also provides the requirements that the bill must observe: it must contain some elements and abide by certain conditions, such as:

(a) Elements: (i) Place and dates where the contract is filed; (ii) Name and address of the transporter, the dispatcher and the addressee; (iii) Place and date of the loading of the merchandise and place of delivery; (iv) kind of merchandise and type of packaging and, if they constitute dangerous merchandise or lack the special precautions, the kind of merchandise in terms of the applicable special legislation; (v) Gross weight of the merchandise, quantity or any other express measure; (vi) Other information concerning any particularities of the goods, value, etc.

(b) Conditions: (i) Three copies of the contract must be issued; (ii) it should be signed by the dispatcher and the transporter; or (iii) accepted in writing, by means of a letter, telegram, fax or equivalent "electronic" means.

Thus, from this provision, we can conclude that bills of lading concerning road transport can be processed as an electronic document.

The maritime transportation of goods is governed by Decree-Law no. 352/86, of October 21[1265], whenever Portuguese law is applicable[1266]. In the contract for the maritime transportation of merchandise, one party undertakes to transport the goods, from one port to another, for remuneration, called "freight".

[1263] *Decreto-Lei n.º 239/2003, de 4 de Outubro*

[1264] Please note that the lack, irregularity or loss of the bill of lading do not harm the existence nor the validity of the transport contract.

[1265] *Decreto-Lei n.º 352/86, de 21 de Outubro*

[1266] This contract is disciplined by treaties and the international conventions in Portugal and, subsidiary, by this act.

According to Art. 3, such a contract must be executed in writing. The law provides guidelines for compliance with this requirement: letters, telegrams, telex, fax and "other equivalents created by the modern technology" (Art. 3/2). This was the wording used by the Portuguese legislator in 1986, twenty years ago.

Since to date it has not been revoked, I believe that this act must be interpreted according to the interpretation that such expression had not only then (in the eighties), but also at present. Thus such a contract must be capable of being executed under an electronic document duly signed by digital signatures.

However, the bill of lading which is to be provided to the transporter is different. The abovementioned act also refers to this issue: the bill of lading must include the following: (i) the nature of the merchandise; (ii) main identification marks of the merchandise; (iii) the quantity and amount or the weight of the merchandise; (iv) type of packaging and protection used for the merchandise; (v) ports where the merchandise is loaded and unloaded; (vi) the date of execution.

Hence, such act makes no mention of the form of the bill of lading and, therefore, need not necessarily be in paper form, since the obligations concerning the bill of lading do not prohibit or even refer to the use of an electronic form.

Furthermore, Art. 5 (Reception of the merchandise for shipping) provides that when the transporter receives goods for shipping, it must provide the other party with a receipt or a bill of lading, with the express mention "for shipping", thus including the data mentioned above as well as: (i) the preservation and the apparent state of the merchandise; (ii) the name of the transporting vessel; (iii) other elements that may be deemed relevant. Again and as mentioned above, this document need not be in paper form.

C.2.2. Storage contracts

The temporary storage of certain goods in warehouses or otherwise is a frequently used intermediary step in international trade and national commerce. Similarly, this process also relies heavily on a series of documents to establish its validity and recognition, most notably through the execution of storage agreements and the issue of negotiable or non-negotiable receipts.

From a legal perspective, the storage of goods in Portugal is mainly regulated by Book II, Title II, Chapter XI of the Civil Code — Art. 1185 -1206 — and (and Commercial Code, Art. 403-407). According to Art. 1185 by virtue of this kind of contract one party provides another with an item, be it furniture or property, so that the latter, known as the trustee, stores it and in time returns it when requested.

The storage agreement is a formal contract under Portuguese law, as this contract is only executed when the good is delivered to the storer or trustee (Art. 1185 of the Civil Code). The validity of this contract is not subject to any form, thus it can be executed orally or in writing[1267]. In short, the law just requires that the goods are transferred so that the contract is deemed executed.

[1267] Obviously that for evidence purposes, the storage agreement should be submitted to written form.

Since it does not have to be in writing, obviously there is no legal requirement establishing that it must be in *paper* form. So, in order for a storage contract to be legally binding, all that is necessary is that the general regulations of Decree-Law no. 290-D/99 (art. 3 and art. 7) are complied with. As such, there is no legal barrier for the use of electronic contracts in the execution of storage agreements.

Portugal customs adhere to the NCTS-network (New Computerised Transit System), which permits the exchange of electronic data between connected offices. By virtue of Legislative Order no. 42/2003, of October 9[1268], the system whereby all declarations are sent electronically by using EDI-based messages (by EDI-FACT or XML), by accessing to website[1269] and uploading the communication has been implemented. Please note that the website system does not use advanced electronic signatures, the user is merely provided with a log in identification and a password.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing[1270]

Almost simultaneously to the legal framework for eSignatures, Portugal introduced an act on eInvoicing through Decree-Law no. 375/99, of September 18[1271]. This act has been governed by Implementary Decree no. 16/2000, of October 2[1272]. However, despite these regulations, eInvoicing was never implemented in Portugal, since an administrative decision suspended the whole process. The General Directorate of European Affairs and International Relationships[1273] through its Report no. 2653 of 27 December 2001[1274] concluded that as the European Commission was not informed of the implementation of the technical parameters within the eInvoicing framework, the process should be suspended (this suspension was confirmed by the tax authorities' withdrawal of the application form to request authorisation to apply eInvoicing).

According to Article 1 of the Decree-Law no. 375/99 electronic invoices are deemed equivalent to hard copies, provided that they include a digital signature, in accordance with Decree-Law no. 290-D/99, of 2 of September, which constitutes a guarantee of the authorship and integrity of the invoice. Implementary Decree no. 16/2000 set forth certain requirements concerning eInvoicing: (i) verification of conformity with the structure of the message with requirements established for the eInvoice; (ii) the time validation of the messages; (iii) the storage, by electronic support, of the invoices or documents (issued and received); (iv) daily storage, by electronic support, of a sequential recapitulative map of the messages; (v) all documents to be in a legible format ; (vi) the maintenance of the integrity, availability and authenticity of the original

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[1268] *Despacho Normativo n.º 42/2003, de 9 de Outubro*

[1269] See http://www.e-financas.gov.pt/de/jsp-dgaiec/main.jsp.

[1270] Please see Miguel Pupo Correia, "Documentos electrónicos e assinatura digital : as novas leis portuguesas", Lusíada. Direito, Lisboa, (Jan.-Jun.2003).

[1271] *Decreto-Lei n.º 16/2000, de 18 de Setembro*

[1272] *Decreto-Regulamentar n.º 16/2000, de 2 de Outubro*

[1273] *Direcção-Geral de Assuntos Europeus e Relações Internacionais*

[1274] *Informação n.º 2653 27.12.2001*

content of the invoices and recapitulative maps; (vii) non-repudiation of messages; and (viii) non-duplication of invoices.

It was after the suspension of the first eInvoicing legal framework that the eInvoicing directive[1275] was introduced, whose major goal was to harmonise the applicable legislation in the Member States, mainly in the field of VAT.

Said directive was transposed into Portuguese national law by the Decree-Law no. 256/2003, of October 21[1276] amending the VAT Code. The new regulations came into force on 1 January 2004, but since, such provisions have not been regulated.

As established in the directive, Portuguese law enables electronic invoicing provided that it is carried out in accordance with the conditions set forth by the directive (i.e., guaranteeing the source and integrity of the invoice, art. 35/10 of the VAT Code).

The most important requirements set forth with regard to the implementation of an eInvoicing system are as follows:

- The use of an advanced electronic signature or an EDI. Please note that the law just refers to the need to assure the authenticity and the integrity of the content of the invoice (it makes no mention to the need for it to be based on a qualified certificate or be created by a secure-signature-creation device);
- The company must have lists, in paper form, of the invoices issued.
- No prior authorisation or a prior notice is necessary (only the systems implemented until December 31, 2006 are subject to a prior notification of the Tax Office[1277]).

In addition, electronic invoices may be stored outside the Union, provided that the taxable person notifies the administration (Art. 52/5 of the VAT Code) and that the invoices can be accessed electronically from Portugal.

Electronic invoices must be filed in their original form, since this is the only way of ensuring their authenticity and integrity. Invoices received in paper form should also be stored in their original paper form. In my opinion, it is possible to have a digital copy, but the technology used must guarantee the authenticity of its source and the integrity of its content. Nevertheless, tax authorities have taken a very conservative approach and thus a opinion on this matter will be very difficult to obtain (we have been informed that 2 or 3 years ago, several entities requested information in relation to the use of electronic devices from tax authorities, and never got a response).

The storage period for the sender of the invoice was already set at 10 years (art. 52/1 of the VAT Code). This obligation not only covers invoices, but also accounting records and all electronic means associated with the analysis, programming and execution of the process.

[1275] More formally known as Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax; *Official Journal L 015 , 17/01/2002 P. 0024 - 0028*

[1276] *Decreto-Lei n.º 256/2003, de 21 de Outubro*

[1277] *Direcção-Geral de Impostos:* http://www.dgci.min-financas.pt/

C.4.2. Electronic books

On March 26, 2006, the Portuguese Government launched a global program for administrative modernisation called *Simplex - Legislative and Administrative Simplification Programme*[1278], which included the introduction of 333 new measures to simplify the administrative obligations of companies.

Decree-Law no. 76-A/2006, of March 29[1279], which was recently enacted, constitutes one of the most significant measures of SIMPLEX. This provision has very broad effects, revoking, amending and introducing changes to 32 acts, some of which are as relevant as the Commercial Companies Code[1280], the Commercial Registry Code[1281], the Commercial Code[1282] or the Notary Code[1283][1284].

One of the aims of Decree-Law no. 76-A/2006 is to enable the use of electronic documents within the business activity of companies. Pursuant to Art. 29 of the Commercial Code, all companies must have "commercial accounting in accordance with the law". However, by virtue of Art. 30 (called "Freedom of organization of commercial accounting") of this new piece of legislation, the company is free to organize its commercial accounting, and is entitled to define the technical means or traditional support for such accounting. In addition, it includes regulations on the use of minutes books, such as Art. 39 which expressly permits the use of an electronic minutes book.

With regard to storage, Art. 40 sets forth that the books, correspondence and documents are to be kept safe for a ten year term. There is no obligation to store such documents in paper form since it specifically stipulates that such documents "may be stored by electronic means" (Art.º 40/2)[1285].

In relation to the Commercial Companies Code, Decree-Law no. 76-A/2006 introduced Art. 4-A, which states that "the requirement or obligation of written form, printed document or signed document, is considered fulfilled or verified even if the support in paper or the signature is substituted by another support or other means of identification that assures at least an equivalent level of intelligibility, durability, and authenticity".

This provision constitutes a revolution in Portuguese law. In my opinion, the documents to be processed by a company can be produced by electronic means. Obviously this provision is so recent that it has not yet given rise to any doctrine and I believe that at first sight, the only limitation to this general rule (which is a quite sound rule) becomes apparent in cases when a document requires a specific statement by an authority to be in paper form.

[1278] *SIMPLEX - Programa de Simplificação Administrativa Legislativa,* http://www.portugal.gov.pt/Portal/PT/Governos/Governos_Constitucionais/GC17/Ministerios/PCM/MEAI/Comunicacao/Programas_e_Dossiers/20060327_MEAI_Prog_Simplex.htm

[1279] *Decreto-Lei n.º 76-A/2006, de 29 de Março*

[1280] *Código das Sociedades Comerciais*

[1281] *Código do Registo Comercial*

[1282] *Código Comercial*

[1283] *Código do Notariado*

[1284] Decree-Law n. 76-A/2006 will entry in force in June 30, 2006.

[1285] The rule is that it should be kept in either electronic or paper form, for a period of ten years.

D. General assessment

D.1 Characteristics of Portuguese eCommerce Law

- The Portuguese legal framework was built around the concept of autonomy of the parties, specifically with regard to contractual agreements. However, the relationship between the State and its citizens is somewhat different: the State often opts to impose some requirements.
- Such requirements derive from the idea that the imposition of administrative formalities would lead to a better and a more appropriate administration of companies and other entities.
- It was at the end of the nineties when Portugal initiated the process of widening the scope of its legal framework to encompass new areas and e-platforms. In 1999, Portugal enacted the legal framework on electronic documents and electronic invoicing. This year was the starting point of a legislative process that is still today the driving force for adapting the former regime to the use of new technologies.
- Even though Portugal was one of the first countries to enact laws concerning the electronic environment, it has been a long process to transpose the eCommerce Directive, which was concluded with Decree-Law no. 7/2004, of January 17. Again, this act is innovative in relation to the standard terms used by the EU Directive, as it includes many provisions and remedies not included in said directive (liability of ISPs and automatic contracting, amongst others).
- Despite the impact that Decree-Law no. 7/2004 has had on Portuguese law, the main area of this analysis (focused on determining to what extent electronic documents may be used or deemed valid by law), we shall mainly focus on the "old" Decree-Law no. 290-D/99, which is in fact a major factor to this study.

D.2 Main legal barriers to eBusiness

In my opinion, the most significant barrier to eBusiness was implemented as consequence of the legal framework, namely through its inconsistent decisions.

- In truth: prior to Decree-Law no. 7/2004, the two most relevant regimes in the area of Information Technologies Law (electronic signatures and electronic invoicing) failed to be fully implemented and, worst of all, resulted in the belief that they were extremely vulnerable.
- The fact that they were enacted ahead of time, or at least, prior to the issuance of the important EU Directive on both matters in question, has meant that the State has found it extremely difficult in both cases to fully regulate them. The enactment of these Directives put the State in an awkward position, having to decide whether to move on and evolve in order to draft consistent regulations; or accept that a mistake was made and decide to alter the framework within a few months.
- The problems with this were two-fold: with regard to electronic signatures, there is the fact that there is a lack of accreditation schemes, with only one consistent

certification authority in the market; whereas the first suspension of the eInvoicing method will be complicated since no company has implemented such a solution, and even today, this is not regulated.

- This had effects in the market, as it slowed down the introduction of electronic contracting, since many thought that digital signatures were inoperative, void or even still unsafe, especially because operators were unaware of the technical standards to be adopted by the regulation.
- If we bear in mind that these weaknesses appeared simultaneously to the "slow-down" of the eEconomy, we can get the full picture.
- This also affected the legal profession, as the legal equivalent of eDocuments/traditional documents was unknown or deemed insecure: lawyers hardly ever agree to use eContracting; in the same way notaries barely use new devices (a notary used a digital signature in Portugal for the first time in April 2006); courts and the respective operators are unfamiliar with these solutions.
- However, it is true to say that not all the legal environment is apt for the new technical environment since there are many administrative constraints that discourage the use of electronic documents, such as the requirement of paper form. However, in reality the major deterrent comes from the legislator.

D.3 Main legal enablers to eBusiness

- If we manage to stabilise our legal framework on eDocuments, eInvoicing (with the enactment of the regulation), eCommerce and related matters (anti-spamming, authors' rights framework on the Information Society, for instance), I believe that we will be taking the first step forward in the provision of security and consistency of solutions in the market, so that operators will understand their rights and obligations more clearly, which in turn will lead to a more favourable view from the media and to courts feeling more confident about using these methods.
- Furthermore, SIMPLEX and other similar actions which aim to simplify the acts of companies and bring together the use eDocuments and paper-based documents constitute an important driving force for the development of eCommerce and for the use of electronic documents.
- This approach is acknowledged by the 1999 legal framework, which provides a general principle of functional equivalence between eDocuments and traditional ones. This enables a broad use of its solutions, not only with regard to contracts, but also to all legal actions which need not be in paper form.

Romania National Profile

A. General legal profile

Romania is a republic administratively divided into 41 counties[1286] and the Municipality of Bucharest, which is the capital and largest city, with a population of approximately 2,0 million.

The Romanian legal system is similar to other continental law systems, according to which only the Constitution[1287] and other statutory legislation constitute a legitimate source of legal rules. French influences are evident in the Constitution, in the civil and the criminal codes and in the codes of the civil and criminal procedure.

Commerce and contract law are regulated at the state level and are incorporated into the Commercial Code[1288] and the Civil Code[1289] which were both influenced by the French Code of Napoleon.

Commercial disputes are settled by the Local Courts[1290] for matters with a value less than RON 100,000 (approx. EUR 28,920); or by the Tribunals[1291] for matters of or exceeding RON 100,000. Appeals against the decisions of the Local Courts can be lodged with the Tribunals and the appeals against the decisions of Tribunals can be lodged with the Courts of Appeals. The High Court of Cassation and Justice[1292] hears second-degree appeals against the decisions of the Courts of Appeals and second-degree appeals in the interest of the law. The Romanian legal system does not formally recognize case law as a source of law, therefore, previously settled cases are not binding upon courts. However, lately court precedents are cited by practitioners in their pleadings.

B. eCommerce regulations

eCommerce is also regulated by a number of specific laws and methodological norms[1293].

As to the validity and recognition of electronic documents, the actual lack of legal practice in enforcing the existing legislation in the field may be substituted by resorting to the doctrine guidelines and interpretations. In this section, we will summarize the main opinions issued by the doctrine regarding the legal value of the electronic documents.

[1286] *Judete*

[1287] *Constitutia , http://legal.dntis.ro/constitutia/index-con.html*

[1288] *Codul Comercial, http://legal.dntis.ro/comercial/index-com.html*

[1289] *Codul Civil, http://legal.dntis.ro/codcivil/1.html*

[1290] *Judecatorii*

[1291] *Tribunale*

[1292] *Inalta Curte de Casatie si Justitie*

[1293] *Legi/Norme Metodologice*

B.1 eCommerce contract law

B.1.1. General principles

With respect to the validity of electronic contracts, the Romanian law is flexible. According to the provisions of the Romanian Civil Code, the existence of a consensus is mandatory and sufficient, in case of a contract.

Taking into consideration the specifics of the electronic means, the prior consent of the involved parties' is not needed for the conclusion of the electronic contracts.

Before the entering into effect of Law no. 455 of 2001[1294] published in the Official Monitor no. 429 of July 31, 2001, doctrine [1295] held that:

> *"……*
>
> *since the electronic records do not include the original signature of the issuer, they cannot be assimilated with the deeds bearing a private signature*.
>
> *……"*

In accordance with the provisions of Art. 7 (3) of Law no. 365 of 2002[1296] published in the Official Monitor no. 483 of July 5, 2002, proof of the conclusion of the contract and of the liabilities of the parties is construed in accordance with the provisions of the Civil Code and Law no. 455 of 2001.

Moreover, and according to the same Art. 7, when all the conditions stipulated by the law are met, electronic contracts have all the legal effects that the law recognizes in respect of a contract concluded by traditional means.

Pursuant to Art. 969 (4) of the Civil Code:

> "……
>
> *The contract is the law of the parties.*
>
> ……"

and once two business partners agree upon a specific transaction, the contract is just the document which provides for their rights and liabilities and endorses their consensus. Therefore a court is not entitled to question whether the contract was concluded via e-mail, fax or otherwise.

According to Art. 46 of the Commercial Code:

> *"……*
>
> *The commercial liabilities are proved by authentic deeds, deeds bearing a private signature, correspondence, parties' ledgers or witnesses each time a court deems is necessary to hear their testimony*.

[1294] Law no. 455 of July 7, 2001 on electronic signature (*Legea privind semnatura electronica*), http://www.riti-internews.ro/lg455.htm

[1295] Drept Comercial Roman, Stanciu D. Carpenaru, page 377, (2000)

[1296] Law no. 365 of June 7, 2002 on eCommerce (*Legea privind comertul electronic*), http://www.riti-internews.ro/lg365.htm

……"

Therefore, the contract and the liabilities deriving from the said contract may be proven by correspondence, including electronic correspondence between the contracting parties.[1297]

The issues concerning the definition and recognition of the electronic documents are covered by the provisions of Law no. 455 of 2001 and the Methodological Standards for the Application of Law no. 455 of 2001 and Law no. 365 of 2002[1298].

Art. 4 of Law no. 455 of 2001 defines the "electronic document" as:

> *"……*
>
> *a collection of logically and operationally interrelated data in electronic form that reproduces letters, digits or any other meaningful characters in order to be read through software or any other similar technique*.
>
> *……"*

The legal recognition of the electronic documents is regulated by Art. 5 and the following of Law no. 455 of 2001, as follows:

> *"……*
>
> *A document in electronic form that incorporates an electronic signature or has an electronic signature attached to or logically associated with it, based on a qualified certificate not suspended or not revoked at that time, and generated using a secure-signature-creation device is assimilated, in as much as its requirements and effects are concerned, to a document under private signature*.
>
> *A document in electronic form that includes an electronic signature or has an electronic signature attached thereto or is logically associated with it, acknowledged by the party to which the respective document is opposed to, has the same effects as an authentic document, between those who signed it and those who are representing their rights.*
>
> *Should the written form be required as proof or as a condition of validity of a legal document in such cases as the law may provide, a document in electronic form shall satisfy this condition if an extended electronic signature, based on a qualified certificate and created using a secure-signature-creation device was incorporated to, attached to or logically associated with it.*
>
> *……"*

In view of the above, we can conclude that the legal status of the electronic documents is the same as the legal status applicable to the evidence of traditional deeds.

[1297] Article "How electronic is the electronic signature?" posted by Bogdan Manolea on the website www.legi- internet.ro

[1298] Methodological Standards for the Application (*Norme metodologice de aplicare*) of Law no. 455 of 2001 approved by Government Decision (*Hotarare de Guvern*) no. 1259 of December 13, 2001 and published in the Official Monitor no. 847 of December 28, 2001, further amended by Government Decision no. 2303 of December 14, 2004 published in the Official Monitor no. 1279 of December 30, 2004 and Technical and Methodological Norm (*Norma tehnica si metodologica*) of Application of Law no. 365 of 2002 approved by Government Decision no. 1308 of November 20, 2002 and published in the Official Monitor no. 877 of May 5, 2002

In case any of the parties challenges the deed or the signature, the court will order a technical expertise. In order to identify the author of the document, the signatory or the certificate beneficiary, the expert must require qualified certificates, in cases where a certificate was used, as well as any other documents deemed to be necessary.

However, there are still some contracts that cannot be concluded by electronic means (e.g. the contract for the sale and purchase of the land), and which have to be certified in writing by a notary for validity reasons. Such contracts cannot be concluded by electronic means because Art. 5 of Law no. 589 of 2004[1299] published in the Official Monitor no. 1227 of December 20, 2004, expressly provides the types of documents that can be concluded electronically by a notary.

Moreover, according to a press release[1300] despite the existence of the legal framework, the parties still need to physically appear before a notary for the conclusion of any such contract, given that there are currently no notaries who will provide electronic services.

A reference to electronic notifications is made in Art. 3 of Government Ordinance no. 130 of 2000[1301] published in the Official Monitor no. 431 of September 2, 2000.

Prior to the conclusion of a distance contract, the supplier must inform the consumer, correctly and completely, with regard to the following elements:

"……

a) the identity of the supplier and, in the case of contracts requiring payment in advance, its address and contact data, the phone/fax, e-mail and sole code of registration;
b) the main characteristics of the goods or services to be provided;

c) the retail price of the goods or service or service's tariff and the applicable taxes;

d) delivery costs, where appropriate;

e) the arrangements for payment, delivery or performance;

f) the existence of a right of withdrawal, except in the cases referred to in this ordinance;

g) the cost of using the means of distance communication, where calculated other than at the basic rate;

h) the period for which the offer or the price remains valid;

[1299] Law no. 589 of December 15, 2004 regarding the legal framework of the notary public electronic activity (*Legea privind regimul juridic al activitatii electronice notariale*)

[1300] "Saptamana Financiara" newspaper of April 2006

[1301] Government Ordinance no. 130 of August 31, 2000, on the legal framework applicable to the consumer protection when concluding and executing the distance contracts *(Ordonanta privind protectia consumatorilor la incheierea si executarea contractelor la distanta*) further amended by Law no. 51 of January 21, 2003 published in the Official Monitor no. 57 of January 31, 2003

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;

j) *the deadline for the execution of the contractual obligation.*

……"

The information referred to in Art. 3 (1) above shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of the minors or other persons without the capacity of exercise, as well as to the principles related to decent behaviors.

In most cases, contracts concluded between parties stipulate that the commercial communications between such shall be required to be carried out by letters with return receipt confirmed. To our knowledge, so far there is only one legal provision which states that an e-mail bearing an electronic signature is legally binding, i.e. in case of conclusion of the retainer agreement regulated by the Statutes of Attorney Profession[1302].

So far the doctrine acknowledges the electronic document (in the conditions above described) as equivalent to a traditional written document. However we are not aware of any case where an electronic document was accepted as evidence by a Romanian court.

B.1.2. Transposition of the eCommerce directive

Pursuant to the monitoring report of the European Commission[1303] regarding the information-society regulations:

"……

The eCommerce directive has been transposed, but further amendments are still needed to fully comply with the acquis. The building-up of the necessary administrative capacity for the implementation of the eCommerce rules and the implementation of information technology in the Romanian public administration need to continue.

……"

The Law no. 365 of 2002 that transposed the Directive on eCommerce[1304] especially facilitates the electronic conclusion of contracts related to the services of the information society.

Law no. 365 of 2002 was recently amended by Law no. 121 of 2006 published in the Official Monitor no. 403 of May 10, 2006[1305] which reworded some definitions such as ”information society service ” and “commercial communication”.

[1302] Statutes of Attorney Profession (*Statutul profesiei de avocat*), Art. 126 (2) (a) published in the Official Monitor no. 45 of January 1, 2005

[1303] Romania Comprehensive Monitoring Report (2005)

[1304] Directive 2000/31/EC of the European Parliament and of the Council of June 8 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (Directive on electronic commerce)

According to an article[1306] posted on the website www.legi-internet.ro, the Law no. 365 of 2002 is not adequately promoted. The author also opines that it would be helpful if an annotated edition of the law with comments and practical examples would be made available to the public.

B.2 Administrative documents

In 2003, as a result of the reform process, Law no. 161 of 2003[1307] published in the Official Monitor no. 279 of April 21, 2003 came into effect. The law contains among others, a chapter related to the digital reform in Romania. Based on the provisions of the above-mentioned law, the website www.e-guvernare.ro was set up and, starting with September 2003, the Electronic National System, as a unique point of access to the electronic services and administrative standard forms available for the online download, became operational.

In accordance with the provisions stipulated by Art. 14 and Art. 18 of Law no. 161 of 2003:

> *"……*
>
> *The public administration has the obligation to apply the electronic procedure stipulated in this chapter for the supply of public information and services by electronic means for individuals or legal entities.*
>
> *……*
>
> *All documents sent by electronic means must be presented electronically and signed electronically, in the conditions stipulated by the operators of the National Electronic System.*
>
> *(2) Any document presented in an electronic form must be recorded at the time of its transmission and receipt, according to the procedure established by the operators of the National Electronic System.*
>
> *(3) Any document presented in electronic form must be confirmed upon receipt, except for the documents of confirmation of receipt.*
>
> *(4) The format of the electronic document, as well as its conditions of generating, sending and storage are established by the operators of the National Electronic System and approved by Government Decision.*
>
> *……"*

[1305] Law no.121 of May 10, 2006 for the amendment and completion of Law no. 365 of 2002 on eCommerce (*Legea pentru modificarea si completarea Legii nr. 365/2002 privind comertul electronic*)

[1306] Article "Problemele ridicate de legea comertului electronic", Bogdan Manolea, (2005)

[1307] Law no. 161 of April 19, 2003 for ensuring of the transparency of some public dignities and functions and in the business environment, preventing and sanction of corruption (*Legea privind unele măsuri pentru asigurarea transparenţei în exercitarea demnităţilor publice, a funcţiilor publice şi în mediul de afaceri, prevenirea şi sancţionarea corupţiei*), also known as "Anticorruption Law" (*Legea Anticoruptie*)

The development of the website www.e-guvernare.ro marks the beginning of the "desk reform", a program whereby the Romanian Government intends to promote transparency, to increase the administration efficiency by reducing costs and bureaucracy, to ensure a large permanent access to public information and services and to prevent and to fight corruption by electronic means.

The online services allow the provision of basic public services by electronic means. That does not involve the elimination of the desk. On the contrary, it represents a necessary and important step in reforming the public administration by offering the public the possibility of choice, by creating an alternative to the old style filings which required a personal presence.

Currently, the system is available to major taxpayers only, i.e. about 650 companies.

So far, through the Unique Form System, six services are available online on the website www.e-guvernare.ro, and their number will be progressively expanded by Government decisions.

The following statements may be submitted online by the applicants (which are as above-mentioned only important taxpayers to the state budget):

- Statement submitted to the National House for Health Insurance[1308];

- Statement regarding the payment obligations towards social insurance budget submitted to the National House for Pension and other Insurance Rights[1309];

- Statement regarding the profit tax submitted to the Ministry of Finance[1310];

- Statement regarding the payment obligation towards the general consolidated budget submitted to the Ministry of Finance;

- VAT deduction submitted to the Ministry of Finance;

- Statement submitted to the National Agency of Employment[1311].

The Government Decision no. 161 of 2006[1312] published in the Official Monitor no. 172 of February 22, 2006 provides the new methodology regarding the drafting and filling out of the general register of employees, the records made and other issues in relation thereof.

While the old regulation provided that the general register be mandatory drafted in a standard manner and be numbered on each page, so that it became an official document starting with its registration date, the new regulation does not include this provision any longer.
The new regulation was intended to simplify the drafting and filling out of the general register of employees' record, as compared to the previous regulation.

The register is drafted electronically and is filled out chronologically by the employment date. The register includes the following data:

[1308] *Casa Nationala de Asigurari de Sanatate, http://www.cnas.ro/*

[1309] *Casa Nationala de Pensii si Alte Drepturi de Asigurari Sociale, http://www.cnpas.org/*

[1310] *Ministerul de Finante, http://www.mfinante.ro/*

[1311] *Agentia Nationala pentru Ocuparea Fortei de Munca, http://www.anofm.ro/*

[1312] Government Decision no. 161 of February 3, 2006 regarding the drafting and filling out of the general register of employees (*Hotararea Guvernului privind completarea registrului general al salariatilor*)

a) identification data of all employees: name, surname, numerical personal code (NPC);

b) employment date;

c) title/profession according to the Job Classification of Romania (JCR) or other normative acts;

d) type of individual employment agreement;

e) date and grounds for the termination of the individual employment agreement.

The register will be submitted to the Territorial Labor Inspectorate[1313] in an electronic form, by one of the following means:

a) online filling out of the database of the Labor Inspectorate website;

b) e-mail, based on an electronic signature;

c) electronic filing with the Territorial Labor Inspectorate, together with a letter signed by the employer.

The record of the registers, namely the data included therein, submitted by the employers with the Territorial Labor Inspectorate, is kept in a database organized by the Labor Inspectorate.

Following the implementation of Government Decision no. 161 referred above, all Romanian companies, which have at least one employee, shall be required to use electronic signature. Notwithstanding that this type of service costs less than EUR 40/year, less than 20,000 legal entities are currently using it. Therefore, the issuance of Government Decision no. 161 will stimulate the use of the electronic signature[1314].

C. Specific business processes

In this section of the study we will examine specific examples of common document types, such as: bills of exchange, cross border trade formalities and financial/fiscal management in order to assess the validity and recognition of their electronic counterparts. Since no specific relevant legislation exists related to documentary credit, bills of lading and storage agreements, this section does not refer to these types of documents.

[1313] *Inspectoratul Teritorial de Munca, http://www.itmbucuresti.ro/*

[1314] "Adevarul" newspaper (2006)

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The bill of exchange is one of the credit titles with large application in the business field. Even though Romania did not join the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, most of the provisions of the said convention were transposed in the Romanian Law no. 58 of 1934[1315] published in the Official Monitor no. 100 of May 1, 1934.

Law no. 58 of 1934 did not provide any specific condition for the validity of a bill of exchange. Therefore, a valid bill of exchange must comply with the conditions stipulated by the Civil Code related to the validity of the legal deeds.

As mentioned in the doctrine[1316] referring to the bills of exchange, Law no. 58 of 1934 does not provide expressly for the written form. Notwithstanding that, the condition related to form is inherent as Art. 1 of the law refers to the "text of the instrument", and the bill of exchange must be signed. Also in case of an assignment a signature is required.

A bill of exchange may be handwritten, typed or printed. Standard forms are also accepted, which to be filled in the blanks. But in all cases, the signature must be handmade, that is, it must pertain to the signatory in accordance with the provision of Art. 8 of Law no. 58 of 1934.

Further to the unofficial discussions with the representatives of a Romanian commercial bank, currently the bills of exchange cannot be concluded in electronic form, and cannot be traded online through the National Electronic System[1317]. The traditional paper bills of exchange are still used.

C.2 Cross border trade formalities: customs declarations

According to the information posted on the website www.e-guvernare.ro, the online Customs Declarations Department allows the online filling out of the customs declarations for the following categories of applicants:

1. Arrival customs procedures (IED) - for 194 large companies which carry out customs operations at their own offices;

2. Customs Officers (CV) - for 272 customs officers which perform all the customs operations; and

3. 164 applicants on their own name.

The electronic service of online Customs Declarations ensures the identification of the users by a digital certificate, which also allows for the electronic signing of the

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[1315] Law no. 58 of 1934 of May 1, 1934 on bill of exchange and promissory note (*Legea asupra cambiei si biletului la ordin*)

[1316] Drept Comercial Roman, Stanciu D. Carpenaru, page 518, (2002)

[1317] *Sistemul Electronic National*; see also http://www.mcti.ro/index.php?KTURL=page&page=1653

document. Hence, the time allocated to the formalities necessary for the applicants will be less significant. This replaces the classical procedure of filling out the declarations which, previously had to be filled out on the computer, saved on disks and then submitted to the customs offices together with the related file.

Further on, the electronic service of online Customs Declarations will allow electronic payments by using the services of banks offering Internet or Home banking solutions.

Currently, according to an unofficial opinion issued by the Customs Authority representatives, 99% of the customs statements are registered on the server of the Custom Authority through the Custom Electronic System which became operational after the Government Decision no. 1186 of 2002[1318] entering into force. Only few small customs offices are still not connected to the mentioned system.

C.3 Financial/fiscal management: electronic invoicing and accounting

C.3.1. Electronic invoicing

Due to the lack of a legal framework for electronic invoicing within the confines of electronic commerce, abnormal situations have emerged. Therefore, and despite the fact that it is possible to buy software products online and to pay instantly, the related invoice is issued on paper. Currently, according to the law all invoices must be issued on paper support and are given registration numbers by the Ministry of Finance.

Currently, electronic archiving and invoicing are in the stage of legislative projects.

With regard to electronic archiving, a draft regulation is pending. The creation of security archives, which allow online access, makes the recovery of documents possible in case of partial or total destruction, and also results in a reduction of the expenses related to administration and maintenance, and also the expense of time caused by the distance between the parties.

With respect to electronic invoicing, according to a press release from the Minister of Communication and of Information Technology "… the Ministry of Communication and of Information Technology envisages the drafting of a regulation whereby companies will be allowed to issue electronic invoices by the end of year 2006."

According to a draft issued by the Government, the two types of invoices will co-exist for a period of time. The Government official further stated that " … the draft of the law provides that invoices of economic entities will be issued in electronic form. Paper invoices are to be discarded / eliminated in the future. The coming into effect of the law represents a first step for the dematerialization of the financial documents of a company."[1319]

The president of the IT&C Commission of the Chamber of Deputies, also stated that " … the electronic invoice will have the same legal status as the paper invoice."[1320]

[1318] Decision of the Customs Authority no. 1186 of September 17, 2002 on the approval of the Methodology of the customs statement in detail by means of the informatic procedures (*Decizia privind aprobarea Metodologiei de prelucrare a declaraţiei vamale în detaliu prin procedee informatice*) published in Official Monitor no. 703 of September 9, 2002

[1319] "Cotidianul" newspaper (2005)

[1320] id.

According to the draft of the Law on Electronic Archiving, any legal person or individual shall be entitled to store documents in electronic form within an electronic archive.

C.3.2. Electronic accounting

The accounting system in Romania is mostly kept in electronic form. Only small companies or most freelancers keep their accounting records in paper format.

According to the provisions of Law no. 82 of 1991[1321] republished in the Official Monitor no. 48 of January 14, 2005, companies must keep a daily transaction book, an inventory book and an accounts book together with the supporting documents in their archive for a period of ten years starting with the date of the conclusion of the financial year, except for the salary forms which must be kept for a period of fifty years.

According to Art. 2 of Order no. 918 of 2005[1322] published in the Official Monitor no. 582 of July 6, 2005:

> "……
>
> *The legal entities are required to register with the local departments of the Ministry of Finance, the floppy with the accountancy reports on June 30, 2005 accompanied by: the accounting reports listed on paper, the administrator report and the balance of payments, signed and stamped*.
>
> ……"

As mentioned in section B.2., a service on the website www.e-guvernare.ro is available for online registration of the balance sheets with the financial authority. However only the important taxpayers may register their balance sheets online.

D. General assessment

D.1 Characteristics of Romanian eCommerce Law

- As a conclusion, the present legal framework related to eCommerce ensures a broad regulation for the activities that may be carried out on the internet. The Romanian authorities are trying to keep pace with the fast and frequent changes within the information society, but the adaptation of the behavior of the authorities and of the public to these changes is not an easy process.
- Notwithstanding the above and in accordance with an opinion expressed in doctrine "…….. these legal provisions are rather futile in respect of the provisions with commercial character and even though these provisions may be supplemented with the general provisions of the Civil and Commercial Codes, as

[1321] Law no. 82 of December 24, 1991 on accountancy(*Legea contabilitatii*)

[1322] Order no. 918 of June 2005 on the approval of the system of the accountancy report of the companies at June 30, 2005 (*Ordin pentru aprobarea sistemului de raportare contabila la 30 iunie a agentilor economici*)

well as other special legal provisions, some issues related to practical aspects of the electronic commerce still remain unregulated."[1323]

D.2 Main legal barriers to eBusiness

- According to a study[1324], the major obstacles that make the electronic commerce lag behind are more related to the current situation of the Romanian banking system which although much improved lately, still shows major problems regarding the electronic inter-bank payment clearing, as well as to a certain fear pf the public regarding the risk of the transactions.
- Even though the European Directive on eCommerce was implemented through a series of legal norms, in practice there still exists mistrust and lack of information on electronic commerce.
- As mentioned in section B.2., there are few administrative services available online and still more administrative regulations that require the traditional paper based documentation.
- On the website www.e-guvernare.ro several services are posted as available online, but some of them cannot be accessed, such as those related to: driving licenses, quarterly and yearly balance sheets for the important taxpayers, visas and customs statements.

  In practice the public is confronted with some impediments such as the requirement that the balance sheet be filed with the local financial authorities both in electronic and paper form and only the important taxpayers may file such document online.

  The only certain advantage of the companies that have computers and access to internet and visit the website www.e-guvernare.ro is the downloading of electronic forms.
- According to a press release " … from the many services announces until now, only those regarding online bids or online distribution of authorizations for international goods transportation work."[1325]
- Even though the above discussed regulations make it possible to conclude contracts in an electronic form, the paper monopoly still persists in the contractual field. Only few messages bearing electronic signatures are received via e-mail and the electronic notary. Thus, although provided by law, the legal framework does not function in real life.

[1323] Article"Observatii referitoare la regimul juridioc actual al comertului electronic", 9 "Revista de Drept Comercial", Gheorghe Stancu , page 104 (2004)

[1324] The study "Documentul de discutie privind comertul electronic in Romania" by Romania Information Technology Initiative: dot-GOV Project posted on the website http://www.riti-internews.ro/ (April 9, 2003)

[1325] "Adevarul" newspaper (2006)

D.3 Main legal enablers to eBusiness

- Although currently most of the sale transactions require paper invoices, receipts, etc., in the future traditional paper-based commerce will be replaced by eCommerce to a greater or lesser extent depending on the speed of education of the public regarding the advantages of the eCommerce.
- Law no. 365 of 2002 has been an important step forward, taking into consideration the fact that the electronic documents not only accomplish all the functions of the traditional documents, but in many ways such documents may offer a higher degree of trust and speed of transactions, especially regarding the identification of the source of the electronic document and of the integrity of its content.
- In conclusion, despite the existing legal barriers to the development of eBusiness, the enactment of the regulations related to eCommerce had a major contribution to the easement of the completion and the development of the commercial transactions in Romania in accordance with the requirements of the European Union business environment.

Slovakia National Profile

A. General legal profile

Slovakia is a republic with a political system of parliamentary democracy, territorially divided into 8 Higher-Tier Territorial Units, 8 regions and 79 districts.

The national Council of the Slovak republic is the sole constituent and legislative body of the Slovakia.

The system of courts is formed by the Supreme Court of the Slovak Republic, regional courts, district courts, Higher Military Court and military district courts. Judges are independent in their decision-making and are bound solely by law. In cases specified by the Constitution or the law, judges are also bound by international treaties.

eCommerce is regulated through the Commercial Code[1326], the Civil Code[1327], the eCommerce Law[1328] and through a number of specific laws.

As to state control over eCommerce, it is the responsibility of the Slovak Inspectorate of Commerce[1329] to ensure, that the provisions of the eCommerce Law are followed.

The Slovak system of jurisprudence does not have any binding power of precedent, although decisions of the Supreme Court are highly authoritative and only very rarely disregarded.

B. eCommerce regulations

eCommerce in Slovakia is interpreted as a standard, classic commerce with a different form of service provision.

Most questions regarding the validity and recognition of electronic documents must be answered based on doctrine, at least in cases where legislation does not offer a clear rule. In this section, the main tenets of Slovak doctrine regarding the legal value of electronic documents are briefly commented.

[1326] *Obchodný zákonník*

[1327] *Občiansky zákonník*

[1328] *Zákon o elektronickom obchode*

[1329] *Slovenská obchodná inšpekcia*

B.1 eCommerce contract law

B.1.1. General principles

The Slovak legal system allows more flexibility in the formation and proof of commercial contracts than for civil contracts. Contractual partners are allowed not to apply the provisions of the Commercial Code[1330].

The main tenet typical for Slovak commerce and civil law is – as a general rule – the principle of informality (flexibility). It means that, insofar that there is neither a formal statement in law nor a deal between contractual parties, that an act in law could be performed in every form. Barring certain more formal types of contracts[1331], Slovak contract law typically only demands that a consensus between parties regarding the essential elements of a contract exists.

According to legal doctrine there is just one difference between standard, classical commerce and eCommerce – its form. Whereas eCommerce is realized by electronic means, in electronic form, standard commerce is realized in classical, mostly paper based form[1332]. Because of this fact it was essential to pass legislation that would regard electronic documents as legally equivalent to paper documents. The notion of legal equivalence was transposed into the Slovak legal system by the eCommerce Law[1333]:

> *Art. 5 (2) eCommerce Law: If the presentation or storage of a written legal act is required, an electronic document[1334] fulfils this requirement, on condition of unchangeability and reliability of the electronic document from its first presentation in final form, and on condition that it is always possible to present it to the person for whom it is intended.*

The Slovak legal system has a generally accepted legal definition of notions such as a document, a digital document, an electronic document and a signed electronic document[1335] that were formed through legislation.

> *Art. 2 letter a - c eSignature Law: A document is a non – empty sequence of characters. A digital document is a numerically enciphered document. An electronic document is a digital document maintained on a physical carrier*

[1330] With the exception of certain articles enumerated in Art. 263 of Commercial Code.

[1331] Such as e.g. the sale of real estate (Art. 46 part 1 Civil Code), assumption of dept (Art. 531 part 3 Civil Code) .

[1332] D.Gregušová, A.Dulák, M.Chlipala, B.Susko, *Právo informačných a komunikačných technológií,* Slovenská technická univerzita, Bratislava, 2005, p.125.

[1333] Act on 3 December 2004 on electronic commerce and on amendment of some acts (*Zákon č. 22/2004 Z.z. o elektronickom obchode a o zmene a doplní zákona č. 128/2002 Z.z. o štátnej kontrole vnútorného hotrhu vo veciach ochrany spotrebiteľa a o zmene a doplnení niektorých zákonov v znení zákona č. 284/2002 Z.z. v znení neskorších predpisov)*

[1334] With reference to Art. 2 letter c of Act on 15 March 2002 on electronic signature and on amendment of some acts as amended (*Zákon č.215/2002 Z.z. o elektronickom podpise a o zmene a doplnení niektorých zákonov v znení neskorších predpisov), for an English translation of eSignature Law see* http://www.nbusr.sk/NBU_SEP/leg_rozne/215_2002AJ.pdf *, for consolidated Slovak version see:* http://www.nbusr.sk/NBU_SEP/215.php *(hereinafter "eSignature Law").*

[1335] Since the entry into force of the eSignature Law.

transmitted or processed by a technical means in an electronic, magnetic, optic or other form.

Regarding the validity of a legal act, the Civil Code[1336] demands the observing of the contractual form or of the form set down by law. A written legal act is valid on the condition of the presence of a signature. Both in civil and in commercial cases, proof is often dependant on the existence of a written document, without the law emphatically indicating whether or not this document may be electronic.

Additionally, the primary requirement for a document submitted as proof of a contract was the presence of a signature.

Art. 40 (3) Civil Code: A written legal act is valid, if it is signed by the participant.

The use of electronic signatures has been recognised in Slovak legislation since the year 2002[1337]: article 40 (4) of the Slovak Civil Code explicitly recognises electronic signatures as (potentially[1338]) valid for the proof of contracts.

Art. 40 (4) Civil Code: the written form is maintained if the legal act is executed by electronic means that allow to determine the integrity of legal act and to determine the person, who has executed this legal act. The written form is maintained always if the legal act executed by electronic means has been signed by the qualified (guaranteed) electronic signature[1339].

Since the transposition of the e-signature directive, more precise rules have been determined. However, the recognition of electronic signatures in some circumstances (depending on the quality of the electronic signature) obviously implies the recognition of electronic documents as proof. Therefore documents can no longer be refused by Slovakian courts as proof on the sole grounds that they are electronic. As such, they receive an analogous treatment to paper documents.

Within the confines of commercial law, Slovak legislation has traditionally been relatively flexible. Any form of evidence is allowed to be brought before the court, regardless of the value of the contract. This would allow electronic documents to be invoked as evidence, although the judge is in principle free to determine the actual value of the document as evidence. This includes the right to discard it altogether, should he decide that it has no real value (e.g. if it contains no form of signature, and its origins are otherwise unverifiable). In commercial affairs, parties are free to conclude arrangements between themselves in which they can specify explicitly which forms of evidence can be deemed acceptable in a court of law, and such agreements are binding.

[1336] Act No 40/1964 Coll. Civil Code as amended.

[1337] To be precise: since the entry into force of the Law of 15 March 2002 Act on electronic signature and on amendment of some acts as amended (*Zákon č.215/2002 Z.z. o elektronickom podpise a o zmene a doplnení niektorých zákonov v znení neskorších predpisov).*

[1338] Article 1322 of the Civil Code states that an electronic signature (defined as a "unit of electronic data which can be attributed to a specific person and demonstrates the preservation of the integrity of the document") *can* be accepted as a signature. In a court of law, the judge will have to determine its validity autonomously. However, the validity of the signature may not be denied solely on the grounds that it is electronic.

[1339] Qualified electronic signature according to Art. 5(1) of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures was transposed into the Slovak legal system as "quaranteed electronic signature" (Art.4 eSignature Law). In text bellow is referred as "qualified electronic signature"

Regarding so called "qualified documents", it is necessary to stress the fact that Slovakia has only few regulations that expressly incorporate the acceptance of electronic document or the possibility of their use. To fill this legislative gap, the statement of the Civil Code[1340] as a general regulation (*lex generalis*) that stipulates under which conditions the written form is maintained is very useful. But the aforementioned statement can be applied solely to legal acts for which the regulations demands a written form. For documents demanding the intervention of a public notary (e.g. real estate contracts, agreement on enterprise selling[1341], or filling reports for the Commercial registry etc.), it is not applicable. Therefore, such acts still need to be concluded on a written (paper) document. The other category of documents that have to be concluded in written form are special types of documents, for which the law prescribes not the form (either written or oral) but for which it stipulates their character as a document (e.g. testament, bills of exchange etc.)

As for electronic archiving, Slovakia has not implemented a generic framework that could be useful across sectors or for multiple document types.

This existing legal framework has been amended and clarified through the transposition of the eCommerce directive.

B.1.2. Transposition of the eCommerce directive

Not unlike the eSignature directive, the eCommerce directive has also had a profound impact on Slovak contract law. The eCommerce Law[1342], which fully transposed the eCommerce directive[1343] in Slovak national legislation, greatly facilitates the electronic conclusion of contracts.

eCommerce Law is not a comprehensive regulation of contractual relations, and existing basic regulation provisions in the Civil Code and Commercial Code are preserved. eCommerce Law just regulates relations and situations arising between "Service Providers" (being natural or legal persons providing services through the internet or other networks) and "Recipients" (being natural or legal person who receive the service) in connection with the provision of "Information Society Services" (this term includes any all services provided through the internet or other electronic networks). The law is in fact limited to contracts related to services of the information society (further referred to as online contracts). Contracts concluded in other contexts do not benefit from this clause and thus formal requirements to use paper may continue to exist.

The eCommerce Law regulates three aspects of Information Society Services. First, it sets out the data and information that Service Providers must provide to the recipients of their services when offering such services. Secondly, it lays down some formalities that must be followed when concluding contracts through the internet. Thirdly, it

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[1340] Art. 40 (4) 2. sentence of Civil Code.

[1341] Art. 476 – 488 Commercial Code.

[1342] Act No. 22/2004 Coll. , Act on 3 December 2004 on electronic commerce and on amendment of some acts (*Zákon č. 22/2004 Z.z. o elektronickom obchode a o zmene a doplní zákona č. 128/2002 Z.z. o štátnej kontrole vnútorného hotrhu vo veciach ochrany spotrebiteľa a o zmene a doplnení niektorých zákonov v znení zákona č. 284/2002 Z.z. v znení neskorších predpisov).*

[1343] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

stipulates limitations on the liability of Service Providers offering only intermediary services, such as transmission of information, or automatic, intermediate or transient storage of the transmitted information.

Art. 1 (2) sets out the areas to which eCommerce Law does not apply (e.g. taxation[1344] , lottery and other similar games[1345], personal data protection within information systems[1346], the activities of notaries[1347], activities of attorneys[1348], activities of court prosecutors[1349] etc.)

As to state control over electronic commerce, it is the responsibility of the Slovak inspectorate of Commerce[1350] to ensure that the provisions of the eCommerce Law are followed.

Regarding contracts concluded by electronic means, legal requirements set out in other Acts (e.g. Commercial Code and Civil Code) shall be also applied to them. At each step before placing an order, the recipient must be given the opportunity to correct or amend anything in the order or withdraw the order. On the other hand, the service provider is obliged to inform the recipient of all important issues relevant to the contract (e.g. time limits, conditions of the contract, etc.). The recipient must be given an electronic confirmation upon conclusion of the contract without undue delay. The process and conditions of concluding contracts set out in the eCommerce Law apply to persons contracting in a business capacity only if they have not agreed otherwise.

Certain contracts, such as contracts that require the consent or decision of a state authority or notary and contracts of securing an obligation[1351], may not be concluded by electronic means and the statements lied down in the eCommerce Law shall not be applied.

The enumerative exclusion clause in the eCommerce Law is very brief in comparison with the eCommerce Directive and does not contain a number of contract types such as contracts regarding real estate; contracts regarding securities by persons acting in their private capacity; and contracts regarding family law or successions. On the other hand a number of important contract types (particularly contracts involving the intervention of public notaries) are excluded from the eCommerce Law.

[1344] Act No. 511/1992 Coll. on Tax and Fee Administration and on Changes in the System of Urban Financial Bodies *(Zákon č.511/1992 Zb. o správe daní a poplatkov a o zmenách v sústave územných finančných orgánov v znení neskorších predpisov)*.

[1345] Act No. 171/2005 Coll. on Gambling *(Zákon č. 171/2005 Z.z. o hazardných hrách a o zmene a doplnení niektorých zákonov).*

[1346] Act No. 428/2002 Coll. on Data Protection as amended (*Zákon č. 428/2002 Z.z. o ochrane osobných údajov v znení neskorších predpisov).*

[1347] Act No. 323/1992 Coll. on Notaries and Notary Activities (Notarial Code) (*Zákon č. 323/1992 Zb. o notároch a notárskej činnosti – Notársky poriadok).*

[1348] Act No. 586/2003 Coll. on Advocacy and on Amendment and Supplementation of Trade Law No. 455/1991 Coll. as amended (*Zákon č. 586/2003 Z.z. o advokácii a o zmene a doplnení zákona č. 455/1991 Zb. o živnostenskom podnikaní v znení neskorších predpisov)*.

[1349] Act No. 233/1995 Coll. on Court Prosecutors and Execution (Rules of Execution) as amended (*Zákon č. 233/1995 Z.*z. o súdnych exekútoroch a exekučnej činnosti – Exekučný poriadok a o zmene a doplnení niektorých zákonov).

[1350] *Slovenská obchodná inšpekcia*

[1351] Art. 544 to Art. 558 Civil Code.

With regard to specific requirements for use of electronic signatures, eCommerce Law refers to the application of the eSignatures Law. With the enactment of the eSignatures Law the equivalence of the handwritten form of documents with the electronic form was realised, as well as the equivalence of qualified electronic signatures[1352] with handwritten signatures:

> *Art. 40 (4) Civil Code[1353]: The written form is observed if the legal act is executed by electronic means that allow to determine the integrity of legal act and to determine the person who has executed this legal act. The written form is always observed if the legal act executed by electronic means has been signed using a qualified electronic signature.*

From the first sentence of this article follows that the written form is observed on the condition that the electronic means allow to determinate the integrity of the legal act (integrity of electronic document contents) and if it allows to determine the person who has executed this legal act (authentication). An electronic signature according to the eSignatures Law is able to fulfill these requirements mentioned in the first sentence of Art. 40 (4). But the evidential burden lies with the signatory. On the other hand, if the signatory uses a qualified electronic signature for the signing of an electronic document, then the written form is always maintained and the signatory is not required to prove this fact.

Regarding to use of electronic signatures, the eCommerce Law also refers to the eSignature ordinance[1354] enacted pursuant to Art. 27 of the eSignatures Law, that lays down the manner and procedure of using an electronic signature in commercial and administrative transactions.

> *Art. 4 (1) eSignature Ordinance: An electronic document used in commercial transactions, signed by a qualified electronic signature pursuant to a specific regulation[1355] has the same legal force as a handwritten signature, created in a written form.*

All these requirements and legal statements mentioned above only covered the areas where the use of handwritten signature is required and are not confined to notarial confirmation of signature (legalisation). Because of this legislative gap it is not yet

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[1352] Qualified electronic signature is according to Art. 4 of eSignature Law defined as: "*electronic signature that must comply with the requirements of Article 3 hereof:*

(a) it is executed by means of a private key intended for the execution of the guaranteed electronic signature;

(b) it may be executed only with the security equipment for execution of the electronic signatures pursuant to Article 2, subparagraph (h);

(c) the manner of its execution enables the identification in a reliable manner of which natural person executed the guaranteed electronic signature;

(d) a qualified certificate to the public key belonging to the private key is issued, and this private key is used for the execution of the guaranteed electronic signature".

[1353] Civil Code was in 2002 amended by eSignature Law in above states meaning and with this amendment was in Slovak legal system ensured the equivalence of qualified electronic signature to handwritten signature.

[1354] Ordinance of National Security Authority No. 542/2002 Coll. on the manner and procedure of using an electronic signature in commercial and administrative intercourse *(Vyhláška NBÚ č. 542/2002 Z.z. o spôsobe a postupe používania elektronického podpisu v obchodnom a administratívnom styku).*

[1355] eSignature Law.

possible to execute in electronic form such legal acts for which a confirmating action of a public notary is needed.

B.2 Administrative documents

Contract law, typical by its contractual freedom, allows parties a certain degree of freedom to regulate their relations (and to a certain extent allows them to specify the validity of electronic documents), whereas administrative law allows no such thing. Instead, parties are required to adhere to the rules set forth by governmental regulations, without a possibility of agreeing to a more flexible electronic communications mechanism.

Statements of the Civil Code, as a general law (*lex generalis*) regarding to validity of legal acts[1356] are applicable also for use electronic documents in administrative procedures to the extent that no special regulation (*lex specialis*) exist. This means that if some special regulation requires a written form of legal acts, this form requirement is met if the legal act executed by electronic means has been signed by a qualified electronic signature. In spite of this general statement, a lot of acts were amended with regard to the possibility of filing reports in electronic way:

Art. 42 (1) Civil Court Code[1357]: The filing of reports may be done in written form or orally, via electronic means signed by a qualified electronic signature pursuant to the specific act, telegraphically or via facsimile.

Art. 19 (1) Administration Code[1358]: The filing of reports may be done in written form, or orally, or via electronic means signed by a qualified electronic signature pursuant to the specific act. It can also be done telegraphically; such filing containing a suggestion in the given matter shall be either in written form or orally added to the minutes within three days.

Additionally it is only allowed to use electronic document formats which do not contain active elements.

Art. 9 (3) eSignature Ordinance[1359]: If the electronic document format allows the use of active elements, the electronic document containing such active elements may not be signed by an electronic signature and may not be used in commercial or administrative transactions.

The eSignature Ordinance distinguishes between commercial and administrative transactions. Administrative transactions entail the dispatch or receipt, or dispatch confirmation or receipt confirmation of an electronic document signed by a valid qualified

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[1356] Art. 40 (4) 2. sentence of Civil Code: The written form is maintained always if the legal act executed by electronic means has been signed by the qualified electronic signature.

[1357] Act No. 99/1963 Coll. Civil Court Code.

[1358] Act No. 71/1967 Coll. on the administration proceeding (The Administration Code).

[1359] Ordinance of National Security Authority No. 542/2002 Coll. on the manner and procedure of using an electronic signature in commercial and administrative intercourse *(Vyhláška NBÚ č. 542/2002 Z.z. o spôsobe a postupe používania elektronického podpisu v obchodnom a administratívnom styku).*

electronic signature between public authority bodies and the general government bodies, or between a public authority body and a natural person, or between a general government body and a natural person, or between a public authority body and a legal entity, or between a general government body and a legal entity. In administrative transactions, only prescribed document formats are used[1360].

According to the aforementioned regulations the citizen is allowed to file reports electronically on the condition of using a prescribed document format; but on the other hand the public authority (public administration) is obliged to establish an electronic registry, which is currently the hurdle to the development of use of electronic documents in public administration:

Art. 6 (1) eSignature Ordinance: If a public authority body or general administration body uses a qualified electronic signature, it shall establish an electronic registry for the receipt, dispatch, verification, confirmation and processing of electronic documents in transactions with natural persons or with legal entities, or with other public authority bodies or general government bodies.

Another hurdle to the development of use of electronic documents in public administrations is the non-existence of certain documents or annexes (such as e.g. trade licenses, commercial registry statements, confirmations from insurance companies etc.) in electronic form, resulting in an impossibility to enclose them to request or filling report.

In general, use of electronic documents has not yet extended, mostly because of a lack of coordinated government initiatives in this field and because of a lack of governmental support.

C. Specific business processes

In this section of the study, we will take a closer look at certain capita selecta of the applicable Slovak legislation and legal and administrative practice. Specific examples of common document types will be examined to assess the validity and recognition of their electronic counterparts, along with an analysis explaining the (lack of) prevalence of any allowable electronic document types.

The section below is organised according to four stages in the electronic provision of goods on the European market. They comprise credit arrangements, transportation and storage, cross border trade formalities and financial/fiscal management.

It is necessary to say a few words by way of introduction and to stress the fact that, with the exception of financial management (e-invoicing and accountancy) Slovakia has no special regulation for the "electronic world". For this reason the general regulations (*lex generalis*) such as the Commercial Code and the Civil Code are also applicable to these specific business processes.

[1360] According to Annex 3 of eSignature Ordinance is allowed in administrative intercourse only to use document formats such as ASCII, Microsoft/Apple Rich Text Format (RTF) version 1.5, Adobe Portable Document Format (PDF) version 1.3 and 1.4, HTML 4.01 as defined in international norm (see www.w3c.org/TR/REC-xml), S/MIME version 3 as defined in international norm (RFC 2633 S/MIME V3) etc.

C.1 Credit arrangements: Bills of exchange and documentary credit

The credit arrangement, as a commercial contract, is regulated in the Commercial Code[1361]. Part three of the Commercial Code[1362] describes absolute (unconditional) and relative commercial obligations. Credit agreements[1363] are absolute commercial obligations, meaning that the statements of part three of the Commercial Code shall be applied, regardless of the nature of the parties.

For the credit agreement a written form is not prescribed, so it can also be concluded orally[1364] or electronically. It follows that so far there is no legal obligation to conclude credit agreements in written form. The written form is demanded only if at least one contractual party expresses the need for the contract to be in writing. Because the form of the credit agreement is not explicitly (expressly) regulated, electronically concluding credit agreements is also allowed.

In praxis credit agreements are mostly concluded in written form, on demand of the creditor. Very often the provider of credit (mostly any bank institution) demands a written form of contract under condition of notarial declared signature, which excludes any electronic form of contract.

C.1.1. Bills of exchange

The bill of exchange is a prime example of a negotiable instrument and is used in business circles for various purposes. Originally, the bill of exchange was designed as a payment method but over time it has evolved into an instrument for debt collection, credit and investment. Bills of exchange have a long history and their importance for international trade is proven by the conclusion of the Geneva Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes in 1930. This convention was incorporated into the Slovak legal system through the Bills of Exchange and Cheques Act[1365]. The Bills of Exchange and Cheques Act is a very old regulation, which was not amended during its whole legal force, and which according to doctrine has since became outdated.

A bill of exchange is an instrument in written form that contains a number of mandatory statements and is signed by the drawer of the bill. Although the law does not mandate the use of paper, this is often assumed to be the case by legal scholars and professionals due to the traditional formalistic approach to trade bills. In light of the

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[1361] Art. 497 Commercial Code.

[1362] Part three (Art. 261 – 755) Of Commercial Code regulates commercial obligations (*obchodné záväzkové vzťahy).*

[1363] Credit agreement in division V (Art. 497 – 507) of Commercial Code is defined in its fundamental provisions as follows: "*Under the credit agreement, the creditor undertakes to provide monetary means up to a certain amount upon the debtor´s request, and the debtor undertakes to pay back the provided monetary means together with interest."*

[1364] Art. 272 (1) Commercial Code: The contract must be in writing in order to be valid only in instances stipulated by this Act [Commercial Code] or if at least one party negotiating the conclusion of the contract requests the need for the contract to be in written.

[1365] Act No. 191/1950 Coll. on bills of exchange and cheques act.

recent changes to Slovak civil law to accommodate e-commerce, the time has come to evaluate this assumption.

With regard to bills of exchange, the signature is a formal requirement for the legal *existence* of the bill, not merely to constitute valid *evidence* of its existence (i.e. without a signature, there is no bill from a legal perspective). A signature of the emitter is an obligatory content requirement. The requirement of a signature may be fulfilled electronically.

None the less, Slovak law does not expressly regulate electronic bills of exchange. They are not used in practice in business processes and their validity is very questionable. Because there is no example in praxis, the future will depend on doctrine or on application of general contractual principles.

C.1.2. Documentary credit

Flexible and dependable possibilities for credit creation are essential to the development of international trade. Specifically for States within the European Union and the EEA, the continued growth of the EEA market means that corporations are more frequently confronted with the possibility of conducting trade with previously unknown partners abroad. The availability of a means of financing that allows the minimisation of risk for both parties can prove to be a great catalyst in this scenario. The documentary credit has traditionally fulfilled this role.

Traditionally, the documentary credit has been considered a method of payment, intended mostly to facilitate business relations between trade partners who are unfamiliar with each other, and who wish to minimise their personal risk. In recent times, it is more frequently used as a credit/lending instrument.

From a legal perspective, the documentary credit is based largely on convention. In Slovakia, the applicable regulation is incorporated into the Commercial Code[1366]. But there is no explicit legal framework for electronic documentary credit, so that general rules of contract law, doctrine and jurisprudence are important.

From a more general point of view, instruments such as the documentary credit are based largely on customs and jurisprudence. It is not entirely certain that the same rules that have been consistently applied to paper documentary credits will be readily applied to their electronic equivalents. In other words: it remains to be seen to what extent jurisprudence will stand by its existing interpretations in an electronic context.

[1366] Art. 689 Commercial Code Documentary Credit: *"Under a documentary credit, the bank assumes the obligation to provide performance to the beneficiary, provided that the documents specified in the advisory note on the letter of credit are duly presented within the validity of the letter of credit."*

C.2 Transportation of goods: Bills of Lading and Storage agreements

When goods are transported by any means, various documents are issued during the various steps of the transport, starting with a receipt (nonnegotiable or negotiable) issued by the enterprise receiving the goods and handed over to the owner of the goods. Other documented steps may be the loading and unloading process.

From a legal perspective, general regulation for the process of transportation of goods in Slovakia is incorporated in the Commercial Code, but there is no explicit regulation for the use of electronic documents in this business process. This means that the general provisions of the eCommerce Law are applicable.

C.2.1. Bills of lading

The bill of lading is a type of document issued after the conclusion of a transportation contract. Transportation contracts are incorporated in Division XIV (articles 610 – 629) of the Commercial Code. According to art. 612 (1) of Commercial Code, under contract, the transporter may be obliged to issue a bill of lading[1367] to the consignor on accepting the consignment. The bill of lading is a negotiable document which incorporates the right to demand the handing over of the consignment from the transporter in accordance with the contents of the bill of lading. The transporter is then obliged to hand over the consignment to the person authorised in the bill of lading, if such a person presents the bill of lading and confirms on it the receipt of the consignment. The bill of lading may be issued to the bearer, to a specific designated person, or to such a person's order. The Commercial Code also regulates the required contents of the bill of lading (obligatory content terms[1368]).

As the law contains no specific paper based requirements, there is no legal barrier for the use of electronic contracts in the conclusion of bills of lading.

C.2.2. Storage contracts

The temporary storage of certain goods in warehouses or otherwise is a frequently used intermediary step in international trade. This process relies heavily on a chain of documents to establish its legal validity and recognition, most notably through the conclusion of storage agreements and the issuing of negotiable or non-negotiable receipts.

Storage of goods in Slovakia is for the most part regulated by the Commercial Code, Division VIII – Storage Contract (Art. 527 – 535) that comprises just general regulation for this business process as such and does not regulate the use of electronic documents in this specific process. For such use the provisions of the eCommerce Law and the eSignature Law are applicable. For certain special categories of goods a separate legal

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[1367] *"Náložný list".*

[1368] Obligatory content terms stipulates in art. 614(1) of Commercial Code.

framework exists that contains a variety of primary or secondary provisions[1369]. We will only focus on the possibilities of the storage agreement as described in articles 527-535 of the Commercial Code.

Through the storage agreement[1370] the warehouseman (storer) undertakes to store an object (items to be stored) and to take care of it; and the depositor undertakes to pay a storage fee for the warehouseman's services. The storage agreement is an informal contract in Slovak law, in the sense that the contract need not be concluded in a written form, but the warehouseman must take over the object (goods) at the time that the depositor hands it over and confirm the receipt of the object (goods) in writing. The document confirming the receipt of the object for storage may be considered a negotiable instrument to which the right to demand the release of the stored object is attached (a warehouseman's receipt[1371], also referred to as warehouse receipt or warehouseman's certificate). The warehouseman's receipt may either be issued to the bearer or registered in the name of the owner.

Another formal condition for the conclusion of this type of contract is that the items to be stored have to have been transferred to the storer, either physically or by proxy.

The law therefore requires two formal elements: a written document (but not the written form of contract, just the confirmation of receipt of the items to be stored in writing) and the transfer of the goods (either factually or by proxy). The second element can be neglected for the purposes of this study, as we are only concerned with the possibility of using electronic documents.

The requirement of a written document, however, is at the heart of this study. It is important to note that the law does not require a *paper* document for a storage contract to be legally binding, so that there is no reason to deny legal validity to storage contracts concluded electronically. For the purposes of evidence, the principles of contract law and the general principles for maintaining of paper form described above can be applied.

As such, there is no legal barrier for the use of electronic contracts in the conclusion of storage agreements.

Slovakia, along with the Czech Republic, Slovenia and Spain has participated in Benchmarking Project[1372] that relates to the usage of electronic signatures in customs declarations for transit goods both for the customs administrations and for the traders. The project was realized on the basis of approval TAXUD/A2/BR D (2005) 1311 from 2 May 2005, and was in duration from 9 June 2005 to 2 March 2006.

The participating countries agreed to participate in this project because they were aware of the fact that the EU countries use different models of e-signature practice, as well as the fact that various international organizations such as the World Customs

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[1369] This is the case e.g. for the storage of dangerous substances (including certain chemicals), explosives, gasoline (Ordinance of Ministry of Environment No. 704/2002 Coll. on technical requirements and general conditions on operation of devices using for storage of gasoline) and waste (Act No. 223/2001 Coll. on waste).

[1370] Regulated in Art. 527 of Commercial Code.

[1371] "*skladištný list"* according to Art. 528(2) of Commercial Code.

[1372] Electronic Signature in Customs Clearance, Benchmarking Project, BM Project No. 269. For detailed information see: Electronic Signature in Customs Clearance, Benchmarking Project, BM Project No. 269, Final Report, January 2006

Organization, the European Union and others are concerned with the topic of e-signature. The motivation of the participating countries was to find solutions for a common approach at the EU level- at least within some issues of this extensive area.

The objective of this project was to identify best practices in the area of electronic signature, particularly regarding the use of electronic signatures to sign customs declarations and accompanying documents in electronic form, the general use of electronic signatures in the relationship between public administration and traders, e-signing answers (e-messages concerning controls, clearance, etc.) from the Customs Administration to other subjects (especially declarants) and international acceptance and evaluation of certificates of e-signatures within all EU Member States.

The implementation of electronic signatures adheres to fundamental standards and recommendations of the World Customs Organization. Acceptance of the *UNCITRAL Model law on e-commerce and digital signatures*[1373] was among the first recommendations of the WCO in the IT area. In June 2004, the WCO adopted the Kyoto Convention Guidelines on the Application of Information and Communication Technology (Kyoto ICT Guidelines World Customs Organisation). In respect to electronic signatures the recommendation is fully based on PKI (Public Key Infrastructure)[1374].

Regarding electronic archiving, all four Member States participating in the Benchmarking Project agreed that quality and trustworthy archiving is a must. All of them implemented archiving of all incoming and outgoing messages, incl. e-signatures and certificates. Nevertheless the form, periods, used technology, tools for the preparation of evidence needed for court, etc. differ. Though archives were in practice used several times as evidence, none of the Member States has experience with a whole court process. There is a need for establishing legal principles for trustworthy electronic archiving in EU.

The EU accession places new requirements on the operation of customs administrations. In the common customs area, customs administrations are forced to revisit their ways of operation to remain competitive and to provide efficient ways for customs clearance.

The Slovak Customs Administration (SCA) has decided to implement electronic communication in all customs processes. The implementation of electronic communication is covered by the ECK (*Elektronické Colné Konanie* = Electronic Customs Processes) initiative of SCA. This approach resulted in the reorganization of existing customs procedures to be in line with the potential created by electronic customs processes.

To create a paperless environment for all traders, the SCA has decided to use the electronic signature (ES) to protect all communication. The ES ensures the legal validity of the electronic communication, and is used furthermore for identification of the message sender, assuring the integrity of the message and assuring the non-repudiation of the legal act of posting an electronic message related to customs procedures.

The SCA ECK initiative is viewed as a process that influences not only the technology, but also existing customs processes and procedures. These have to be revisited and adapted due to the potential created by automation and electronic communication.

The ECK initiative was started by early 2002. At this time no legislation on electronic signatures was in place, so the prepared solutions were based on international standards. As the legislation was adopted later (mid 2002) and the certification of tools

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[1373] United Nations Publication Sales No. E.02.V.8 ISBN 92-1-133653-8.

[1374] For more details see also WCO document PM0083E.

required for AES implementation was accomplished (beginning 2005), the implementation of the ECK initiative was coordinated with these activities.

The SCA has decided to set up a PPP (Public Private Partnership), as the initial investment in the technology was above available financial resources. Therefore the notion of commercial operator was defined as an entity that will provide electronic services to traders on a commercial base. The SCA has focused on revisiting customs processes and the implementation of a general interface that was accessible to operators – the ECK Gateway (ECKG).

The implementation of ECKG started at a time when no conditions for AES were in place (no certified software and hardware modules were available). Therefore the first implemented solutions were based on common ES technology, where its legal validity was set up within bilateral agreements. Such an approach was used in the implementation of services such as on-line customs duty payment and transit.

Furthermore, the ECKG was used to "sign messages for SCA". This approach was adopted due to a complicated full implementation of PKI in all internal systems. Operational systems remain the same, only outgoing messages are electronically signed by ECKG. As the implementation of PKI is planned also for internal systems, customs officers will confirm their decisions by electronic signature (AES-based). Due to some automatic decisions implemented within the operational systems, the concept of automatic signature by ECKG will partly remain for the future.

In the second quarter of 2005 the conditions for AES were met and SCA has worked on the reimplementation of ECKG, covering the usage of certified software and hardware components, as well as the required functionality of electronic registry. Operation of the new ECKG started in September 2005 for transit processes.

According to the final conclusions of the Benchmarking Project and according to Art. 113 of the MCC all types and cases of customs declarations that are submitted electronically should be signed according to the Directive regardless of the data format used (XML, UN/EDIFACT etc.). In all four Member States, the traders authentication is based on the PKI standard, namely X.509 certificates, and they recommend the usage of an advanced e-signature to achieve the required legal validity of customs declarations.

C.3 Cross border trade formalities: customs declarations

Slovakia, along with the Czech Republic, Slovenia and Spain has participated in Benchmarking Project[1375] that relates to the usage of electronic signatures in customs declarations for transit goods both for the customs administrations and for the traders. The project was realized on the basis of approval TAXUD/A2/BR D (2005) 1311 from 2 May 2005, and was in duration from 9 June 2005 to 2 March 2006.

The participating countries agreed to participate in this project because they were aware of the fact that the EU countries use different models of e-signature practice, as well as the fact that various international organizations such as the World Customs Organization, the European Union and others are concerned with the topic of e-signature. The motivation of the participating countries was to find solutions for a common approach at the EU level- at least within some issues of this extensive area.

The objective of this project was to identify best practices in the area of electronic signature, particularly regarding the use of electronic signatures to sign customs declarations and accompanying documents in electronic form, the general use of electronic signatures in the relationship between public administration and traders, e-signing answers (e-messages concerning controls, clearance, etc.) from the Customs Administration to other subjects (especially declarants) and international acceptance and evaluation of certificates of e-signatures within all EU Member States.

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customs procedures to be in line with the potential created by electronic customs processes.

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The SCA ECK initiative is viewed as a process that influences not only the technology, but also existing customs processes and procedures. These have to be revisited and adapted due to the potential created by automation and electronic communication.

The ECK initiative was started by early 2002. At this time no legislation on electronic signatures was in place, so the prepared solutions were based on international standards. As the legislation was adopted later (mid 2002) and the certification of tools required for AES implementation was accomplished (beginning 2005), the implementation of the ECK initiative was coordinated with these activities.

The SCA has decided to set up a PPP (Public Private Partnership), as the initial investment in the technology was above available financial resources. Therefore the notion of commercial operator was defined as an entity that will provide electronic services to traders on a commercial base. The SCA has focused on revisiting customs processes and the implementation of a general interface that was accessible to operators – the ECK Gateway (ECKG).

The implementation of ECKG started at a time when no conditions for AES were in place (no certified software and hardware modules were available). Therefore the first implemented solutions were based on common ES technology, where its legal validity was set up within bilateral agreements. Such an approach was used in the implementation of services such as on-line customs duty payment and transit.

Furthermore, the ECKG was used to "sign messages for SCA". This approach was adopted due to a complicated full implementation of PKI in all internal systems. Operational systems remain the same, only outgoing messages are electronically signed by ECKG. As the implementation of PKI is planned also for internal systems, customs officers will confirm their decisions by electronic signature (AES-based). Due to some automatic decisions implemented within the operational systems, the concept of automatic signature by ECKG will partly remain for the future.

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C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

For the longest time, no adequate legal framework has been available to suit business needs, i.e. a framework that would meet with international approval, could offer legal certainty, and would be technically well suited for transglobal business activities.

The e-Invoicing directive[1378] is the most influential European initiative thus far to remedy this situation. It attempted to harmonise the applicable legislation in the Member States, most notably in the field of VAT. The aspired result was the general acceptance of electronic invoices for VAT-administration purposes, thus providing a significant stimulus to the use of e-invoicing in general. This Study will examine Slovak legislation with a view of identifying conditions not sanctioned or specified by the e-invoicing directive.

The directive was transposed in Slovak national law by the Law of 6 April 2004 VAT Law[1379]. This regulation was amended twice in the context of e-invoicing, and article 75 (6) was twice modified in this sense. The earlier VAT Law (Act No. 222/2004 Coll.) which entered into force on 1 May 2004, required (among other conditions, that will be discussed below) the use of qualified electronic signatures (advanced electronic signature based on qualified certificates and created using secure-signature-creation devices according to the E-Signature Directive). The following amendment[1380], that entered into force on 1 May 2005, omitted the obligation to use a qualified electronic signature and did not mention how the origin and integrity of the invoice should be guaranteed. Then, in 2005 a parliamentary proposal[1381] was approved that again modified Art. 75 (6) of VAT Law and introduced the obligation to use an advanced electronic signature.

As required by the directive, Slovak law now allows electronic invoicing under two conditions. Firstly, the customer has to accept the receipt of invoices by electronic means. Secondly, guarantees need to be provided for the authenticity of the invoice's origin; and for the integrity of the invoice's contents. The Directive provides two main methods to guarantee the authenticity of origin and integrity of contents of an invoice: either by using an *advanced electronic signature*; or by using *electronic data interchange - EDI* (in which case the security procedures must be laid down in an agreement). Member States are also allowed to accept electronic invoices sent by *other electronic means*; however this is subject to acceptance of the Member State(s) concerned. Slovakia transposed into its legal system just one main method to guarantee the authenticity of origin and integrity of contents of an invoice – by using an advanced electronic signature and did not implemented the possibility of using EDI or any additional methods of e-invoicing.

[1378] More formally known as Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax; *Official Journal L 015 , 17/01/2002 P. 0024 - 0028*

[1379] Act No. 222/2004 Coll. Of 6 April 2004 on VAT as amended.

[1380] Act No. 651/2004 Coll. on amendment of VAT Act, that was the second amendment of VAT Law, but the first amendment in context to e-invoicing.

[1381] Act No. 523/2005 Coll. on amendment of VAT Act entered into force on 1 January 2006 as its fourth amendment and its second in context to Art. 75 (6) and e-invoicing.

In addition to security requirements for the storage of the e-invoice, the invoice must be stored in a manner that guarantees, for the entire storage period, the authenticity of the invoice's origin and the integrity of the invoice's contents. The invoice must also be readable and cannot be changed. There is no special regulation for archiving (storage) of e-invoicing so Art. 76 (1) of VAT Law remains applicable, which stipulates a storage period for paper invoices of ten years.
With regard to the storage of e-invoices outside of the Slovak Republic or outside of the E.U. countries there is no mention in the Slovak legal system.

Since the Directive allows member states to require different levels of security for electronic invoices it is not very surprising that the national laws vary. With such diverging requirements for electronic invoicing the question becomes what a company should do to pursue cross-border trade including electronic invoicing within the European Union. If the company is based in a country with lower requirements than the Directive's main rules, it may not be sufficient to comply with the national requirements (of course depending on what requirements the recipient's country's laws have). At the other end of the spectrum, a company based in a country requiring qualified electronic signatures (such as Germany, Spain and until a short time ago Slovakia) should be able to automatically have its invoices accepted in all other countries.

C.4.2. Electronic accounting

This section will evoke the major principles of Slovak accountancy legislation. The fundamental Slovak regulation has been incorporated in the law of 18 June 2002 on accountancy[1382] (referred to as the Accountancy Law).

The accounting documentation of an accounting entity comprises all the accounting records. The Accountancy Law distinguishes a written form[1383] and a technical form[1384] of accounting records. An accounting entity may convert accounting records from one form into another. In that case, the accounting entity shall ensure that the contents of the records in the original form and those of the records in the converted form are identical. All forms of accounting records are equivalent, and the contents of all accounting records have identical consequences. When transferring accounting records, an accounting entity shall ensure their protection against misuse, damage, destruction, unauthorised interference and unauthorised access.

From a practical perspective, most (if not all) major corporations have taken to use accountancy software, although regulations often pose requirements that can only be fulfilled in a paper environment. It is not possible to maintain a strictly electronic accountancy system within the confines of Slovak law. When electronic documents are

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[1382] Act on 18 June 2002 No. 431/2002 Coll. on accountancy as amended. (*Zákon č. 431/2002 Z.z. o účtovníctve v znení neskorších predpisov).*

[1383] Written form is according to Art. 31 (2) a of Accountancy Law defined as made out in handwriting, by typewriter, by printing or reprographic techniques, or by a computer printer device in a format readable for a natural person.

[1384] Technical form is according to Art. 31 (2) b of Accountancy Law defined as made out by electronic, optical or other methods, such that allow for its conversion into a written form; the conversion into a written form shall not be required for signature records according to section 32 (3).

used, these documents must be organised in such a manner as to ensure their unchangeability, a principle that is valid for both paper and for electronic documents.

An accounting entity that is an enterprise, the Export-Import Bank of the Slovak Republic, a cooperative or a state-owned company shall be required to deposit its ordinary financial statements, extraordinary financial statements and annual report in the collection of deeds of the Companies (Commercial) Register within 30 days of the approval of the financial statements; the financial statements may be filed as part of the annual report. There is no mention in the law, if deposit can be done electronically, but on the other hand it is also not excluded.

For storage purposes, article 35 of the Accountancy Law requires stipulates following categories and according to their character states period of time for archiving.

> *Art. 35 (3) Accountancy Law: "Accounting records shall be archived as follows:*
>
> *a) financial statements and annual reports shall be archived for ten years following the year to which they pertain,*
> *b) accounting documents, books of account, lists of books of account, lists of numerical codes or of other symbols and acronyms used in bookkeeping, a depreciation schedule, inventory lists, stocktaking reports and the accounting schedule shall be archived for five years following the year to which they pertain,*
> *c) accounting records which contain information relating to the method of bookkeeping and which the accounting entity uses to evidence the form of bookkeeping (section 31(2)) shall be archived for five years following the year in which they were last used,*
> *d) other accounting records shall be archived for a period of time set out in the accounting entity's archiving plan so that there is no violation of other provisions of this Act and separate regulations legislation."*

There is also no mention in law, if archiving (storage) can be done electronically, but on the other hand and on the condition of fulfilling the provisions of the Archiving Law, it is also not excluded.

D. General assessment

D.1 Characteristics of Slovak eCommerce Law

- Slovak commerce legislation has traditionally allowed trade partners a fair amount of flexibility in arranging methods of contract conclusion and evidence of commercial relationships. In a sense, the eCommerce directive is therefore a natural continuance of this general principle.
- eCommerce in Slovakia is interpreted as a standard, classic commerce with a different form of service provision. Therefore there is no need for detailed special regulation of eCommerce and Slovak legislators decided to pass a very brief eCommerce Law, stipulating just the basic relationship with respect to the electronic form of eCommerce. Existing basic regulation provisions in the Civil Code and in the Commercial Code are preserved.
- The law is in fact limited to contracts related to services of the information society (so called online contracts).

- In Slovakia certain more formal documents exist, where the physical carrier is traditionally considered to be an embodiment of the underlying legal reality, and where contract partners therefore attach a specific value to the document (as is the case e.g. for documentary credit, bills of exchange or contracts demanding a notarial declared signature). As a result, traditional paper documents are still usually the solution of preference by default.

D.2 Main legal barriers to eBusiness

- From a purely legal perspective, the Slovak legal system presents a few significant hindrances. The first of these is the existence of administrative barriers. As explained above, public authorities do not accept electronic documents. The most common argument for their refusal is an obligation of public authorities to establish an electronic registry for the receipt, dispatch, verification, confirmation and processing of electronic documents. Because they do not provide any electronic registry, they argue that they are not able to receipt an electronic document.
- The next obstacle on the side of administrations is a lack of governmental support. As a consequence, and with the exception of customs clearance and tax declaration, no other applications are under development yet, and no procedure has been put in place to do this electronically. On the other hand, if there is already an interest to provide any application in electronic form, than it mostly encounters the problem that it is not possible to provide the whole process electronically. To give an example, within a process of eProcurement the attachments to eTender (such as a trade licence, documents from Commercial Registry, criminal record, declarations from tax authorities or from social and health insurance etc.) are not available in electronic form, and according to law most of them have to be issued on the approved form and the public administration need to stamp the original document.
- Another remaining legal obstacle to the development of eBusiness is that several administrative regulations (e.g. accounting and bills of exchange regulations) still require commercial undertakings to maintain an administration that is (partially) paper-based, and also the lack of legal regulation of certain commercial obligations (e.g. accounting regulations, bills of exchange regulations documentary credit etc.). While this does not necessarily prevent business partners to engage in electronic contracting, it can none the less be considered a disincentive to organising a purely electronic business.
- Not insignificant is also the human factor and the fact that people who are accustomed to paper based documents do not necessarily trust eCommerce and electronic documents. This could also be a consequence of the fact that until now there is no jurisprudence in the area of eCommerce, and that nobody can therefore be sure that a judge will not in the future refuse to acknowledge that any used solution meets legal standards.

D.3 Main legal enablers to eBusiness

- As noted above, Slovak commercial legislation constitutes a basic regulation for commercial obligations. Currently the main enabler to eBusiness is the fact that according to Slovak law it is possible and allowed to create legally valid electronic documents, meaning electronic documents (using a permitted electronic documents format) signed by a qualified electronic signature (based on a qualified certificate and created by a secure signature creation device and by a secure signature creation application).
- As such, it would be accurate to say that, although Slovak legislation certainly does not eliminate all legal barriers to the development of eBusiness, it typically allows trade partners the possibility of agreeing to a suitable framework when required.

Slovenia National Profile

A. General legal profile

In accordance with constitutional Articles 1 and 2, Slovenia is a democratic republic and a social state governed by law. The state's authority is based on the principle of the separation of legislative, executive and judicial powers, with a parliamentary system of government. Slovenia comprises 210 municipalities[1385], 11 have the status of a city municipality.

The legislative authority is exercised by the National Assembly[1386], which has exclusive jurisdiction over the passing of laws. Regulations and other general legal acts must be in conformity with the Constitution and laws, and are legally binding for all parties involved, including for the courts. They are issued by the Government or ministers and are intended to articulate in greater detail relations set by the law or other legal acts.

The usual way to implement an EU Directive in Slovenia, regulating a new legislative field, is by adopting new legal measures (most commonly a parliamentary bill) relating to and corresponding with the provisions of the respective EU directive. In case an EU Directive concerns an already regulated field, the regulatory provisions are most often implemented through amendments of existing Slovenian legislation.

The executive authority is on the government, which is currently comprised of 15 ministries and 16 ministers.

The judicial powers lie with the courts. There are three court levels of general jurisdiction. Local Courts and District Courts are courts of the first instance, their division of competences being governed by several instruments. Generally speaking, Local courts decide less serious criminal cases and civil cases of lower disputed value, whilst competence in other cases lies with the District courts. Higher Courts are courts of appellate jurisdiction, whilst the Supreme Court is the highest court in Slovenia.

The highest authority of judicial power for the protection of constitutionality, legality, human rights and fundamental freedoms is the Constitutional Court, which is however not regarded as being part of the judicial system itself. As its functions are also partly legislative, the Constitutional court is often referred to as a "negative legislator", and therefore a sui generis power above the legislative and judicial power, however not forming part of neither. Courts are bound only by constitution and law, so that written legislation is the most important legal source. Court decisions are also important as legal sources, but the courts are not bound by precedent. The Slovenian judicial system follows the Germanic continental legal inheritance.

Slovenia has a single-level system of local self-government; a municipality regulates only local tasks. Currently constitutional revisions for a second level regional self-government are being passed in the National assembly.

Currently applicable and prior laws may be obtained in the relevant Official Gazettes[1387]. Official Gazettes are also available for free on-line since 1995 or via the governmental

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[1385] *Občine*

[1386] *Državni zbor,* see http://www.dz-rs.si/index.php?id=69

[1387] *Uradni list;* see http://www.uradni-list.si

portal[1388] where also information on other governmental acts, not published in the Official Gazette can be obtained. Adopted and draft laws or other acts (in Slovene) together with explanatory commentaries where available may also be obtained through The National Assembly's website[1389].

B. eCommerce regulations

B.1 eCommerce contract law

eCommerce contract law is governed by different legal instruments. The most important legal act regulating especially eCommerce contract law is the recently adopted Electronic Commerce market Act[1390]. However, provisions of the Electronic Commerce and Electronic Signature Act[1391], Civil Code[1392] and Consumers Protection Act[1393] also have to be taken into consideration.

The general legislative situation in the field of electronic contract law after the enactment of the Electronic commerce market act can be described as follows: Provisions of the Electronic commerce market act, which is basically a direct transposition of the Directive 2000/31/EC, apply to the full scope of the directive, i.e. to all contracts concluded by electronic means via automated systems/applications. As the Electronic commerce market act is the most specific legal instrument, its provisions will prevail in case of collision with any other rules. If however a legal issue in respect of eCommerce is not regulated by the Electronic commerce market act, other relevant provisions apply. As the electronic commerce market act doesn't contain provisions on the validity of electronic form and restrictions on electronic contract conclusion, the relevant rules of the Electronic Commerce and Electronic Signature Act will apply. *Ceteris paribus* the same would apply also to general principles of civil law as provided by the Civil code.

Another important issue that has to be observed is based on the fact that in case of closed systems (systems where the number of parties is known in advance), such a system can be contractually excluded from the scope of almost all provisions and rules of the Electronic Commerce and Electronic Signature Act, except from the principles of non-discrimination of the electronic form and non-discrimination of electronic signatures (Articles 4 and 14).

[1388] See http://zakonodaja.gov.si

[1389] See http://www.dz-rs.si

[1390] Zakon o elektronskem poslovanju na trgu Official Gazette of the Republic of Slovenia, no. 61/2006. http://zakonodaja.gov.si/rpsi/r00/predpis_ZAKO4600.html

[1391] Zakon o elektronskem poslovanju in elektronskem podpisu – officially consolidated text – Official Gazette of the Republic of Slovenia, no. 98/2004. http://zakonodaja.gov.si/rpsi/r03/predpis_ZAKO1973.html

[1392] Obligacijski zakonik – Official Gazette of the Republic of Slovenia, no. 83/2001, 32/2004, 28/2006 Odl.US: U-I-300/04-25). http://zakonodaja.gov.si/rpsi/r03/predpis_ZAKO1263.html

[1393] Zakon o spremembah in dopolnitvah Zakona o varstvu potrošnikov (ZVPot-A) – Official Gazette of the Republic of Slovenia, no. 110/2002.

B.1.1. General principles

Firstly it should be noted that the Civil code has no explicit provision on a distinction between civil and commercial contracts. However the general provisions themselves are very flexible. According to Article 51 of the Slovene Civil code, the form of contracts is not fixed, except if otherwise provided by law. Furthermore, formal requirements that could have had an influence on the validity of the contract can be overcome by the factual execution/realisation of the contract concerned (Article 58), which is a theory referred to as the theory of realisation.

Autonomy of will is stipulated as a key principle of Slovene civil law in Article 3 of the Civil code stating that the parties to a contractual relationship are free in regulating their relationship and are limited herein only by binding legal and constitutional provisions. Since the formal requirements referred to above can also be regarded as a binding legal provision, the mentioned theory of realisation provides for an additional legal remedy in keeping realised contracts in force and thus prevent their nullification; a *favor contrahendi*.

Similar provisions where the autonomy of will prevails over other provisions can also be found throughout the Civil code, e.g. Article 50 provides for the validity of fictitious contracts if they fulfil the contractual conditions of another contract type (manifesting the *plus valere quod agitur quam quod simulare concipitur* principle). The emphasis is thus primarily on the will of the contracting parties. However, in practice the form of the contract often also depends on the economical scope of the business pursued. Thus written and signed contracts will be the rule in greater investments (*ad probationem*) although there is no such formal requirement.

Slovene legislation doesn't have a special definition of the term electronic document; however the Electronic Commerce and Electronic Signature Act provides the definition of data in electronic form (Article 2, indent 1). According to the relevant provision, data in electronic form means any data designed, stored, sent, received or exchangeable electronically. This definition clearly also applies to electronic documents, which could be described as a subgroup of data in electronic form, having some additional attributes in design. While this is only a doctrinal interpretation of the relevant provision, it is on the other hand sufficiently flexible and also technology neutral. To our knowledge, there is currently no specific jurisprudence in this respect.

As far as the validity of electronic documents in general is concerned, Article 4 of the Electronic Commerce and Electronic Signature Act explicitly provides that data in electronic form may not be declared invalid or lacking in evidentiary value solely because they are in electronic form. Additionally, paragraph 1 of Article 13 of the Electronic Commerce and Electronic Signature Act states that where the law or other regulation requires a written form in order for to document to be legally valid, an electronic form shall be considered equivalent to the written form if the data in electronic form are accessible and suitable for later use. There is no additional formal requirement with regard to the accessibility and suitability for later use as far as the document type is concerned.

However Paragraph 2 of the same Article 13 provides for a restriction in this respect, as certain contracts do not benefit from the above mentioned presumption of equivalence of the electronic form. Thus, those types of contracts are *de facto* excluded from valid formation in electronic form. This restriction includes contracts on legal transactions transferring ownership rights to real estate or establishing other material rights to real estate, testamentary transactions, contracts arranging property relations between

spouses, contracts disposing of the assets of persons declared legally incapable, contracts on the handover and distribution of assets for life, endowment contracts and agreements on renunciation of inheritance, promises of gifts and gift contracts in the event of death, and other legal transactions which the law stipulates must be concluded in the form of a notarised record. All of the above mentioned contracts according to the law require at least the written form in most cases, as well as an additional formal intervention of a public body (e.g. a notary public).

The principle of contractual freedom is pointed out as a key principle of civil law in Slovenia. Accordingly, contractual parties are free in defining their mutual contractual responsibilities, including in ways not foreseen by the Civil code. However, in case of disputes the Civil code's provisions will nevertheless apply through interpretation of general principles of civil law as well as through application of certain institutes in similar cases. The only limitations are binding legislative and constitutional provisions.

An emanation of contractual freedom is also the possibility of the contracting parties to agree upon a form which needs to be met if a contract is to be legally binding. This is provided by Articles 54 and 55 of the Civil code. The relevant Articles stipulate that if a form is required by the parties as an *ad valorem* condition for the validity of the contract, the lack of form causes its nullification. However if the form is only required as an *ad probationem* condition, the contract is concluded with the agreement of the parties. In the latter case only an obligation of the parties arises to shape the contract in the form that has been agreed upon. Consequently, the form as an *ad valorem* condition must be explicitly agreed upon, since in other cases the contract is validly concluded.

This would apply also to documents in electronic form; as all electronic documents and/or messages are valid expressions of one party's will, there is no precondition to their legal acceptability (although an explicitly agreed upon requirement of a written form would logically cause their invalidation). However, there is no provision that an electronic document would become invalid if one party refuses to accept it. In this case its validity would be assessed in the last instance by the courts according to the burden of proof principle.

The Electronic Commerce and Electronic Signature Act provides a framework for electronic notifications. Article 7 of the Electronic Commerce and Electronic Signature Act provides that if the sender requested on or before sending an electronic message, or in the electronic message itself, or agreed with the recipient, that receipt of the message be confirmed, and stated that the electronic message was conditional on confirmation of receipt, the electronic message shall be considered not to have been sent until the sender receives confirmation of receipt. If however the sender fails to state that the electronic message is conditional on confirmation of receipt, and does not receive confirmation of receipt within the specified or agreed interval, or if such is not stipulated or agreed within a reasonable interval, the sender may inform the recipient that he has not received confirmation of receipt and may stipulate a reasonable interval within which he must receive confirmation of receipt. If he still does not receive confirmation of receipt within such interval after prior notification to the recipient, the electronic message shall be considered not to have been sent.

An important provision is that if the sender fails to agree with the recipient on the form of confirmation of receipt of an electronic message, any automatic or other confirmation by the recipient, or any behaviour by the recipient that is sufficient for the sender to know or be able to know that the electronic message was received, shall be considered as confirmation. Consequently Slovene law doesn't provide for an explicit *ex lege* invalidity of electronic messages; a fictitious invalidity (non-existence) could be identified only in the case of the message being conditional on confirmation of receipt or

after additional intervention. The latter however must be by itself clearly identifiable as such. In other cases (as noted above) a more or less conclusive approach is provided by the Electronic Commerce and Electronic Signature Act, whereby a tacit acceptance is nearly impossible (except perhaps in case of actual performance of the contract).

The Slovene legal system hasn't implemented a general framework for sending electronic registered mail. However, for the purposes of administrative procedures, the General Administrative Procedure Act[1394] provides a legal basis for sending and receiving documents in electronic form via electronic registered mail. Chapter V (Article 63 and following) thereof provides for complex regulation of communications between a citizen and public administrations. The involvement of third trusted parties (commercial providers) is also somewhat defined to the extent that they function *de facto* as post-office boxes in respect of receipt of documents. However, obtaining an electronic registered mail address to replace the physical postal address is not obligatory for the citizen. Currently this framework is exclusively provided for administrative procedures. However, contractual parties are always free to agree upon such communication and consequently also to determine a third trusted party (commercial provider) acting as a repository of notifications. To this end a consensus of the parties would certainly be required.

With regard to archiving of electronic documents, two bills are relevant: the Electronic Commerce and Electronic Signature Act and the Documentary and archival material custody and archives act[1395]. Article 12 of the Electronic Commerce and Electronic Signature Act states that where the law or other regulation stipulates that certain documents, records or data are to be stored, they may be stored in electronic form:

- if the data contained in an electronic document or record are accessible and suitable for later use;
- if the data are stored in the form in which they were created, sent or received, or in another form that authentically represents the data formed, sent or received;
- if it is possible to determine from the stored electronic message where it originates from, to whom it was sent and the time and place of its sending or receipt; and
- if the used technology and procedures prevent to a satisfactory extent subsequent changes to or deletion of data, which could not be readily determined, or if there exists a reliable assurance that the message has not been altered.

In order to be stored in a legally valid manner all conditions must be met cumulatively. It must be noted however that the described provision of the Electronic Commerce and Electronic Signature Act applies only to documents which are generated electronically, i.e. which originate in electronic form. It does not cover the electronic storage of documents which are physical in origin. Thus it also doesn't provide the legal basis for a valid transformation of originally physical documents to electronic documents.

This gap is however filled through the Documentary and archival material custody and archives act, which was adopted in 2006. The Documentary and archival material

[1394] Zakon o splošnem upravnem postopku (uradno prečiščeno besedilo); Official Gazette of the Republic of Slovenia, no. 61/2006. See http://zakonodaja.gov.si/rpsi/r04/predpis_ZAKO4814.html; official consolidated text

[1395] Zakon o varstvu dokumentarnega in arhivskega gradiva ter arhivih (ZVDAGA), Official Gazette of the Republic of Slovenia, no. 30/2006 http://www.uradni-list.si/1/ulonline.jsp?urlid=200630&dhid=81674

custody and archives act provides for a general legal framework on the organisation, infrastructure and implementation of storage of documentary material in physical and electronic form, legal validity of such material, the custody of archival material and conditions for its use, tasks of the archives and public archival service and inspection, but perhaps most importantly also the transformation of documents originating in a form other than electronic digital form into the latter. Thus the Documentary and archival material custody and archives act provides a general legal basis for all types of storage. However, the conditions from the Electronic Commerce and Electronic Signature Act still apply if originally electronic documents are concerned.

The overall framework could be described as follows: storage of documents originating in electronic digital form is subject to conditions provided by Article 12 of the Electronic Commerce and Electronic Signature Act, whereas storage of documents originating in another form is subject to the provisions of the Documentary and archival material custody and archives act. If the conditions regarding transformation provided by the Documentary and archival material custody and archives act are met (Article 10 and Article 12 thereof) this is allowed to the extent of deletion of originals, unless provided otherwise by a sector-specific act and in any context of a law or regulation requiring storage of documents.

The criteria of transformation are provided by Articles 10 and 12 of the Documentary and archival material custody and archives act, and depend on (non)long-term or long-term storage. Basic requirements emphasize the preservation of integrity, applicability of content, provision of the same authenticity as in the original form, compliance control and error management, separate storage of any added content and transformation related content, evidence on valid transformation methods and procedures and other conditions provided by a governmental regulation. Long-term storage requires the fulfilment of additional requirements on adding content in order to preserve the same applicability, authenticity integrity and non-repudiation.

At the time of writing of this report, there is no relevant jurisprudence explicitly acknowledging the acceptability of electronic documents as being equivalent to traditional written documents.

B.1.2. Transposition of the eCommerce directive

As of June 2006, the Directive 2000/31/EC on information society services has been partially implemented into Slovenian legislation through the Consumer Protection Act and the Electronic Commerce and Electronic Signature Act. Parts of the Directive, like Articles 6 and 10, have not been implemented into Slovenian legislation. As the implementation measures were deemed incomplete, the new Electronic Commerce market Act was adopted by the parliament in May 2006 and entered into force in June 2006. However, some provisions of the Directive are also transposed by the Electronic Commerce and Electronic Signature Act; especially in respect of treatment of contracts and exclusions.

In this respect, the Electronic commerce market act provision applies only to information society services. Exclusions are provided according to the Directive and with the same scope. In case of other services provided in electronic form, the provisions of the Electronic Commerce and Electronic Signatures Act, being a general legal act on eCommerce with horizontal application, would apply, even with regard to subject matter excluded under the Electronic commerce market act. Obviously, the aforementioned

exclusions of the Electronic Commerce and Electronic Signatures Act remain applicable (e.g. contracts on legal transactions transferring ownership rights to real estate or establishing other material rights to real estate, testamentary transactions, contracts arranging property relations between spouses, …).

It should be noted that these exclusions do not completely follow the provisions of the Directive, as in Slovenia more liberal rules on electronic contract conclusion were already enacted prior to the Directive.

Where the formal requirements in an electronic context are concerned, we primarily refer to our analysis of the validity of electronic documents in general, and the non-discrimination principles of the Electronic Commerce and Electronic Signature Act (articles 4 and 13; see above). According to both provisions an identifiable legal basis for the equivalence of the electronic and written form is provided; however, due to the principle of non-discrimination, electronic documents which do not fulfil the criteria of being equivalent to written documents cannot be denied validity solely because of their electronic form. It could be said that they have nonetheless much the same evidentiary value as they have more power in transferring the burden of proof to the other party.

The legal basis for signature requirements is provided by Article 15 of the Electronic Commerce and Electronic Signature Act, stating that, with regard to data in electronic form, secure electronic signatures certified by a qualified certificate shall be equivalent to an autographic signature, and shall have the same validity and evidential value. Thus all types of contracts for which the law requires being in writing, can be concluded also by electronic means, provided that they do not fall into one of the exclusions presented above. In order to achieve validity they have to conform to the above mentioned formal and signature requirements.

B.2 Administrative documents

In analysing the question of the use of electronic documents in administrative procedures, two bills are primarily relevant: firstly the Electronic Commerce and Electronic Signature Act, which as a horizontal bill regulating eCommerce in a broad sense applies also to administrative, judicial and other similar procedures unless otherwise provided by another law; and secondly the General Administrative Procedure Act, which provides the general legal basis for all administrative proceedings; i.e. all G2C and G2B and a major part of G2G relations. Special arrangements can still be provided by sector-specific bills; however the mainstream legislative approach is that only few anomalies to the general provisions of the General Administrative Procedure Act are introduced by sector-specific legislation, none of those derogating from the concept of electronic commerce in administrative proceedings.

Thus the general principles of the General Administrative Procedure Act will apply. It should be noted that the General Administrative Procedure Act provides a very clear legal basis for electronic commerce relying also on the principles provided by the Electronic Commerce and Electronic Signature Act. This reference is significant due to the fact that administrative procedures are, contrary to civil law relations, strictly formal. However in most cases a written form with an autographic signature will suffice to file almost any application. As a framework for their equivalence is already provided by the

Electronic Commerce and Electronic Signature Act, a reference to its provisions was the most logical solution.

As a result, a complex general legal framework for electronic communication with public administrations already exists. Accordingly all applications can be legally valid filed in electronic form (Article 63, paragraph 2). As an application typically requires the signature of the applicant in this respect the relevant provisions of the Electronic Commerce and Electronic Signature Act will apply. To this end a secure electronic signatures certified by a qualified certificate must be used. Such an electronic application is processed by the central governmental information system for filing, notifying and handing over electronic documents, which automatically sends out a confirmation of receipt to the applicant. Acceptance and processing of electronic documents and participation in the central information system is according to the provisions of Article 63, paragraph 4 mandatory for all internal administrative bodies at the level of the central government, and for other public authority institutes at central governmental level. A special written authorisation for participating in the information system can also be issued to self-government authorities at the local level.

The General Administrative Procedure Act also contains provisions (Article 139) which aim at facilitating the exchange of information between public bodies in processing applications. Accordingly a public body processing an application may not require documents from the applicants if those can be obtained from publicly accessible registers of other public bodies or, in case of non-public registers, if the applicant explicitly authorises the public body processing his application to such access.

On the other side the governmental decision making process is more or less completely based on the electronic exchange of information, which is also mandatory. This is regulated very precisely by the Rules of procedure of the Government of the Republic of Slovenia[1396]. Article 9 provides that the government proceeds only with documents filed electronically in the governmental information system. Consequently ministries and governmental offices are obliged to file all documents within their governmental competence electronically. The Rules of procedure of the Government of the Republic of Slovenia also provide a legal basis for informatised decision making on the very governmental level (Articles 22 and 24).

The central governmental information system for filing, notifying and handing over ought to be functioning from 2005 onwards. It is however doubtful whether the actual application functions accordingly in its full scope, as the central governmental internet portal http://e-uprava.gov.si/e-uprava/ still focuses on a case to case approach in filing applications only on a certain (limited) scope of services (based on a lifetime event approach), which is quite far from allowing filing applications in electronic form in every administrative procedure at state level. Although general information on electronic filing is provided on-line[1397], no specific address for receiving such applications and processing the via a central information system can be found, even though the relevant provisions of the General Administrative Procedure Act can hardly be interpreted otherwise.

Accordingly, while the acceptance of validly signed electronic documents is mandatory for all public bodies and an applicant could rely upon them in case of dispute, in practice

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[1396] Poslovnik Vlade Republike Slovenije, Official Gazette of the Republic of Slovenia, no. 43/2001 (23/2002 - popr.), 54/2003, 103/2003, 114/2004, 26/2006), http://zakonodaja.gov.si/rpsi/r02/predpis_POSL32.html

[1397] See http://e-uprava.gov.si/e-uprava/vodnikiUPStran.euprava?vodnik.dogodek.id=59

this can not really be regarded as a measure facilitating electronic commutation with public bodies.

C. Specific business processes

Firstly it should be repeated that the Electronic Commerce and Electronic Signature Act is a horizontal measure and that consequently its provisions, especially the principle of non-discrimination of the electronic form, will also apply in cases where an electronic form is not explicitly foreseen. Due to its horizontal nature, such a legislative approach is also unnecessary. On the other hand, legal tradition and practice is often reluctant to accept novelties, such as an introduction of traditionally "paper" documents in an electronic form. The responses below are therefore to be regarded as a strictly doctrinal interpretation of the relevant legislation in force.

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The bill of exchange is a prime example of a negotiable instrument and is used in business circles for the purposes of debt collection, credit and investment. As all over the world, bills of exchange have a long history also in Slovenia. The main part of legislation regulating Bills of exchange dates back to the 1946 enacted Bill of exchange act[1398]. As a form of securities, according to general principles of civil law bills of exchange are unilateral declarations of will, which, in order to be accepted as bills of exchange, have to fulfil mandatory formal requirements, put down by the Bill of exchange Act.

Those are:

- a declaration that a paper is a bill of exchange in the language of the paper,
- non-conditional order do pay a certain amount of money,
- nomination of drawee,
- declaration of maturity,
- place of payment,
- nomination of remittee,
- date and place of issue and
- drawer's signature.

A declaration of will, which doesn't fulfil the described mandatory criteria, is still valid (as a different security or other disposition), however it will not benefit from special regulations in respect to bills of exchange. A bill of exchange without a declaration of maturity is regarded as a bill of exchange on submission.

[1398] Official Gazette of the Federal peoples Republic of Yugoslavia no. 104/1946 (33/1947 - popr.), Socialistic federal rebublic of Yugoslavia, no. 16/1965, 54/1970, 57/1989, and Republic of Slovenia, no. 17/1991-I-ZUDE, 13/1994-ZN, 82/1994-ZN-B.

The law does not contain any regulation regarding the use of an electronic form (electronic documents) for bills of exchange, but it does not mandate the use of paper either. However, the use of paper is often assumed in every case of required written form due to the traditional formalistic approach, but also due to the fact that the Electronic Commerce and Electronic Signature Act and especially its principle of non-discrimination is still widely unknown in general legal circles.

Interpreting the principle of non-discrimination accordingly put down by the Electronic Commerce and Electronic Signature Act, no legal barriers to bills of exchange in electronic form can be identified. If an electronic document fulfils all the mandatory criteria described above and is signed with a secure electronic signatures certified by a qualified certificate, which, according to Article 15 of the Electronic Commerce and Electronic Signature Act is equivalent to an autographic signature, thus having the same validity and evidential value, there are no legal reasons which would render such a bill of exchange invalid or lacking formality.

However it should be noted that at the time of writing this report there is no evidence of such practice by the stakeholders and a general reluctance (assumptions favouring the mandatory use of paper) to implement such measures still prevails. Additionally, a certain ignorance of the Electronic Commerce and Electronic Signature Act, non-existence of knowledge on benefits of the electronic form, and also the non-existence of relevant information services could be guessed to be the main reasons for this non-acceptance in practice.

No additional legal issues which impede the use of electronic documents can be identified. The use of electronic stamps and sealing is regulated by Article 166 of the Decree on administrative operations[1399] (adopted on the basis of the General administrative procedure act). Accordingly a secure electronic signature certified by a qualified certificate of the relevant public body is equivalent to its official seal. An appropriate legal basis is also provided in case of a notary intervention as the Notary act[1400] also already contains relevant provision in Articles 31 to 38.a. In case of bills of exchange the latter is especially relevant as the bill of exchange has to be protested before a notary. Articles 31 to 38.a provide a legal basis also for a protest in electronic form. However, there are no indications on the factual application of the relevant provisions on the notary's accepting protests in electronic form.

C.1.2. Documentary credit

Documentary credit is regulated by Articles 1072 to 1082 of the Obligations Act[1401], which is still in force even after the adoption of the Civil code. The latter as a rule replaced the Obligations Act. However, following transitional provisions of the Civil Code, certain contractual provisions of the Obligations Act remained in force, especially those involving

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[1399] Uredba o upravnem poslovanju, Official Gazette of the Republic of Slovenia no. 20/2005, 106/2005, 30/2006. http://zakonodaja.gov.si/rpsi/r02/predpis_URED3602.html

[1400] Zakon o notariatu /ZN-UPB2/ - officially consolidated text. Official Gazette of the Republic of Slovenia no.4/2006.

[1401] Zakon o obligacijskih razmerjih, Official Gazette of the Socialistic federal rebublic of Yugoslavia, no.
29/1978, 39/1985, 2/1989 Odl.US: U št. 363/86, 45/1989 Odl.US: U-363/86, 57/1989, and Republic of Slovenia, no. 27/1998 Odl.US: U-I-123/95, 88/1999 (90/1999 - popr.), 83/2001-OZ, 30/2002-ZPlaP, 87/2002-SPZ).

banks. The subject of documentary credit is an obligation of the bank towards the consignee to pay to the designee indicated by him an amount of money if certain conditions (submission of required documents) are fulfilled within a given time.

Traditionally the documentary credit is abstract in relation to the transaction which was the cause for its opening, and it therefore constitutes a completely separate legal disposition. If not explicitly provided otherwise (through an agreement on non-revocation) documentary credit is revocable. Thus it can be revoked or changed at any time by the consignee or by the bank, if revocation would be in his favour. On the other hand a non-revocable documentary credit represents an independent obligation of the bank towards the nominee and can only be revoked or changed with consensus of all the parties involved.

The only formal requirement under Slovene law is that documentary credit must be in writing. No special provisions regulating its electronic form can be identified. Thus in this respect the horizontal provisions of the Electronic Commerce and Electronic Signature Act apply. Interpreting the principle of non-discrimination accordingly, no legal barriers to documentary credit in electronic form can be identified, provided the electronic document fulfils the mandatory criteria described above and is signed with a secure electronic signatures certified by a qualified certificate. Again, at the time of writing this report there is no evidence of such practice.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

In the Slovene legal system, bills of lading are subjected to many legal acts, mostly depending on the means of transportation. Thus bills of lading are regulated by the Civil code, Maritime Code[1402], the Road Transport Contracts Act[1403] and the Railway Transport Contracts Act[1404].

The Maritime code provisions apply to all forms of maritime transportation of goods. The Maritime Code specifies provisions on the bill of lading in Articles 491 to 507. Especially it provides which information must be included in the bill of lading (Article 500). Those are:

- firm and address of the ship owner,
- name and identity of the ship,
- firm and address of the consignee,
- firm and address of the nominee or a designation "on order" or a designation "to the holder",
- port of destination or a designation when it will be determined,

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[1402] Pomorski zakonik, Official Gazette of the Republic of Slovenia no. 26/2001, 21/2002, 110/2002-ZGO-1, 2/2004. http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO2868.html.

[1403] Zakon o prevoznih pogodbah v cestnem prometu /ZPPCP-1/ Official Gazette of the Republic of Slovenia no. 126/2003. http://zakonodaja.gov.si/rpsi/r03/predpis_ZAKO3743.html

[1404] Zakon o prevoznih pogodbah v železniškem prometu /ZPPŽP/ Official Gazette of the Republic of Slovenia no. 61/2000. http://zakonodaja.gov.si/rpsi/r07/predpis_ZAKO1627.html

- quantity of goods,
- type of shipment (cargo),
- status of shipment and of its packing,
- transportation payment provisions,
- number of bills of lading issued and
- date and place of issue.

Additional information and conditions of transportation can also be included.

The Civil code regulates bills of lading (load or cargo bills) in the chapter regulating transportation contracts (Articles 671 to 703), the Road Transport Contracts Act in Articles 38 to 51, and the Railway Transport Contracts Act in Articles 32 to 34. All lading bills according to general principles constitute securities, i.e. unilateral declarations of will, which can however take different legal forms (on order, to the holder, to the nominee). Consequently also different rules will apply, which are however the same as far as the electronic form is concerned.

Article 502 of the Maritime code explicitly states that a signature of a bill of lading can also be in an electronic form. Though it does not contain provisions on the bill of lading itself being in electronic form, the provisions on signing indicate that the Maritime code also allows for this possibility. Nevertheless the Electronic Commerce and Electronic Signature Act still applies. Other bills do not contain special provisions on their specific bills of lading being in electronic form, thus the same observation on the applicability of the Electronic Commerce and Electronic Signature Act can be made, and as a rule a written form together with a signature is required.

Interpreting the provision of Article 502 of the Maritime code and other relevant provisions of the Civil code, the Road Transport Contracts Act, and Railway Transport Contracts Act together with the principle of non-discrimination accordingly no legal barriers also to bills of lading in electronic form can be identified, provided the electronic document fulfils the mandatory criteria described above and is signed with a secure electronic signatures certified by a qualified certificate.

At the time of writing this report no indication on actual use of electronic bills of lading in Slovenia can be identified in any form of transport. The legal basis for such intervention in electronic form is already provided, however its practical implementation is somewhat missing.

C.2.2. Storage contracts

Storage contracts are subjected to Articles 747 to 765 (chapter XVI) of the Civil code. A storage contract is defined as a contract where the warehouse owner accepts and stores certain goods, keeps their status unchanged and hands them over to the depositor or designee, whereas the depositor is bound to pay a certain amount for those services. Typical for storage contracts is the edition of a storage bill, which is specially regulated in Articles 757 through 765. A storage bill must typically be in writing and signed by the warehouse owner. According to Slovene law a storage bill is composed of a mortgage deed and a receipt bond, which are separately transferable securities but which have to make reference to each other. The handing over of the goods is conditional upon the presentation of the storage bill as a whole; however, the holder of the mortgage deed is entitled to mortgage rights on the goods stored, whilst the holder of the receipt bill is

entitled to claim the goods if he pays out the whole value of the storage bill to the holder of the mortgage bill or deposits the required amount to the warehouse owner. The mortgage deed must be protested at time of maturity, whereas in respect of protesting relevant rules of bill of exchange regulations apply.

The relevant provisions under Slovene law do not contain special provisions on storage bills being in electronic form, thus same observations on the applicability of the Electronic Commerce and Electronic Signature Act as in previous cases can be made, as a written form together with signature is required.

No indication on actual use of electronic storage bills can be identified.

C.3 Cross border trade formalities: customs declarations

Customs declarations are regulated by the Act implementing the customs regulations of the European Community[1405]. According to Article 34, before a subject can fill customs declarations in an electronic form it has to get permission from the Customs Administration of the RS (CURS[1406]). Detailed conditions are prescribed by the minister responsible for finance through the Rules on completion of Single Administrative Documents and on electronic data exchange and on other forms used in customs procedures[1407] and by the Decree on terms and conditions of carrying out agency business in customs matters[1408].

In Slovenia, a system for filling electronic customs declarations exists and is accessible to end users. According to the customs authority, almost 98 % of the customs declarations exchanged between companies and customs authority are in an electronic form.

The Annex to the Rules on completion of Single Administrative Documents and on electronic data exchange and other forms used in customs procedures contains some samples of additional certificates, declarations and confirmation for completing the customs declaration, which can also be filed electronically. As custom proceedings are a form of the administrative procedure, in theory, no legal obstacles for such applications should exist if the relevant provisions of the General administrative procedure, Electronic Commerce and Electronic Signature Act as well as Documentary and archival material custody and archives act altogether are applied accordingly. However, no application capable of accepting such complex documents appears to exist presently.

[1405] Zakon o izvajanju carinskih predpisov Evropske skupnosti, Official Gazzette of the Republic of Slovenia no. Ur.l. RS, št. 25/2004, 28/2006 Odl.US: U-I-315/05-9), http://zakonodaja.gov.si/rpsi/r00/predpis_ZAKO2300.html

[1406] See http://www.gov.si/curs/angl/index.htm

[1407] Pravilnik o izpolnjevanju enotne upravne listine in računalniški izmenjavi podatkov ter o drugih obrazcih, ki se uporabljajo v carinskih postopkih Official Gazzette of the Republic of Slovenia no. 111/2005, http://zakonodaja.gov.si/rpsi/r05/predpis_PRAV7225.html

[1408] Uredba o pogojih za opravljanje poslov zastopanja v carinskih zadevah Official Gazzette of the Republic of Slovenia no. 33/2004, 109/2004, 96/2005, http://zakonodaja.gov.si/rpsi/r07/predpis_URED3117.html

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

The e-Invoicing Directive was transposed in Slovene national law by the Value added tax act[1409] that governs the system of value added tax and introduces the obligation of payment of value added tax. According to Article 35a, paragraph 2 of the Value added tax act, invoices may be issued in paper form or electronically, subject to an acceptance by the purchaser or by the customer. The minister responsible for finance prescribes the conditions for sending and issuing of invoices in electronic form. This has been done in the Rules on the Implementation of the Value Added Tax Act[1410].

A taxable person may also send other documents electronically. For example, a VAT return may be submitted electronically by electronic means under the conditions prescribed by the minister responsible for finance (Article 38), as well as the special VAT return (Article 52k,paragaph 1) or the quarterly statement (Article 39b, paragraph 4). Furthermore Article 52i of the Value added tax act states that the non-established taxable person who for a Member State of identification chooses Slovenia shall declare to the tax authority when his activity as a taxable person commences, ceases or changes to such an extent that this scheme can no longer be used. A declaration shall be made electronically. A non-established taxable person can also submit a claim for the refund electronically by electronic means (Article 52m). Every process is widely regulated by secondary legislation by the Minister of finance[1411].

Article 97 of the Rules on the Implementation of the Value Added Tax Act defines the conditions for an invoice in an electronic form. Paragraph 2 of Article 97 states that invoices may be issued in an electronic form, in compliance with the relevant provisions regulating electronic commerce, and if the buyer agrees with such issue and provided that authenticity of origin and integrity are guaranteed. The electronic invoice must also allow the verification of the time and place of sending and receiving it. With regard to any signature requirement, a reference is made to the Electronic Commerce and Electronic Signature Act. This reference is however somewhat clumsy as it doesn't explicitly require secure electronic signatures certified by a qualified certificate for invoice signing. Nevertheless this provision was (in our opinion correctly) interpreted in such a way by various commercial service providers, which offer systems of electronic invoicing to enterprises.

Until the end of 2005 a person who wanted to issue electronic invoices had to declare this beforehand to his tax authority on a special form that could be found in an appendix to the decree. As of 1 January 2006, this is not required anymore.

[1409] Zakon o davku na dodano vrednost, Official Gazzette of the Republic of Slovenia no. 89/1998, 17/2000 Odl.US, 19/2000 Odl.US: U-I-39/99, 27/2000 Odl.US: UI 173/99, 66/2000 Odl.US: U-I-78/99-20, 30/2001, 82/2001 Odl.US: U-I-188/99-19, 67/2002, 30/2003 Odl.US: U-I-383/02-12, 101/2003, 45/2004, 75/2004 Odl.US: U-I-412/02-13, 114/2004, 132/2004 Odl.US: U-I-143/03-9, 108/2005, 21/2006 Odl.US: U-I-176/04-16. http://zakonodaja.gov.si/rpsi/r05/predpis_ZAKO1345.html

[1410] Pravilnik o izvajanju zakona o davku na dodano vrednost, Official Gazzette of the Republic of Slovenia no. (Ur.l. RS, št. 17/2004, 45/2004, 84/2004, 122/2004, 60/2005, 117/2005, 1/2006, 10/2006) http://zakonodaja.gov.si/rpsi/r02/predpis_PRAV5442.html

[1411] http://zakonodaja.gov.si/rpsi/r05/predpis_ZAKO1345.html

Storage of electronic invoices is subject to Chapter XV (Articles 56, 56a and 57) of the Value Added Tax Act. It should be noted that the VAT Act doesn't contain special provisions regarding the place of storage, nor does it prescribe intra state storage. Consequently no legal barriers to outside state/EU storage can be identified. At any rate, especially in case of intra EU storage, such a barrier could be contrary to the principle of free provision of services in view of an industry of specific storage services evolving.

According to Article 56 of the Value Added Tax Act a taxable person must keep records (store) of all relevant documentation but especially its financial documentation (invoices) on the services or goods provided for a period of at least 10 years after the year of service provision and a period of at least 20 years in case of real-estate transactions. Paragraph 4 of Article 56 provides that a taxable person may store all documentation also in electronic form if free access of the Tax Authority is provided to stored documents for the whole period of storage and if the following integrity conditions are fulfilled cumulatively:

- data are accessible and suitable for later use,
- data are stored in the form in which they were formed, sent or received,
- it is possible to determine the origins of the data from, to whom it was sent and the time and place of its sending or receipt,
- the technology and procedures used to prevent to a satisfactory degree any subsequent changes to or deletion of data, which could not be readily determined, or if there exists a reliable assurance that the message has not been altered.

The observed conditions are basically the same as those provided by Article 12 of the Electronic Commerce and Electronic Signature Act for storage of original electronic documents. However if original documents are not electronic in origin, the provisions of the Documentary and archival material custody and archives act on transformation should also be respected, at least with regard to primary transformation. With regard to storage on the other hand, the above mentioned conditions apply.

Another provision regulating the storage of documentation is provided by Article 52n of the Value added tax Act. Accordingly a non-established taxable person providing electronic services shall keep records of the transactions in such scope and detail as to enable the tax authority of the Member State of consumption to determine that the VAT return is correct. Upon request, these records should be made available electronically to the tax authority in Slovenia and to the tax authority in the Member state of consumption. The taxable person shall maintain these records for 10 years from the end of the year when the transaction was carried out. Logically also in this case there are no special provisions on the place of storage as storage in another country is more or less presumed.

C.4.2. Electronic accounting

Accounting is in Slovenia regulated primarily by the Accounting Act[1412], which defines in Article 2 that subjects have to follow Slovenian accounting standards[1413]. There are 40 standards in total.

Slovenian accounting standard 21 (SRS 21) on book-keeping documents defines the conditions for the electronic preparation of book-keeping documents. According to indents 21.8 and 21.9 of standard 21, electronically originated documents are legally valid for book-keeping purposes if signed with an electronic signature by an authorised person, according to the law or companies internal regulations. It should be noted that according to accounting standard 21, no secure electronic signature certified by a qualified certificate is required. Consequently an electronic signature which is attributable to a specific individual should be sufficient. The same is also valid in case of submission of book-keeping documents for revision, and later into storage.

In case of documents that were originally in paper form, indent 21.14 of accounting Standard 21 provides that in case of transformation into an electronic form the paper originals can be destroyed after revision. Thus revision must still be carried out on original documents, which somewhat precludes completely electronic accounting.

The periodic deposit of a company's annual report, also containing detailed book-keeping information, is regulated by Article 58 of the Companies Act[1414]. The annual report must be provided to AJPES (Agency of the Republic of Slovenia for Public Legal Records and Related Services[1415]). Means of presentation are regulated by the Methodological instructions on annual report and other documentation of companies' presentation[1416]. According to article 22 thereof, the annual report provision must be mandatory in electronic form via the internet portal or an XML file. Additional documentation as well as comments should also be provided electronically, as a part of the XML file. However, provision in a PDF format and in paper is also allowed.

[1412] Zakon o računovodstvu, Official Gazzette of the Republic of Slovenia no. 23/1999, 30/2002, http://zakonodaja.gov.si/rpsi/r07/predpis_ZAKO1597.html

[1413] Slovenski računovodski standardi, Official Gazzette of the Republic of Slovenia no. 118/2005 (10/2006 - popr.), 9/2006, 20/2006, 70/2006) http://zakonodaja.gov.si/rpsi/r03/predpis_DRUG2463.html.

[1414] Zakon o gospodarskih družbah /ZGD-1, Official Gazzette of the Republic of Slovenia no. 142/2006 (60/2006 - popr.))http://zakonodaja.gov.si/rpsi/r01/predpis_ZAKO4291.html

[1415] Agency of the Republic of Slovenia for Public Legal Records and Related Services; see http://www.ajpes.si/?language=english

[1416] Metodološko navodilo za predložitev letnih poročil in drugih podatkov gospodarskih družb in samostojnih podjetnikov posameznikov Official Gazzette of the Republic of Slovenia no.112/2005; http://zakonodaja.gov.si/rpsi/r04/predpis_NAVO794.html.

D. General assessment

D.1 Characteristics of Slovenian eCommerce Law

- Slovenian eCommerce law can be described as very flexible, technology neutral and in general appropriate to most business processes. If namely all relevant provisions on electronic commerce, archives and administrative procedure, together with the relevant sector-specific legislation are interpreted according to the prevailing doctrine, very little legal barriers to almost any business process can be identified.
- As this holds traditionally true for civil legal relations, which are very much determined by the parties autonomy of will, the same should be observed also for administrative procedures, which on the other hand are traditionally formal. Recent legislative changes provide a very comprehensive and universally applicable legal basis for an electronic interaction with the government.
- Fact is however that all the possible very positive consequences of eCommerce in an economic view are often overseen, because of traditional assumptions on formality and consequent reluctance to accept novelties prevail. It could be said that only enacted applications spur eCommerce, whereas their non-existence hampers its evolution as it renders eCommerce rather impracticable in comparison to traditional, physical, mechanisms of business conduct; thus denying it its main comparative advantage.

D.2 Main legal barriers to eBusiness

- Together with prevailing assumptions on formality, resulting from a certain ignorance of eCommerce legislation and reluctance for acceptance of novelties, there is also a rather slow implementation of new business models which primarily slows down the evolution of eCommerce. However the latter could be also based on the limited Slovene market volume. Firms are often destimulated to invest in new eBusiness solutions which are country specific as they bear the risk of being overrun by other more universal solutions on the EU or even global level, whereby their return on investment ratio is logically lower. So, common practice is the adaptation of already effected solutions, which however also implies remaining behind the frontrunners.
- Another barrier is a certain lack of interoperability of different eCommerce institutes, which causes a reluctance of the users to acquire different information solutions and is impracticable. Thus physical means of business conduct are often still preferred for the simple reason of being more efficient.

D.3 Main legal enablers to eBusiness

- A main enabler of eBusiness in Slovenia is very well developed information infrastructure, together with high fixed and mobile broadband penetration ratios. Together with a very well informed and capable user base, the preconditions to eBusiness are fulfilled.
- Another enabler is comprehensive and technology neutral legislation which only has to be interpreted in such a way as to spur eBusiness.
- Due to the small market volume, new solution development is a less probable enabler. However, being a small country (population of 2 million) with a very diversified and characteristic urban-rural distribution population structure, Slovenia could also be a very good test laboratory for new eBusiness solutions and its general implications. Those could on the other side also have synergic effects to new product development.

Spain National Profile

A. General legal profile

The Kingdom of Spain is a parliamentary monarchy, consisting of 17 autonomous communities[1417], 50 provinces[1418] and more than 8,000 municipalities[1419].

Although Spain is one of the more decentralized states in Europe, the State has retained competence on commerce and contract Law regulations, which are generally governed by the Civil Code[1420] and the Commercial Code[1421]. Therefore, eCommerce is also subject to centralized regulation.

Commercial disputes are typically dealt with by the First Instance Court[1422]. However, Commercial Courts[1423] may be competent in matters relates to transportation contracts, maritime law and actions related to general contractual conditions. Appeals may be generally filed before the Courts of Appeal[1424]. The Supreme Court[1425] generally hears points of Law. The reiterated jurisprudence of the Supreme Court has certain binding power of precedent as the Civil Code considers that it complements the Spanish legal system.

[1417] *Comunidades Autónomas*

[1418] *Provincias*

[1419] *Municipios*

[1420] *Código Civil,* http://civil.udg.es/NORMACIVIL/estatal/CC/INDEXCC.htm

[1421] *Código de Comercio,* http://constitucion.rediris.es/legis/1885/l1885-08-22/l1885-08-22_indice.html

[1422] *Juez de Primera Instancia*

[1423] *Jueces de lo Mercantil*

[1424] *Audiencias Provinciales* ; see also http://www.justicia.es/servlet/Satellite?pagename=Portal_del_ciudadano/OrgSeccionJT/Tpl_OrgSeccionJT&c=OrgSeccionJT&cid=1080202871533

[1425] *Tribunal Supremo*

B. eCommerce regulations

B.1 eCommerce contract Law[1426]

B.1.1. General principles

The Spanish legal system has traditionally avoided to subject acts, transactions or contracts to specific formal requirements. As a rule, a contract comes into being with the acceptance of an offer.[1427] Moreover, contracts are binding regardless of the form in which they were concluded, as long as they comply with the essential conditions to be valid (Art. 1278 of the Spanish Civil Code). In this sense, Art. 51 of the Commercial Code also recognises the binding nature of contracts regardless of the form and language in which they are concluded.[1428] Thus, the transposition of the eCommerce Directive appears to be redundant where stating that contracts concluded by electronic means are effective when they comply with the general requirements of validity of contracts and that the consensus of the parties is not a precondition to the legal acceptability of an electronic contract.[1429] The clarification is not fully inappropriate because the Spanish legal system has not always accepted new ways of showing consent.[1430]

However, there are cases where the form may be necessary for the validity of the contract either because the parties have agreed so[1431] or as established by Law,[1432] e.g. donation of real estate (Art. 633 of the Civil Code), articles of marriage (Art. 1327 of the Civil Code) or mortgages (Art. 175 of the Civil Code). In some cases, formal requirements do not prejudice the existence or validity of the contract, but the parties may undertake themselves to incorporate them in a public deed (e.g. the sale and purchase of real estate) or in a private document such as any contract exceeding 9.01 euros (as stated in Art.1280 of the Civil Code).

The Spanish legal system has traditionally been more concerned with questions regarding the validity of the offer and acceptance than with the form in which those are kept, i.e. the concept and validity of documents. Thus, there is not a legal definition of

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[1426] Source: See J. DE OTAOLA (Author), Monograph *Spain*, which is an integral part of *Cyber* Law *in the International Encyclopaedia of* Law*s* series, Kluwert Law International, 2004.
[1427] Art. 1262 of the Civil Code.
[1428] Generally the regulatory differences between civil and commercial contracts is scarce and tends to disappear because the majority of the doctrine supports the unification of both regimes, without prejudice to the maintenance of the rules that govern specific types of contracts. In this sense see, amongst others, D. RODRÍGUEZ RUIZ DE VILLA, *Tiempo y lugar de perfección de los contratos electrónicos y demás contratos a distancia*, Revista de Contratación Electrónica, No.52 (September 2004).
[1429] The eCommerce Law states that its application is without prejudice to other regulations, amongst them, the Civil and Commercial Codes and the remaining civil or commercial rules.
[1430] Art. 51 of the Spanish Commercial Code requires previous consensus of the parties in a written contract to accept the binding nature of telegraphic correspondence.
[1431] See L. DIEZ-PICAZO, *Fundamentos del Derecho Civil Patrimonial. Introducción. Teoría del Contrato*, Civitas, 1993.
[1432] In the same sense, see Art. 52 of the Commercial Code.

"document" in the Civil Code and Commercial Code,[1433] because its concept is implied.[1434] On the contrary, both Codes[1435] deal with the moment in which contracts come into being when the offer and acceptance takes place at a distance.

As a result, the Supreme Court has soon extended the binding nature of the acceptance made by letter (i.e. on paper) to the acceptance transmitted by other means of communication. The Supreme Court Judgment of 31 May 1993 already accepted the use of the fax. Later on, the Supreme Court Judgment of 30 July 1996 purported the validity of the acceptance transmitted by telegraph, telex, telefax and other electronic means.[1436]

Notwithstanding the above, the concept of document has been relevant in the framework of civil procedures, especially because part of the doctrine believed that the former Procedure Code limited the means of evidence. However, the Constitutional Court and Supreme Court have soon accepted a concept of document that extends to instruments or objects that contain an idea, even if it does not appear in a written form, e.g. mere images or phonographic recordings.[1437]

The Law transposing the eCommerce Directive does not contain a concept of document or electronic document, but it states that whenever it is required that a contract or any information related thereto shall be in writing, the requirements shall be deemed as complied with if the contract or the information is stored in an electronic medium.[1438] A concept of electronic document may be found in Art. 3.5 of the eSignature Law,[1439] which considers as documents those incorporated in an electronic medium that contains electronically signed data.[1440] Electronic documents, either public or private have the legal efficacy that corresponds to their nature, in accordance with the applicable regulation.

As already mentioned, the admissibility of electronic documents as evidence was almost unanimously accepted by the doctrine and the jurisprudence. The majority were in favour of its admission as documentary evidence in civil procedures. However, the Civil

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[1433] Art. 26 of the Penal Code provides that a document is any physical medium containing data or facts relevant for evidential or legal purposes. However, the definition is only applicable in the field of criminal regulations and not to civil or commercial contracts.

[1434] Traditionally the material or medium containing a contract has been of scarce relevance as long as it was suitable to express human thinking. See A. RODRÍGUEZ ADRADOS, *Firma electrónica y documento electrónico*, Ensayos de Actualidad de Escritura Pública, Consejo general del Notariado, 2004.

[1435] See Art. 1262 of the Civil Code and Art. 54 of the Commercial Code.

[1436] An identical approach can also be found, amongst others, in the Judgment of the Provincial Court of Barcelona of 30 May 2001 and in the Judgment of the Provincial Court of Tenerife of 14 February 2003.

[1437] See the Supreme Court Judgments of 5 July 1984 and of 24 March 1994 or the Constitutional Court Judgments of 27 June 1988 and 16 November 1992, amongst others.

[1438] Notwithstanding, the functional equivalence does not prevent the conclusion of contracts that are not stored in an electronic medium, although they may face similar problems as verbal contracts with regard to evidence.

[1439] Law 59/2003 of 19 December on Electronic Signatures. (*Ley 59/2003, de 19 de diciembre, de firma electrónica en la que se regula, su eficacia jurídica y la prestación de servicios de certificación* (*Boletín Oficial del Estado* of 20 December 2003, No. 304)). http://www.boe.es/boe/dias/2003/12/20/pdfs/A45329-45343.pdf
English interface: http://www.boe.es/g/eng/index.php

[1440] Although the Law does not clarify whether only those can be considered as electronic documents, the majority of the doctrine considers that there are other types of electronic documents.

Procedure Law in force states that electronic documents were not to be brought in the procedure as documentary evidence, but could only be considered among other instruments storing words, images and sounds.

This general rule has nowadays become almost an exception. On the one hand, Art. 24 of the eCommerce Law expressly provides that the electronic medium containing a contract concluded by electronic means shall be admissible as documentary evidence in court. On the other hand, the eSignature Law establishes a similar provision with regard to documents signed electronically. As a result, the legislator has considered that the admissibility of certain electronic documents as documentary evidence is the appropriate way to promote the conclusion of electronic contracts and the use of electronic signatures.

In conclusion, both electronic mediums containing electronic contracts concluded by electronic means and documents signed electronically are documentary evidence, whereas the rest of documents in electronic form follow the rules regulating the proof by means of instruments storing words, images and sounds. There is no apparent reason to apply different legal regimes to similar sources of evidence and it is not yet clear to which extent such distortion may or not create barriers to the use of electronic documents.

Besides, the functional equivalence between written documents and electronic media does not solve the difficulties that the parties may encounter when they have to prove the content and authorship of the offer and the acceptance.[1441] Those difficulties may be mitigated by the use of institutions such as electronic signatures.[1442] Indeed, in order to strengthen the reliability of electronic transactions it is necessary not only to ensure the authentication of communications but also that the content is not altered during its transmission. The technical and legal solution thereto lies in the use of electronic signatures.

It is important to bear in mind that the Spanish regulation on electronic signatures does not alter the rules concerning the conclusion, formalization, validity, and efficacy of contracts and any other legal acts, nor does it affect the rules governing the use of documents. However, the regulation laid down by the eSignature Law has a considerable impact on the legal recognition of electronic signatures and on its legal effects.

The eSignature Law primarily focuses on the so called `*qualified electronic signature´*, i.e. an advanced electronic signature –as defined in Art. 2 of the Directive on Electronic Signatures- based on a qualified certificate and created by a secure-signature-creation device.[1443] Qualified electronic signatures have the same effects in relation to data in electronic form as handwritten signatures in relation to paper-based data, i.e. they are regarded as legally equivalent to handwritten signatures. As far as the other categories of electronic signatures are concerned, the Law only establishes that they shall not be deprived of effectiveness and legal effects. As a result, its legal effects have to be determined on a case-by-case basis.

[1441] Art. 51 of the Commercial Code states that the declaration of witnesses is not enough to prove the existence of a contract exceeding 9.01 Euros.

[1442] As stated by Recital 4 of Directive 1993/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community Framework for Electronic signatures (OJ L 13, 19 January 2000), electronic commerce necessitates electronic signatures and related services allowing data authentication with a view to strengthen confidence in, and general acceptance of, the new technologies.

[1443] . The concept was introduced as a response of the demands of the market and simplifies the terminology used by the Directive, but does not imply a relevant regulatory change.

As a rule, public deeds are presumed true[1444] even when signed electronically, i.e. they form conclusive proof. Furthermore, private documents give full evidence in the procedure when the prejudiced party does not dispute its authenticity (Art. 326 of Spanish Civil Procedure Law).

However, when the authenticity of an electronic document is challenged, Art. 326 of the Civil Procedure Law refers the issue to the eSignature Law. Accordingly, in case of use of qualified electronic signatures, the object of the proof is rather the reliability of the certification-service-provider, i.e. the compliance of the provider with the requirements laid down in the Law, in particular those related to the confidentiality of the proceeding, to the authenticity, conservation, and integrity of the information, as well as to the identity of the signatories.

In case advanced electronic signatures are used, the eSignature Law further refers back to the rules of Art. 326.2 of the Civil Procedure Law, i.e. any useful and appropriate means of proof may be used and the judge is free to determine the actual value of the document as evidence.

Finally, the eSignature Law lacks systematic because it leaves unregulated the cases where an electronic document is signed using an electronic signature that is neither qualified nor advanced, apart for the above mentioned statement that they shall not be deprived of effectiveness and legal effects. In those cases, Art. 326.2 of the Civil Procedure Law shall be analogically applied. In any case, it appears that the fact that the document is signed with an electronic signature that is neither qualified nor advanced may in practice give rise to serious concerns about its authenticity.[1445]

Apart from the cited regulation of Art. 51 of the Commercial Code, requiring previous consensus of the parties in a written contract to accept the binding nature of telegraphic correspondence, there is no general framework for electronic notifications. Thus, the above mentioned rules on the validity and proof of the offer and acceptance are fully applicable. In the practice, the parties to a contract may agree on specific ways of sending notifications, but nothing prevents the use of electronic means. Even when the notification is required to be made using registered mail or *burofax*,[1446] it is possible to send the documents electronically, leaving the postal service in charge of its printing and delivering in paper to a physical address.[1447]

As for electronic archiving, no generally applicable rules have been implemented. The eCommerce Law does not even specify the characteristics that an electronic medium should have, which ends up in favour of the technological neutrality of the concept. However, those characteristics are implicit in the Law: the medium shall make the information accessible for subsequent consultations and reproductions. Further, the eCommerce Law foresees the institution of reliable third parties that store the offer, the acceptance as well as its date and time, keeping such data during the period stipulated by the parties, which shall not be less than five years. When required, the reliable third

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[1444] The presumption does not prevent the possibility to challenge a public deed, e.g. in cases of forgery. In such cases, the authenticity of the public document is verified comparing it with its original (Art. 320 of the Civil Procedure Law).

[1445] J.C. ERDOZAIN LÓPEZ, *Firma electrónica. Aspectos procesales: valor probatorio. Modelos de responsabilidad de los prestadores de servicios de certificación*, Aranzadi Civil, No. 1, 2003.

[1446] The Spanish postal service describes a *burofax* as an express mail, with signature confirmation of important documents that are third-party proofs. Proof of delivery, service notice and certified copy -providing an authenticated copy of the contents of the *burofax* sent- are additional services available attached to the sending of the *burofax*.

[1447] Further information on the requirements for sending documents and on its payment may be found in English at www.correos.es.

party acts a as a witness and depository of someone else's documents. In addition, Law 24/2005, of 18 November,[1448] governs the cases in which notaries communicate the content of public documents that enclose the parties' consent using their electronic signature. In such cases, the notifications received may be stored on paper. The electronic storage is also foreseen but the Law refers the regulation to a lower-level provision that has not yet been approved.

Finally, Royal Decree 1906/1999, of 17 December,[1449] specifically regulates telephonic and electronic contracts using general conditions. Although the Royal Decree was meant to be modified after the approval of the eCommerce Law, there is still no new regulation substituting it. The doctrine has extensively discussed its relation to the eCommerce Law, but the majority supports the prevalence of the Law in case of contradiction because of its higher legislative status.

B.1.2. Transposition of the eCommerce directive

The Law 34/2002, of 11 July, on Information Society Services and Electronic Commerce[1450] (eCommerce Law) transposed into Spanish Law Directive 2000/31/EC of the European Parliament and of the Council of June 2000 on certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market[1451] (eCommerce Directive). The regulation has closely followed both the form and the content of the eCommerce Directive, although with some exceptions.

Consequently, the eCommerce Law is applicable without prejudice to the regulations that do not fall within the coordinated field, as well as those on taxation, the protection of public security, public health, consumer interests, data protection or competition rules. In addition, the Law excludes from its scope the services provided by notaries, mercantile, and land registrars in connection with the exercise of public authority as well as those provided by Lawyers and procurators representing and defending clients at the courts. Unlike the eCommerce Directive, the Spanish regulation does only exclude the games of chance that involve wagering a stake with monetary value from the Internal Market principles. However, those are further subject to the specific national or regional regulations.

Likewise, the eCommerce Law does not affect the general rules that determine the Law applicable to contractual obligations. However, Art. 26 confusingly provides that the rules on the territorial scope of the Law shall be taken into account. Besides, jurisdiction is to be determined by private international rules.

Regarding electronic contracts, the eCommerce Law focuses mainly on the formation and validity of electronic contracts or, more precisely, of contracts concluded by electronic means, i.e. any contract in which the offer and acceptance are transmitted through electronic equipment of data connected to a telecommunications network.

[1448] *Ley 24/2005, de 18 de noviembre, de reformas para el impulso a la productividad* (*Boletín Oficial del Estado* of 19 November 2005, No. 277). http://www.boe.es/boe/dias/2005/11/19/pdfs/A37846-37868.pdf

[1449] *Real Decreto 1906/1999, de 17 de diciembre, por el que se regula la contratación telefónica o electrónica con condiciones generales en desarrollo del artículo 5.3 de la Ley 7/1998, de 13 de abril, de condiciones generales de la contratación (Boletín Oficial del Estado of 31 December 1999, No. 313) http://www.boe.es/boe/dias/1999/12/31/pdfs/A46411-46413.pdf*

[1450] *Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico* (*Boletín Oficial del Estado* of 12 July 2002, No. 166). http://www.boe.es/boe/dias/2002/07/12/pdfs/A25388-25403.pdf

[1451] OJ L 178, 17 July 2000.

Although the regulation mainly focuses on the relations between providers and recipients of information society services, its scope in the field of electronic contracts is far more reaching. In fact, its Explanatory Preamble expressly establishes that the dispositions on general aspects of electronic transactions such as the ones regarding the validity and effectiveness of electronic contracts are applicable even if none of the parties have the status of provider or recipient of information society services. Furthermore, according to the eCommerce Law, the contracting of services and goods by electronic means is to be considered as an information society service in so far as it represents an economic activity.[1452]

However, the eCommerce Law does not apply to all kinds of electronic contracts, which does not necessarily mean that those are excluded from the concept of electronic contract but from the total or partial application of the regulation established therein. As a result, the provisions regarding the regulation of electronic contracts do not apply to contracts governed by family Law or by the Law of succession. In addition, contracts that require by Law the involvement of courts, public servants, or professions exercising public authority such as notaries or registrars, as well as those that shall be incorporated in a public deed to be valid or effective, are governed by its specific regulations. Finally, contracts that create, transfer, modify or discharge rights in real estate are subject to the mandatory formal requirements of validity and effectiveness established in the Spanish legal system.

Finally, the eCommerce Law links its regulation with the one established by the eSignature Law by establishing that the proof of an electronic contract is subject to the general rules and to the regulation on electronic signatures, as the case may be.

[1452] Recital 18 of the eCommerce Directive appears to be more restrictive, as it states that the use of e-mail or equivalent individual communications for the conclusion of contracts between natural persons acting outside their trade, business, or profession is not an information society service.

B.2 Administrative documents

Art. 45 of the Law 30/1992,[1453] of 26 November establishing the legal regime of public administrations and administrative procedures requires Public Administrations to promote the use of electronic techniques and media in connection with the exercise of their public authority. Moreover, it foresees the possibility of citizens to interact electronically and at a distance with public administrations. With regard to electronic documents, the Law sets out that documents issued by public administration have the same validity of an original document as long as its authenticity, integrity, conservation, and the proof of reception -as the case may be- are guaranteed.

In addition, Royal Decree 772/1999 of 7 May[1454] deals with the submission of applications and other communication before the Administration, as well as the issuing of originals and copies by the latter. The regulation has been developed by several instruments, including the regulation of electronic Registries for tax purposes. In fact, the Spanish Tax Agency[1455] has strongly contributed to the use of electronic communications and signatures. The Agency has a `virtual office´[1456] where citizens can comply with most of their tax obligations. Moreover, Royal Decree 208/1996 of 8 February[1457] ruled administrative information services to citizens and Royal Decree 263/1996 established the general framework with regard to the use of electronic techniques by the Administration.[1458]

In 2003, the Administration launched the action plan CONECTA[1459], aimed at promoting eGovernment.[1460] Consequently, a web page has been created where citizens have access to electronic services provided by the administration.[1461] In addition, a new Regulation was approved[1462] that creates a legal framework for electronic notifications and electronic

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[1453] *Ley 30/1992, de 26 de noviembre,de régimen jurídico de las administraciones públicas y del procedimiento administrativo común* (*Boletín Oficial del Estado* of 27 November 1992, No. 285). http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=1992/26318

[1454] *Real Decreto 772/1999, de 7 de mayo, por el que se regula la presentación de solicitudes, escritos y comunicaciones ante la Administración General del Estado, la expedición de copias de documentos y devolución de originales y el régimen de las oficinas de registro (Boletín Oficial del Estado of 22 May 1999, No. 122).* http://www.boe.es/boe/dias/1999/05/22/pdfs/A19410-19415.pdf

[1455] *Agencia Tributaria,* http://www.aeat.es/

[1456] http://www.aeat.es/cgi-bin/aeat/conexov.pl

[1457] Real Decreto 208/1996, de 9 de febrero, por el que se regulan los Servicios de Información Administrativa y Atención al Ciudadano (*Boletín Oficial del Estado* of 4 March 1996, No. 55). http://www.boe.es/g/eng/bases_datos/doc.php?coleccion=iberlex&id=1996/04997

[1458] Real Decreto 263/1996, de 16 de febrero, por el que se regula la utilización de técnicas electrónicas, informáticas y telemáticas por la Administración General del Estado(*Boletín Oficial del Estado* 29 February 1996, No. 52).

[1459] See http://www.map.es/iniciativas/mejora_de_la_administracion_general_del_estado/plan_conecta.html

[1460] *Plan de choque para el impulso de la Administración electrónica en España* (Administración electrónica)´http://www.administracion.es/perfiles/administracion_electronica/programas_y_servicios/common/plan_choque.pdf

[1461] http://www.administracion.es/perfiles/administracion_electronica/programas_y_servicios/servicios_telematicos_general-ides-idweb.jsp

[1462] *Real Decreto 209/2003, por el que se regulan los registros y las notificaciones telemáticas, así como la utilización de medios telemáticos para la sustitución de la aportación de certificados por*

registries, and which promotes the use of electronic documents as a replacement to paper documents. This Regulation was further developed in a Ministerial Order of 2003[1463]. The CONECTA plan was followed by the MODERNIZA[1464] plan, which extends CONECTA with the view of improving electronic public services to better meet the citizens' requirements and expectations.

In addition, the Administration offers a secure method of communication for administrative procedures.[1465] Further, the new regulation on the electronic identity card[1466] will also have an impact on the use of electronic documents and electronic means of communications.

Finally, Law 24/2001, of 27 December, regulated the use of electronic signatures by notaries and registrars in connection with the exercise of public authority.[1467] The Law introduced the possibility to access different administrative Registers, such as the Mercantile Register and the Property Register. Moreover, it establishes the bases for the communication between notaries and registers. The system is based on the use of qualified electronic signatures, properly synchronized time stamping mechanisms and private networks that guarantee secure communications.

Although it compels notaries and registrars to have a qualified electronic signature, its scope is limited. Firstly, the regulation does not deal with original public documents but only with their copies. Secondly, it focuses on the use of electronic signature between notaries, registrars and public administrations. Thirdly, the mentioned public authorities may only issue authorized copies of documents to other notaries, registrars or to the courts. Besides, they may only issue simple or informative copies to the persons entitled to access the original public documents. Finally, the Instruction of 18 March 2002[1468] has further regulated some technical aspects in relation thereto.

A key component of the Spanish eGovernment strategy is the introduction of an electronic national identity card by the name of *DNI Electronico*[1469], which will gradually replace the traditional Spanish identity card. Following the creation of a suitable legal

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los ciudadanos; see http://www.infouma.uma.es/normativa/general/realesdecretos/rd209-2003.htm

[1463] *Orden PRE/1551/2003, de 10 junio, por la que se desarrolla la disposición final primera del Real Decreto 209/2003, de 21de febrero de 2003, que regula los registros y las notificaciones telemáticas, así como la utilización de medios telemáticos para la sustitución de certificados por los ciudadanos*; see http://www.csi.map.es/csi/pg2024.htm

[1464] See http://www.map.es/iniciativas/mejora_de_la_administracion_general_del_estado/moderniza.html

[1465] http://notificaciones.administracion.es/portalciudadano/acceso_servicio.asp.

[1466] *Real Decreto 1553/2005, de 23 de diciembre, por el que se regula la expedición del documento nacional de identidad y sus certificados de firma electrónica (Boletín Oficial del Estado of 24 December 2005, No. 307). http://www.boe.es/boe/dias/2005/12/24/pdfs/A42090-42093.pdf*

[1467] Ley 24/2001, de 27 de diciembre, de Medidas Fiscales, Administrativas y del Orden Social (*Boletín Oficial del Estado* of 31 December 2001, No.313). http://www.boe.es/boe/dias/2001/12/31/pdfs/A50493-50619.pdf

[1468] *Boletín Oficial del Estado* of 9 April 2003, No. 85. http://www.boe.es/boe/dias/2003/04/09/pdfs/A13673-13677.pdf

[1469] See http://www.dnielectronico.es for more information.

framework through the Regulation 1553/2005[1470], the roll-out of the new card has started in March 2006, in the city of Burgos. By the end of 2006, eID cards are expected to be rolled out in 20 provinces, as well as in Ceuta and Melilla.

The card incorporates integrated eSignature/eAuthentication capabilities, and will be mandatory for any Spanish citizen over the age of 14.

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange[1471]

A bill of exchange is an unconditional order from the drafter to another person to pay a certain sum of money to a third party. Traditionally, bills of exchange have been considered the most relevant negotiable instrument, being a method of payment[1472] and also an instrument for short-term credit and financing. [1473] However, its importance has significantly declined due to the volume of unpaid bills.

The regulation of bills of exchange by the Law 19/1985, of 16 July,[1474] assumes that the unconditional order shall be in writing. In this sense, as previously mentioned, the eCommerce Law generally states that whenever it is required that a contract or any information related thereto shall be in writing, the requirements shall be deemed as complied with if the contract or the information is stored in an electronic medium.

In addition, the requirement of a signature for the legal existence of the bill may be fulfilled by the use of electronic signatures: the eSignature Law considers that qualified electronic signatures have the same effects as handwritten signatures. Moreover, other categories of electronic signatures shall not be deprived of effectiveness and legal effects.

[1470] *Real Decreto 1553/2005, de 23 de diciembre, por el que se regula la expedición del documento nacional de identidad y sus certificados de firma electrónica;* see http://www.derecho.com/xml/disposiciones/trini/disposicion.xml?id_disposicion=114476

[1471] Sources: M.J. GUERRERO LEBRÓN, *El crédito documentario electrónico y su nueva regulación*, Revista de Contratación Electrónica, No. 34 (March 2003); M.J. MORILLAS JARILLO, *Letra de cambio electrónica*, Revista de Contratación Electrónica n.31 (October 2002).

[1472] See Art. 1170 of the Civil Code.

[1473] F. SÁNCHEZ CALERO, *Instituciones de Derecho Mercantil*, MCGraw Hill, Madrid 1997 and M.J. MORILLAS JARILLO, *Letra de cambio electrónica*, Revista de Contratación Electrónica n.31 (October 2002).

[1474] *Ley 19/1985, de 16 de julio, Cambiaria y del Cheque (Boletín Oficial del Estado of 19 July 1985, No. 172)*. http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=1985/14880

Art. 37 of the Royal Legislative Decree 1/1993, of 24 September,[1475] requires bills of exchange to be issued using an official form.[1476] Nonetheless, the doctrine dealing with the use of electronic documents has pursued to overcome such problem. In this sense, it is said that the use of the official form is only required for tax purposes. Therefore, it cannot be considered as necessary for the existence and validity of the bill of exchange. It is also argued that Art. 76.3 of Royal Decree 828/1995, [1477] developing Royal Legislative Decree 1/1993, accepts the use of electronic documents. In fact, the Article was challenged on the grounds that the legislator could not acknowledge the use of electronic documents where higher ranking provisions did not foresee such possibility, but the Supreme Court[1478] declared the validity of Art. 76.3 and accepted the electronic form for negotiable instruments and other commercial documents.

As a result, there is theoretically no legal obstacle for the use of electronic bills of exchange. Nonetheless, the existing legal framework is far from encouraging to the use of these electronic negotiable instruments.[1479] For example, the lack of use of the official form impedes the application of the specific rules foreseen by Civil Procedure Code in case of lack of payment of a bill of exchange, where the main advantage is that a favourable judgment leads directly to its enforcement without having to start a new procedure for that purpose. In addition, the use of electronic bills of exchange would require further legal certainty as well as legal and technological measures adequate to solve the problems arising from the need to know with sufficient certainty who is the person actually having control over the negotiable instrument, and from the need to guarantee the existence of a single authoritative copy, which shall be identified as such.

[1475] *Real Decreto Legislativo 1/1993, de 24 de septiembre, por el que se aprueba el Texto Refundido de la Ley del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados (Boletín Oficial del Estado of 20 October 1993, No. 251)*. http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=1993/25359

[1476] The form of the official document has been approved by Ministerial Order of 30 June 1999 (*Boletín Oficial del Estado* of 16 July 1999, No. 169).

[1477] *Real Decreto 828/1995, de 29 de mayo, por el que se aprueba el Reglamento del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados (Boletín Oficial del Estado* of 22 June 1995, No. 148).

[1478] Judgment of the Supreme Court of 3 November 1997.

[1479] Only the intermediary phases regarding communications and compensation between banks and other credit institutions takes place electronically, although combining to a certain degree the use of paper. See Art. 45 of the mentioned Law 19/1985 and Royal Decree 1369/1987, of 18 September (*Real Decreto 1369/1987, de 18 de Septiembre, por el que se crea el sistema nacional de compensacion electrónica (Boletín Oficial del Estado of 12 November 1987, No. 271*)).

C.1.2. Documentary credit[1480]

The documentary credit is created with the aim to overcome the lack of confidence regarding transactions with a previously unknown partner abroad. The solution involves the intervention of a bank or credit institution that undertakes on the instruction of the buyer to pay up to a stated sum of money to the seller through another bank or credit institution, within a prescribed time limit and against stipulated documents, i.e. the so called `cash against documents´.[1481] As a result, documentary credit is primarily a method of payment.

The legal nature of documentary credit is not clear under Spanish Law and there is no consensus in the doctrine or the jurisprudence on the legal configuration thereof. However, the majority understands that documentary credit is a cumulative delegation of debt that constitutes a complex legal relationship where there is an underlying sell and purchase contract, a banking commission contract binding the buyer and the issuing bank and a contract between the buyer or beneficiary and the bank that undertakes payment.[1482]

As a result, documentary credit is based on convention and the autonomy of the will and contractual freedom of the parties. However, there is a conventional framework –the UCP Rules- created by the International Chamber of Commerce. Insofar as they originate from the International Chamber of Commerce, the mentioned rules do not as such form part of the Spanish legal system and its application shall generally be the result of the acceptance of its binding nature by the parties.[1483] Despite this, it is debatable the extent to which those rules may be considered as commercial custom capable of integrating contracts, specially when its application on documentary credit agreements requires the express consent of the parties.

The intermediate phases of documentary credit, i.e. the communications between banks, is normally done using electronic means. In fact, the use of traditional paper communications in this phase is scarce.[1] In this sense, the majority of the communications are made using the *Society for Worldwide Interbank Financial Telecommunication or* SWIFT.[1484] Spain formally joined the institution in 1978, although the first transmissions did not occur until 1980. Nowadays all Spanish banks use the SWIFT system. Further, the electronic transfer of funds takes place through systems such as TARGET (*Trans-European Automated Real Time Gross Settlement Express Transfer*). In Spain, since the entry into in force of the Law 2/2004,[1485] the three existing systems have been reduced to two.

[1480] Sources: M. RICO CARRILLO, *La electronificación del crédito documentario*, Revista de Contratación Electrónica, No. 62 (July 2005); M.J. GUERRERO LEBRÓN, *El crédito documentario electrónico y su nueva regulación*, Revista de Contratación Electrónica, No. 34 (March 2003).

[1481] The Supreme Court in its Judgment of 16 May 1996 has described the essential elements of documentary credit.
http://www.poderjudicial.es/jurisprudencia/presentacion?K2DocKey=E:\SENTENCIAS\20030808\280791100019961009 41.xml@sent supremo&query=%28%3CYESNO%3E%28fecha resolucion+%3E%3D+19960516%29%29%3CAND%3E%28%3CYESNO%3E%28fecha resolucion+%3C%3D+19960516%29%29

[1482] See the Supreme Court Judgments of 11 March 1991, 3 May 1991 and 8 May 1991.

[1483] See the Supreme Court Judgment of 9 October 1997.

[1484] Although there are other available networks, the SWIFT is the most extended one.

[1485] *Ley 2/2004, de 27 de diciembre, de presupuestos generales del Estado para el año 2005 (Boletín Oficial del Estado of 28 December 2004, No. 312)*.

Besides, the International Chamber of Commerce has approved a Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (eUCP). It constitutes an extension of the existing UCP intending to provide a suitable framework for the presentation of electronic equivalents of paper documents. The regulation pursues the admission of the so-called electronic records. The form and technical requirements of the same are only relevant when the parties agree on a specific standard. In addition, electronic records shall be signed so as to comply with the authentication and integrity requirements of the eUCP.

However, the eUCP has also introduced some legal uncertainties. One example is related to the notice of completeness, which may be done by electronic means. However, the lack of reception of the same is equivalent to the lack of submission of the documents on time. Thus, it appears that the consequence of the lack of receipt of the notice may hinder the whole operation. As a result, it may have been convenient to follow other regulations on electronic transactions –such as the one contained in the eCommerce Directive- and require an acknowledgement of receipt of the notice of completeness. Another example is related to the lack of regulation of the format required for the presentation of electronic records. As a result of the eUCP the bank shall not refuse a document on the grounds of the use of a specific format, although it may not be able to examine it. Although the aim of the rule is to place the risk on the bank, it might have been more effective to foresee a suspension of the examination term in order to agree a format for the submission of documents.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading[1486]

Bills of lading are governed by the Commercial Code, as well as by the Law of 22 December 1949,[1487] the latter being applicable specifically to international contracts. The bill of lading usually serves as proof of the reception of the good (entailing the carrier's ability to state if the conditions of the goods are the same as those described in the bill), as well as a proof of the contract and its terms. In addition, bills of lading are considered as a negotiable instrument, where the holder of the bill is entitled to the reception of the goods.

The Spanish legal system does not in any way prohibit or even hinder the use of electronic bills of lading. Some of the concerns raised by the doctrine are similar to those faced by any documentary credit, i.e. authenticity, certainty and identification of the person actually having control over the document.

In addition, it is important to bear in mind that the Spanish legal system requires for the transmission of the property not only the acquisition of the right but also the possession

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[1486] Sources: M. RICO CARRILLO, *La electronificación del crédito documentario*, Revista de Contratación Electrónica, No. 62 (July 2005); M.J. GUERRERO LEBRÓN, *El crédito documentario electrónico y su nueva regulación*, Revista de Contratación Electrónica, No. 34 (March 2003); A. RECALDE CASTELLS, *Electronificación de los títulos valor*, Revista de Contratación Electrónica, No. 19 (September 2001); M.P. MARTÍN CASTRO, *Nuevas formas de documentación del contrato de transporte*, Revista de Contratación Electrónica, No. 7 (August 2000).

[1487] *Ley de 22 de diciembre de 1949, de transporte marítimo de mercancías en régimen de conocimiento de embarque(Boletín Oficial del Estado of 24 December 1949 No. 358).*

of the document. One of the consequences is that the protection granted to those who have acquired in good faith only operates once the legitimate acquirer takes possession of the product. In certain cases, the Law considers the possession of a document as equivalent to the possession of the goods. Although such recognition is not explicit in the case of bills of lading, the majority of the doctrine purports that it is implicit in the Law.

Several attempts have been made to replace the paper bills of lading by an electronic equivalent, such as the one lead by Atlantic Container Lines, which created the so called Data Freight Receipt, later substituted by the Cargo Key Receipt, or the one proposed by Seadock Intertanko, which faced the refusal of banking entities due to the control that the Chase Manhattan Bank had in the project.

Also, the Comité Maritime International (CMI), a non-governmental international organization, configured a framework of rules applicable to electronic bills of lading. The system is based on a series of communications and a central electronic registry controlled by the transporter, who is responsible for the storage of the messages and for the security of the information transmitted and received.

The latest important experience of electronic bills of lading is the one known as Bolero (Bill of Lading Electronic Register Organization). Unlike the model proposed by the CMI, Bolero is a closed system based on multilateral agreements where the parties involved consent to the application of a set of rules. Further, it is based on a unique central registry that verifies the authenticity of the messages exchanged, thus acting as a trusted third party.

As already mentioned, the functional equivalence is guaranteed both for documents and signatures by the eCommerce Law and the eSignature Law. Nonetheless, the viability of the electronic bills of lading would depend on being able to substitute the function of the paper document as a way to give possession over the goods.

C.2.1. Storage contracts

Commercial storage contracts are specifically governed by Articles 303-310 of the Commercial Code. The Civil Code also applies in the absence of specific rule. Both regulations are very similar except for the issues concerning liability.

As a rule, storage contracts are considered as non-formal contracts,[1488] in the sense that they are binding from the moment the goods have been transferred, whichever the form and language in which agreements are concluded.[1489] They can even be concluded verbally, although the parties may face in such cases the problems arising not only from the proof of the existence of the contract, but also those related to the goods deposited and their state. As a result, storage contracts may also be concluded electronically, without the use of electronic signatures being required.

Despite the regulations that may apply to certain goods, the Commercial Code also foresees specific rules for commercial storage of goods in warehouses.[1490] In such cases, the contract shall be concluded in writing, stating the data of the parties and of the goods, as well as the terms and conditions applicable to the contract. Therefore, the

[1488] J.M. DE LA CUESTA RUTE (Director) and E. VALPUESTA GASTAMIZA (Coordinator), *Contratos Mercantiles*, Editorial Bosch, Barcelona 2001.
[1489] See Arts. 51 and 305 of the Commercial Code.
[1490] Art. 193-198 of the Commercial Code.

storing party receives from the warehouse a document which constitutes a negotiable instrument that represents certain goods or a quota of the same.

As mentioned above, the eCommerce Law states that whenever it is required that a contract or any information related thereto shall be in writing, the requirement shall be deemed as complied with if the contract or the information is stored in an electronic medium. In conclusion, there is no legal barrier to the use of electronic storage agreements.

C.3 Cross border trade formalities: customs declarations

The modernization of the Spanish systems have taken more than a decade, but such situation allowed to already take into account the New Computerized Transit System (NCTS) requirements. In fact, Internet connection became operative at the end of 2001. Currently, the Spanish Tax Agency has a centralized application with a single database. Authorities connect through an intranet, whereas external operators connect through the Internet. Moreover, communications use the EDIFACT format, which is also used internally by the Spanish Administration.[1491]

Currently, it is possible to electronically perform a number of transactions using qualified electronic signatures even through a secured web site. [1492] The system includes consultations to the TARIC, simplified declarations, submission of documents related to storage, submission of the single administrative document[1493] (import, export, transit, etc.) and Intrastat declaration.[1494]

[1491] http://www.el-exportador.com/092004/digital/gestion.asp.
[1492] https://aeat.es/aeatse.html?https://www3.aeat.es/ES00/P/aduanaie.html
[1493] The recent Resolution of 10 April 2006 (Boletín Oficial del Estado of 1 May 2006) pursues to adapt the existing specifications to the export control system (ECS).
[1494] Further information is available at http://www.agenciatributaria.es.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

Art. 88 of the Law 37/1992, of 28 December, on the Value Added Tax[1495] (hereinafter, VAT Law) already foresaw the possibility to send invoices and similar documents electronically and with the same effects as traditional paper-based invoicing. The initial regulatory development of the VAT Law established a considerable number of requirements, which made its application burdensome and unattractive. Ministerial Order HAC/3134/2002, of 5 December[1496] has simplified the said requirements and, although an authorization from the Spanish Tax Agency is still needed, the same is deemed as automatically granted whenever use is made of an advanced electronic signature based on a qualified certificate and created by a secure-signature-creation device validated by the Spanish Tax Agency.[1497]

Royal Decree 1496/2003, of 28 November[1498] has transposed the eInvoicing Directive[1499] into Spanish Law. However, its scope is far more reaching as it applies horizontally to other tax regulations, without prejudice to the application of more specific provisions.[1500] Following the Directive, the Royal Decree recognizes the possibility of issuing invoices by electronic means,[1501] subject to the acceptance by the recipient and provided that the authenticity of the origin and the integrity of the contents are guaranteed. Invoices may be issued in any language, but the Tax agency may require a translation to any of the official languages.

Authenticity and integrity may be guaranteed in three ways. First, using an advanced electronic signature within the meaning of Art. 2.2 of the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.[1502] In addition, the legislator has taken the option laid down by the eInvoicing Directive, therefore requiring the advance electronic signature to be based on a qualified certificate and created by a secure-signature-creation device (i.e. a qualified signature). Second, by means of electronic data interchange (EDI) as defined in Art. 2 of Commission Recommendation 1994/820/EC of 19 October 1994 relating to the legal aspects of electronic data interchange[1503] when the

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[1495] *Ley 37/1992, de 28 de diciembre del impuesto sobre el valor añadido (Boletín Oficial del Estado of 29 December 1992, No. 312)*.

[1496] *Orden HAC/3134/2002, de 5 de diciembre, sobre un nuevo desarrollo del régimen de facturación telemática previsto en el artículo 88 de la Ley 37/1992, de 28 de diciembre, del impuesto sobre el valor añadido, y en el artículo 9 bis del Real Decreto 2402/1985, de 18 de diciembre(Boletín Oficial del Estado of 13 December 2002, No. 298).*

[1497] A list of valid certificates can be found at: http://www.aeat.es/normlegi/ecomercio/factcert.htm.

[1498] *Real Decreto 1496/2003, de 28 de noviembre, por el que se aprueba el Reglamento por el que se regulan las obligaciones de facturación, y se modifica el Reglamento del Impuesto sobre el* Valor Añadido (Boletín Oficial del Estado of 29 November 2003, no. 286).

[1499] Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid out for invoicing in respect of value added tax (OJ L 015, 17/01/2002).

[1500] In this sense, Ministerial Order HAC/3134/2002, of 5 December, is still in force until a new Ministerial Order is issued.

[1501] According to the eInvoicing Directive, the regulation covers both the electronic transmission and the making available to the public.

[1502] OJ L 13, 19.1.2000. Note that the reference is directly made to the eSignature Directive and not to the eSignature Law.

[1503] OJ L 13, 19.1.2000.

agreement relating to the exchange provides for the use of procedures guaranteeing the authenticity of the origin and integrity of the data. Third, by other electronic means, subject to acceptance by the Spanish Tax Agency.

Electronic invoices may be stored outside Spain. However, a prior authorization from the Spanish Tax Agency is required for the storage outside the EU, unless the storage takes place in Canarias, Ceuta, Melilla or in a country with which a legal instrument exists relating to mutual assistance similar in scope to that laid down by Directive 76/308/EEC, 77/799/EEC and by Regulation (EEC) No. 1798/2003.

Throughout the storage period, it is required to guarantee the readability, authenticity of the origin and integrity of the content. In any case, invoices shall be made available without undue delay to the tax authorities, i.e. electronic invoices shall be accessible by electronic means in a way that allows its visualization, selective search, copy, download and online printing.

Despite the wide scope of Royal Decree 1496/2003, it does not extend to invoicing obligations set out by other commercial regulations. Thus, although the storage period is of four years for tax purposes, invoices shall be kept for at least six years according to Art. 30 of the Commercial Code, which does not establish any further requirements on such storage.

C.4.2. Electronic accounting

The Commercial Code designates two accountancy books that shall be kept: the inventory and annual accounts book, and the daily transaction book.[1504] The regulation thereon was clearly made on the basis of a paper based accountancy system. However, the regulation, its interpretation and the practice have managed to overcome the existing doubts arising from the maintenance of a strictly electronic accountancy system.

Probably the main legal barrier to electronic accounting was the need to legalize the books, which basically consisted on the submission of such books before the corresponding Mercantile Register and its stamping by the registrar. The legalization requirement is still in force and it can take place before or after the use of the book. However, the Instruction of 31 December 1999[1505] regulated the submission of books in an electronic medium or even its electronic transmission.

In addition, the Instruction of 13 may 2003[1506] establishes the regulation on the submission of Annual Accounts by electronic means. Amongst other less relevant documents, the submission of the Annual Accounts shall also include the certification of the approval thereof, duly executed and a public notary shall legitimate signatures. Currently, both the signatures on the certification and the signature of the public notary may be qualified electronic signatures. The public notary is therefore competent to identify the signatories and check the validity of the certificate.

[1504] As a rule, the use of other accountancy books is not subject to specific formal requirements. Thus, its electronic keeping is admitted.
[1505] *Boletín Oficial del Estado* of 8 January 2000, No. 7.
[1506] *Boletín Oficial del Estado* of 3 July 2003, No. 158.

D. General assessment

D.1 Characteristics of the Spanish eCommerce Law

- The Spanish legal system has traditionally been reluctant to subject contracts and agreements to formalities. However, there are some exceptions: some documents require a written form, either for validity of for evidential purposes. In some cases, the intervention of a notary public is also needed.
- eCommerce regulations focus on the way contracts are concluded, i.e. on how consent is validly given using electronic means and electronic communications. To this end, they do not impose further formal requirements for the parties concluding an agreement. On the contrary, they pursue to fulfil the same requirements as generally imposed for the conclusion of paper-based contracts.
- Another important characteristic of eCommerce regulations is that they follow a principle of technological neutrality. Its application makes regulations flexible and highly adaptable to the constant changes of technologies, but that may hinder the establishment of wide spread use of common standards.

D.2 Main legal barriers to eBusiness

- The Spanish legislator, following the EU Directives and recommendations, has made an important effort to overcome requirements linked to the use of paper. However, from the legal point of view there are still some concerns that may result in obstacles to the use of electronic media and communication systems in commercial transactions.
- The regulation on evidence is not systematic, because some electronic media are considered documentary evidence, while others are merely *instruments storing words*. As outlined above, Art. 24 of the eCommerce Law expressly provides that the electronic medium containing a contract concluded by electronic means shall be admissible as documentary evidence in court; however, no similar statement exists when an electronic medium contains other kinds of information (non contractual texts or audio recordings), opening the nature of such other information up for discussion.
- So far, it does not seem that such difference is having a real impact in the practice, however only court judgments will clarify the implications of such double ruling.
- In addition, electronic contracting using general conditions is still governed by a Royal Decree that does not fully conform with the eCommerce Law. The impact of the Royal Decree is restricted due to its limited scope and to the fact that the majority of the doctrine supports the prevailing nature of the Law against the specificity of Royal Decree and its subject matter. However, a legislative intervention is needed in order to avoid legal uncertainty.
- As far as negotiable instruments are concerned, the extent to which electronic documents are capable of substituting paper-based documents is still not fully clear to Spanish doctrine. In particular, there seems to be some legal uncertainty with regard to their ability to represent with full legal effect the goods to which they refer, specifically in terms of being a suitable instrument for assigning

property without further requirements. In the case of letter of credits, its main obstacle relates to the effects linked to the lack of use of official forms.

- Finally, electronic contracts in Spain face the same common practical impediments arising where the goods are physical in nature.

D.3 Main legal enablers to eBusiness

- Although the majority of the courts and the doctrine have traditionally supported the application of the principle of equivalence, its legal recognition has definitively added legal certainty in relation to the conclusion of electronic agreements. In fact, the Spanish eCommerce and eSignature Laws, which have partially modified the Civil Procedure Code and have been complemented with consumer protection regulations, form a quite stable and reliable legal framework for the conclusion of most commercial contracts.
- The Administration, specially the Tax Agency, has also played an important role in bringing confidence to the markets by supporting the use of electronic signatures and electronic communications techniques. In this sense, an increasing number of undertakings are electronically managing its accounts and tax obligations electronically under similar security standards, validated by the Tax Agency. Thus, companies increasingly have and are using the same elements that are suitable for concluding commercial electronic agreements with a reasonable degree of security.
- The regulation on the use of electronic signatures and electronic techniques by notaries is also an important step towards the use of electronic documents. First, it makes possible the conclusion of contracts where the intervention of a notary public is required. Moreover, the public authority with which notaries are invested in Spain adds legal certainty to the conclusion of transactions. To some extent, notaries could be thus considered as `qualified reliable third parties´.
- In conclusion, although there are still some uncertainties and legal barriers to ecommerce, most commercial relationships may easily take place electronically, either using existing standards for communication and electronic signature, or by agreements of the parties upon the use of a suitable framework.

Sweden National Profile

A. General legal profile

Sweden is a constitutional monarchy with a democratic elected Parliament[1507]. The country is divided into 21 counties[1508] and has 290 municipalities[1509]. Legislation is, however, mainly based on a national level, though the counties and municipalities have certain areas of competence.

Commerce and contract law is not fully covered by a single code, but rather regulated in several laws, such as The Contracts Act[1510], which is the main legislative act regulating how agreements are concluded (Chapter 1), powers of attorney (Chapter 2) and the validity of legal transactions (Chapter 3). In addition several other statutes regulate the validity of terms and conditions and how to interpret them, such as the Sales of Goods Act[1511], the Consumer Sales Act[1512], the Consumer Services Act[1513] and the Consumer Credit Act[1514], to mention just a few.

The Swedish judicial system includes three instances: the district court[1515], the Courts of Appeal[1516] and the Supreme Court[1517]. As the first instance the district court will adjudicate in disputes between private companies and/or individuals. Civil cases with a value below a certain amount (half of the annual base amount, *basbelopp*, around 20 000 SEK) are handled according to special rules, cases with a value above this amount are dealt with according to the Swedish Code of Judicial Procedure[1518].

[1507] *Riksdag*

[1508] *Län*

[1509] *Kommun*

[1510] SFS 1915:218, *Lag om avtal och andra rättshandlingar på förmögenhetsrättens område;* http://www.notisum.se/rnp/sls/lag/19150218.HTM

[1511] SFS 1990:931, *Köplag;* http://www.notisum.se/rnp/SLS/LAG/19900931.HTM

[1512] SFS 1990:932 *Konsumentköplag;* http://www.notisum.se/rnp/SLS/LAG/19900932.HTM

[1513] SFS 1985:716 *Konsumenttjänstlag;* http://www.notisum.se/rnp/sls/lag/19850716.HTM

[1514] SFS 1992:830, *Konsumentkreditlag;* http://www.notisum.se/rnp/SLS/LAG/19920830.HTM

[1515] *Tingsrätt*

[1516] *Hovrätt*

[1517] *Högsta Domstolen*

[1518] SFS 1942:740, *Rättegångsbalk;* http://www.notisum.se/rnp/SLS/LAG/19420740.htm

B. eCommerce regulations

In the past few years, several legislative initiatives have dealt with questions concerning the validity and recognition of electronic documents.[1519] In addition, legal doctrine has taken up these questions even before.

B.1 eCommerce contract law

B.1.1. General principles

The Swedish Contracts Act is built on the principle of autonomy of will and an offer-acceptance model, which means that a contract is legally established as soon as a consensus exists between parties regarding the essential elements of a contract.[1520]

As a main principle contracts do not require a certain form in order to gain legal effect. In other words the corresponding expressions of intent are sufficient in order for a contract to be established. Two exceptions to this general rule are that the parties can agree on certain formal requirements or that the law – in certain circumstances – stipulates legal form requirements. The difference between these two exceptions lies in the fact that the latter requirements are mandatory, and cannot be disregarded by the parties. The legal effects in case the formal requirement is not fulfilled vary from invalidity of the contract, to an obligation of one party to fulfil the requirement, to invalidity against third parties (e.g. the creditor, or the authorities).[1521]

A report by the Swedish Ministry of Finance and the Government Offices from 2003[1522] dealt with the question of the legal recognition of electronic documents. The report included a review of about 2000 statutes in all areas of law with regards to the mentioning or exclusion of electronic documents.

The Government came to the conclusion that the majority of the statutes (around 1200) did not prevent electronic means, around 190 were considered to possibly constitute an obstacle to electronic means and therefore should be amended, and the rest (around 650) should not be changed for the time being. The reason why the majority of laws did not prevent electronic means was that certain terms and definitions did not per se exclude the use of electronic means. For example the terms application, registration, message, request were not equivalent to paper document and therefore did not have to be amended.

[1519] Report by the Swedish Ministry of Finance and the Government Offices, *FORMEL – Formkrav och elektronisk kommunikation*, Ds 2003:29, available at www.regeringen.se, C. HULTMARK, *Elektronisk handel och avtalsrätt*, Göteborg, Nordstedts Juridik AB, 1998, 153 p., A. LINDBERG, D. WESTMAN, Praktisk IT-rätt, 3rd ed, Stockholm, Nordstedts Juridik, 2001, 527 p.

1520J. RAMBERG, C. RAMBERG, *Allmän avtalsrätt*, 6th ed., Stockholm, Nordstedts Juridik AB, 2002, p. 101 and following.

1521 J. RAMBERG, C. RAMBERG, *Allmän avtalsrätt*, p. 125 and following.

[1522] *FORMEL – Formkrav och elektronisk kommunikation*, Ds 2003:29, available at www.regeringen.se

One of the conclusions in the report was that legislation should be as technology-neutral and long-term aimed as possible, and therefore that amendments might contribute to confusion rather than to clarification.

The writers of the report did not recommend a general rule stipulating the legal effectiveness of electronic documents or their equivalency to paper based documents. "Electronic routines are not prohibited in general. Therefore there is no reason to generally or in specific cases allow electronic means. This could without a doubt increase the confusion, as a specific rule allowing electronic means in certain situations could lead to the false conclusion that non- mentioning of the possibility of electronic means implies that they are not allowed."[1523]

Another conclusion was that in certain areas, e.g. archiving of signatures or penal law, one should await the technological development; while in other areas the entire processes of a certain issue should be examined, in order to avoid that a traditional process is simply converted into electronic means, but instead the process as such should be questioned and made more effective.[1524] Some areas are still not suitable for electronic measures, e.g. family law, and therefore there is no need for amendment in that question of formal requirements at this stage.

Swedish legal doctrine and also the legislator make a difference between the requirements of "written form" and "handwritten signature". "Written" can, at least in the majority of cases, include electronic documents and therefore the term would be equivalent to non-oral expression of intent, instead of to the opposite of paper.[1525] This very much depends on the reasons behind this requirement;[1526] if a paper document is needed in order to secure evidence or if the formal requirement stems from traditions and historical reasons. A handwritten signature on the other hand can in most cases require some sort of physical signing, again depending on the reason behind the requirement,[1527] e.g. the presence of witnesses for somebody's last will.

Swedish law only requires handwritten signatures in very few occasions.[1528] Examples include real estate contracts[1529], transfer of the dwelling in owner-occupied housing association[1530], and family related legal matters, such as pre-marital agreements[1531] and last wills[1532].[1533]

[1523] *FORMEL – Formkrav och elektronisk kommunikation,* p 43.

[1524] *FORMEL – Formkrav och elektronisk kommunikation,* p 44.

[1525] Preparatory Report by the Swedish Government Offices and the Ministry of Industry, Employment and Communications, Ds 2001:13, *E-handelsdirektivet – genomförande av direktivet 2000/31/EG om vissa rättsliga aspekter på informationssamhällets tjänster*, 192 p.; p 104-105; *FORMEL – Formkrav och elektronisk kommunikation,* p 12.

[1526] A. LINDBERG, D. WESTMAN, Praktisk IT-rätt, p 76.

[1527] *FORMEL – Formkrav och elektronisk kommunikation,* p 88.

[1528] Government Bill 2001/02:150 (*Prop. 2001/02:150 Lag om elektronisk handel och andra informationssamhällets tjänster, m.m.*), p 78; Ds 2001:13, p. 103; J. RAMBERG, C. RAMBERG, *Allmän avtalsrätt*, p 130.

[1529] Chapter 4, Section 1 Land Code, SFS 1970:994, *Jordabalk*

[1530] Chapter 6 Section 4 Act on Owner-occupied housing, SFS 1991:614, *Bostadsrättslag*

[1531] Chapter 7 Section 3 Marriage Code, SFS 1987:230, *Äktenskapsbalk*

[1532] Chapter 10 Section 1 Inheritance Code, SFS 1958:637, *Ärvdabalk*

For example Chapter 4, Section 1 Land Code requires - in case of the purchase of real estate - that the contract is in written form and signed by the parties. It is even required for the registration in the land registry that the contract was verified by a witness (Chapter 20 Section 7 Land Code). A premarital settlement has to be signed by both parties (Chapter 7 Section 3 Marriage Code).

As already mentioned, the term "written" can both include as well as exclude electronic documents. There is no clear main line within legislation. Examples where the term includes electronic means are the Qualified Electronic Signatures Act (Section 12), the Act on Consumer Protection with regards to Distance Selling[1534]. Also Chapter 3 Section 5 in the Securities Business Act[1535] can be considered to include electronic means.[1536]

The Qualified Signatures Act[1537] transposed the e-Signatures directive[1538] into Swedish law. Section 17 stipulates that "If a requirement of a handwritten signature or its equivalent, contained in a law or regulation may be satisfied by electronic means, a qualified electronic signature shall be deemed to fulfil this requirement. (...)" In other words, if the legislator allows, explicitly or implicitly, the use of electronic means, the requirement of signature can be fulfilled by qualified electronic signatures. This does not mean, however, that not less secure forms of electronic signatures, e.g. advanced electronic signatures, cannot be used.

Swedish law is built on the principle of freedom of proof[1539]. In other words proving that a contract exists can be done in any possible way, with the exception of contracts that require a certain form. The burden of proof is usually put on the party that has the best possibilities to secure the evidence.[1540]

No specific rules exist regarding the sending of electronic notices or electronic registered mail. However, as mentioned above, the Swedish legal system is rather flexible in this regard and therefore electronic notifications would probably be accepted in court as any other electronic evidence. To our knowledge there is no relevant jurisprudence on this issue.

The Swedish Post Office (www.posten.se) offers several e-services, e.g. the receiver of a letter can choose to receive the letter in electronic form or in paper form, or a company can send a certain letter by e-mail to the post office and the post office takes care of the sending in paper form.

[1533] J. RAMBERG, C. RAMBERG, *Allmän avtalsrätt*, p 130.

[1534] SFS 2000:274, *lag (200:274) om konsumentskydd vid distansavtal och hemförsäljningsavtal (distansavtalslagen*); http://www.notisum.se/rnp/sls/lag/20000274.htm

[1535] SFS 1991:981, *lag (1991:981) om värdepappersrörelse;* http://www.notisum.se/rnp/sls/lag/19910981.HTM

[1536] DS 2001:13, p 38.

[1537] SFS 2000:832, *Lag (2000:832) om kvalificerade elektroniska signaturer*; available in English at http://www.pts.se/Sidor/sida.asp?SectionId=1011.

[1538] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, Official Journal L 013, 19/01/2000 P. 0012 – 0020.

[1539] See Chapter 35 Section 1 Swedish Code of Judicial Procedure, SFS 1942:740, *Rättegångsbalk*

[1540] C. HULTMARK, *Elektronisk handel och avtalsrätt*, p 87 and following.

In the field of trade with financial instruments the Financial Instruments Trading Act[1541] provides for the possibility to publish prospects (offer documents) in electronic form.

Within the private sector there are no special regulations regarding electronic archiving outside of the fields of invoicing and accounting, as indicated below. None the less, the public sector falls under certain obligations mentioned in the Archives Act[1542] and subsidiary legislation.

B.1.2. Transposition of the eCommerce directive

The e-commerce directive[1543] was implemented in Sweden by enacting the eCommerce law[1544] and amending the Financial Instruments Trading Act[1545] and the Consumer Credit Act[1546] with regards to their formal requirements.

The Government Bill 2001/02:150[1547] dealt with the question of formal requirements and stated that the term "written" as such may include and certainly does not exclude the use of electronic means. The term "written" means in this regard non-oral expression of intent and that the content has a longer lasting and readable format.[1548] As the government planned a more general investigation on the admissibility of electronic means in commerce, the question was not particularly dealt with in the legislative process of the implementation of the eCommerce directive.

The proposal therefore only dealt with the situations where electronic means were explicitly excluded in the legislation and which were not stated in the possible exemptions in Article 9 of the directive. This was the case in two areas, namely with regards to consumer credits and the trading of financial instruments.[1549]

The Consumer Credit Act previously stipulated in Section 9 that a credit agreement had to be concluded in writing and be signed by the consumer. If the agreement was not in writing and signed, it was still valid, however the conditions not in favour of the consumer were not valid. This regulation was considered to be in violation of Art 9 of the

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[1541] SFS 1991:980, *Lag (1991:980) om handel med finansiella instrument;* http://www.notisum.se/rnp/sls/fakta/a9910980.htm

[1542] SFS 1990:782, *Arkivlag* (1990:782); http://www.notisum.se/rnp/sls/lag/19900782.HTM; see also the website of the National Archives of Sweden at http://www.ra.se/ra/

[1543] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal L 178 , 17/07/2000 P. 0001 – 0016.

[1544] SFS 2002:562, *Lag (2002:562) om elektronisk handel och andra informationssamhällets tjänster;* http://www.notisum.se/rnp/sls/lag/20020562.HTM

[1545] SFS 1991:980, *Lag (1991:980) om handel med finansiella instrument;* http://www.notisum.se/rnp/sls/fakta/a9910980.htm

[1546] SFS 1992:830, *Konsumentkreditlag* (1992:830); http://www.notisum.se/rnp/SLS/LAG/19920830.HTM

[1547] *Regeringens proposition 2001/02:150 Lag om elektronisk handel och andra informationssamhällets tjänster, m.m.*

[1548] *Regeringens proposition 2001/02:150*, p 78.

[1549] *Regeringens proposition 2001/02:150*, p 79.

eCommerce Directive and amended in a way that allows the consumer to "sign" a credit agreement by using an advanced electronic signature (in accordance with Section 2 of the Swedish Qualified Electronic Signatures Act, SFS 2000:832).

The other statute amended with regards to its formal requirements was the Financial Instruments Trading Act. Its Chapter 3 Section 1 was clarified to the extent that "written" now entails a document, which is readable and possesses some sort of longer lasting character.

The eCommerce Act is applicable to information society services with the same exceptions as mentioned in Article 1.3 of the eCommerce directive and therefore does not amend the Contracts Act with regards to all types of contracts. The eCommerce Act does not contain a special regulation concerning formal requirements as Article 9 of the eCommerce directive. As mentioned earlier, electronic means have not been excluded so far in eBusiness, which is why a clarification of this kind did not seem necessary.

B.2 Administrative documents

Formal requirements in administrative matters are more common than within civil law. At the same time the development of eGovernment initiatives during the last few years have paved the way for an increased use of electronic means in the transfer of documents between the public sector and individual citizens or private companies.

One example is the possibility to submit the annual tax declaration over the Internet or by SMS. Such declarations only work if the employee does not want to make any changes in the pre-filled form sent by the tax authority. In case of private companies or employees who want to deduct certain expenses, the tax declaration has to be signed with an electronic signature or handed in in printed form. Chapter 10 Section 25 of the Tax Payment Act[1550] stipulates that a tax declaration has to be signed by the person obliged to submit it. According to Chapter 10 Section 26 the government can issue regulations or allow in specific cases that the tax declaration is submitted as an electronic document. An electronic document is a recording that was created by using automated means and which allows its content and the sender to be verified by a certain technical process. In this case the requirement according to Section 25 can be fulfilled by electronic means. This year around 2,5 million citizens have submitted their tax declaration electronically.[1551]

Another area within public administration where electronic documents are allowed and used is social security. Several initiatives have been taken on a national and regional level. Also within the area of public procurement and company registration several initiatives are ongoing and in use.[1552]

[1550] SFS 1997:483, *Skattebetalningslag*

[1551] See www.skatteverket.se.

1552For some examples see the website for Europe's Information Society – Thematical Portal of the European Union, under Good Practice Framework for eGovernment, Sweden.

C. Specific business processes

Regarding business processes, including transport of goods, Swedish legislation either explicitly requests electronic means or at least allows them in several cases, either explicitly or implicitly. In addition, several initiatives both from the authorities and trade organisations or businesses have paved the way for the increased use of electronic means within businesses. There are also services in use that allow contracts and agreements to be concluded completely by electronic means.[1553]

The section below is organised according to five stages in the electronic provision of goods on the European market. They comprise credit arrangements, transportation and storage, cross border trade formalities and financial/fiscal management.

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

The Swedish legislation concerning bills of exchange (in Swedish: *skuldebrev* or *växel*, even though *skuldebrev* is a more general term) does not contain any references to electronic means. Neither the Act on Instruments on Debt[1554] nor the Bills of Exhange Act[1555] provide explicitly the possibility for electronic means, nor did the above mentioned report FORMEL include any reference to these statutes.

There are no formal obstacles for bills of exchange to be in electronic form. Some un-answered questions concern though garnishment of certain types of bills of exchange. Another important technical issue is to make sure that only one original exists. It seems this is the solution chosen for e-money. According to the experts I spoke with electronic bills of exchange do not seem to be used in Sweden today, unlike other countries such as Finland.

C.1.2. Documentary credit

Despite the fact that the banking system in Sweden to a large extent is conducted electronically, there is no specific regulation dealing with documentary credits in electronic format.

According to the Swedish Bankers´ Association[1556], documentary credits (in Swedish: *remburser*) are regulated mostly by international rules from the ICC, e.g. e-UCP, UCP

1553See e.g. ChamberSign, Swedish Chamber of Commerce, www.chambersign.se

[1554] SFS 1936:81, *Lag (1936:81) om skuldebrev;* http://www.notisum.se/rnp/sls/fakta/a9360081.htm

[1555] SFS 1932:130, *Växellag;* http://www.notisum.se/rnp/sls/lag/19320130.HTM

[1556] See also http://www.bankforeningen.se/inenglish.aspx

500 and ISBP (International Standard Banking Practice for the examination of documents under documentary credits), and are occasionally used in Sweden.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

According to Chapter 13 Section 42 of the Swedish Maritime Code[1557] a bill of lading (*konossement*) is a document that serves as prove for a transporting contract over sea and that the carrier has accepted or packed the goods. Chapter 13 Section 46 Paragraph 3 states that the carrier or somebody else on his/her behalf shall sign the bill of lading. The signature may be produced mechanically or electronically. Therefore this provision allows the use of electronic means for signing the bill of lading.[1558] The same applies to sea waybills (*sjöfraktsedel*), Chapter 12 Section 58 Paragraph 1 does not exclude electronic routines either, as the regulation does not require an original document to be presented.[1559]

In addition, the provisions stipulating the keeping of a diary (Chapter 18 Section 2 Paragraph 1 Maritime Code in combination with the regulations issued by the Swedish Maritime Administration) allow notes in the diary in digital format.

The Swedish Maritime Administration offers several e-Services, such as for the declaration for Fairway Dues and Vessel Reporting System.[1560] With effect from 1 January 2005, declarations for fairway dues are to be submitted electronically.

C.2.2. Storage contracts

The Swedish International Transport Freight Association (SIFA; *Transortindustriförbundet*) has developed a transport label that allows unique identification of each package unit. In this regard, e-Com Logistics AB, a subsidiary of SIFA, developed guidelines for the used of the MITL-based Standard Transport Label (STL). Within EAN this license plate is called "Serial Shipping Container Code" (SSCC). The label makes it possible to track and trace transported goods and is linked to all shipment data which can be reported to the consignee via EDI messages.[1561]

[1557] SFS 1994:1009, *Sjölag;* http://www.notisum.se/rnp/sls/lag/19941009.HTM

[1558] See *FORMEL – Formkrav och elektronisk kommunikation*, Bilaga 2, p. 124.

[1559] See *FORMEL – Formkrav och elektronisk kommunikation*, Bilaga 2, p. 124.

1560See www.sjofartsverket.se for further information.

[1561] See www.swedfreight.se and www.ecomlogistics.se.

C.3 Cross border trade formalities: customs declarations

The Swedish Customs Authority has offered already in 1991 the possibility to companies to send import and export declarations at customs electronically. The technique was called *Sigillet*.[1562] The systems used today include TID (*Tullverkets Internetdeklaration*), EDIFACT (Electronic Data Interchange For Administration, Commerce and Transport) and NCTS (for transit movements, New Computerised Transit System).[1563]

The Swedish Customs Computer System (TDS) allows import and export declarations to be submitted electronically and includes a blocking system that forwards certain declarations to a customs officer in order to be scrutinised. The declarations can be submitted via the Internet (TID) or electronically (EDIFACT). The electronic declaration carries the same legal significance as a signed paper document.

Chapter 2 in the Customs Act[1564] deals with the Customs Computer System and refers in Section 1 to Articles 4a and 4b in the EC Regulation 2454/93. It furthermore refers to the Swedish law on processing of data within the Customs sector[1565] which regulates the types of data to be stored and processed in the Customs Computer System and also deals with all questions related to data protection in this context.

Chapter 2 Section 2 of the Customs Act stipulates that customs declarations may be transmitted in a computerized form according to Article 61 in the EC Regulation 2913/92. The term electronic document is defined as data created with automatic means whereas the content and sender can be verified with a certain technical process.

According to Chapter 2 Section 7 also the decision by the Customs Authority may be issued in an electronic document.

In order to use the Customs Internet Declaration one has to register at the Virtual Customs Office with his/her personal details, e.g. home address. Also, the company must apply for a TID authorisation. This can be done online, however, the person authorised to sign on behalf of the company must duly sign the application and a verified copy of the Certificate of Registry of the company must be submitted.

In most cases a separate application is necessary in order to get customs clearance. In some occasions this cannot be done via the Internet application, but a physical visit is required in order to get clearance.

The New Computerised Transit System (NCTS) is a system for electronic transmission of information in transit movements, making it possible for operators to use the simplifications Authorised Consignor and Authorised Consignee. Transit operations can be automatically cleared in the system. The system was implemented some years ago and by the end of 2004, 70 % of the Swedish operators used the NTCS for their transit declarations.

At present more than 90 % of the declarations are handled electronically by the authority, and more than 70% of these are cleared automatically.[1566]

[1562] Report Ds 1999:73 Elektroniska signaturer, p 38.

[1563] http://www.tullverket.se/se/Foretag/import/deklarera_elektroniskt/

[1564] SFS 2000:1281, *Tullag;* http://www.notisum.se/rnp/sls/lag/20001281.HTM

[1565] SFS 2001:185, *Lag (2001:185) om behandling av uppgifter i Tullverkets verksamhet;* http://www.notisum.se/rnp/SLS/LAG/20010185.HTM

[1566] Prop. 2000/01:33, p 79; www.tullverket.se.

C.4 Financial/fiscal management: electronic invoicing and accounting

As the legal framework for electronic invoicing and electronic accounting is very much interrelated, both types of documents will be discussed together in the following chapter. If necessary, distinctions between the two will be emphasised.

Electronic invoices have been used for a long time in Swedish businesses. The main technical standards used are EDI-invoice, e-Invoice and e-Giro (initiative by banks), self-billing, invoice-files via e-mail, online services (ASP, web-EDI, etc) and scanning of paper invoices.1567 One of the standards that have been developed by a co-operation between the public and private sector is called Svefaktura.[1568] In addition, private providers offer different solutions.[1569]

Standard contracts are mainly used in order to ensure interoperability between the computer system of the seller and the one of the buyer. Examples include the EDI standard contract.1570

The legal framework that applies to invoices, both electronic and paper-based, and accounting in general includes the Swedish Book-keeping Act[1571], the Swedish Companies Act[1572], the VAT Act[1573] and the Tax Payment Act[1574].

Electronic invoices have been accepted within Sweden for a long time, both in accounting and in tax practice under certain circumstances. One of these circumstances has been that the invoices that were archived in electronic form could be printed out at any point during the archiving period of 10 years. In other words if the company would replace the computer system, the invoice information had to be converted in order to be readable in the new system or should be printed out before the switch.[1575]

Chapter 7 of the Swedish Book-keeping Act deals with the archiving of accounting information. According to Chapter 7 Section 1 accounting information shall be archived either

- in normal readable format (document),
- in micro format or

[1567] See report by The Swedish Alliance for Electronic Business on electronic invoices (GEAs rapport Elektroniska fakturor), January 2004, available (in Swedish) at http://www.gea.nu/pdfer/einvoic/Elektroniska%20Fakturor%20.pdf.

[1568] www.svefaktura.se

[1569] See e.g. www.trustweaver.com and www.chambersign.se.

[1570] Examples available at www.gea.nu.

[1571] SFS 1999:1078, *bokföringslag;* http://www.notisum.se/rnp/SLS/LAG/19991078.HTM

[1572] SFS 2005:551, *aktiebolagslag;* http://www.notisum.se/rnp/SLS/LAG/20050551.htm

[1573] SFS 1994:200, *mervärdesskattelag;* http://www.notisum.se/rnp/sls/lag/19940200.HTM

[1574] SFS 1997:483, *skattebetalningslag;* http://www.notisum.se/rnp/sls/lag/19970483.HTM

[1575] Report by The Swedish Alliance for Electronic Business on electronic invoices, p 32.

- o in any other form that can be read, listened to otherwise comprehended only using technical aids1576 and that can be immediately printed out into a format as mentioned in point 1 or 2.

According to Chapter 7 Section 2 accounting information shall be stored for 10 years. Computer equipment that is necessary in order to retrieve this accounting information shall be accessible in Sweden under all this time. This means in other words that as a main principle electronic invoices cannot be stored outside of Sweden at the moment. According to Section 3 accounting data can, however, be stored abroad under certain circumstances for a short period of time.[1577]

The e-Invoicing directive1578 was transposed in Swedish national law by amending three different laws: the Book-keeping Act[1579], the VAT Act[1580] and the Tax-Payment Act[1581].

With the amendments a new Section 17a was introduced in Chapter 1 of the VAT Act defining the term "transmission of invoices or other documents electronically" which correlates with Article 2 Paragraph 2 point (e) e-Invoicing directive. In addition a rule was introduced in the VAT Act stating that invoices only may be sent electronically if the receiver has approved it (Chapter 11 Section 6 VAT Act).

The VAT Act does not state any additional requirement regarding invoices that are being sent electronically. This means that even other methods than advanced electronic signatures and EDI are accepted from a security point of view.[1582] Traditional tax control has been completed by comparing the VAT in the seller's accounting with the deducted VAT at the buyer. This control works both in a paper-based and electronic environment, but can be even more efficient in a computerised system. A prerequisite for the use of electronic invoices is off course that the content has not been changed during transmission or storage. This requirement is already stipulated in the present Book-keeping Act. In this respect a reference to the Book-keeping Act has been introduced in the Tax Payment Act.

One should, however, keep in mind that even though electronic signatures are not a legal requirement in Sweden when it comes to transmission and storage of electronic invoices, public administrations and companies might increasingly request such solutions in order to guarantee a secure processing of electronic invoices.[1583]

[1576] Interesting to note that the wording of the last point has the same wording as the definition of "recording" in the Swedish Freedom of the Press Act (SFS 1949:105, *Tryckfrihetsförordning*).

[1577] Report by The Swedish Alliance for Electronic Business on electronic invoices, p 32.

[1578] Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax; *Official Journal L 015, 17/01/2002 P. 0024 – 0028.*

[1579] SFS 1999:1078, *bokföringslag*; SFS 2003:1135 amending the Book-keeping Act (SFS 1999:1078).

[1580] SFS 1994:200, *mervärdesskattelag*; SFS 2003:1134 amending the VAT Act.

[1581] SFS 1997:483, *skattebetalningslag*; SFS 2003:1136 amending the Tax Payment Act.

[1582] Report by The Swedish Alliance for Electronic Business on electronic invoices, p 64.

[1583] Report by The Swedish Alliance for Electronic Business on electronic invoices, p 64.

When it comes to the archiving of electronic signatures another provision was introduced in the Book-keeping Act. The new Chapter 7 Section 3a allows companies to store electronic accounting information in another member state of the European Union if

1. the place is reported to the Swedish Tax Authority (or the Swedish Financial Supervisory Authority)
2. the company is able to allow immediate electronic access to the accounting information after a request by the Tax Authority (or the Swedish Financial Supervisory Authority) during the archiving period, and
3. the company can immediately print out the information in a format according to Chapter 7 Section 1 points 1 and 2 (mentioned earlier).

Section 3 a furthermore refers to EC Directive 76/308, EC Directive 77/799 and EC Regulation 218/92. Under specific circumstances the Tax Authority can also allow the storage of accounting information even if the requirements of Section 3a are not fulfilled.1584

D. General assessment

D.1 Characteristics of Swedish eCommerce Law

- Swedish civil law is based on the principle of freedom of contract and does not contain many formal requirements for the conclusion of a contract. Therefore Swedish law has been rather flexible with new types of contracts or also new types of contract conclusion. In addition the freedom of evidence within court proceedings emphasised this flexibility and has not lead to any indirect formal requirements.
- Even in cases where formal requirements are stipulated in law, the reasons for this might not always be to secure evidence or to include a certain warning function for a weaker party, but rather historically grounded. This means that even in cases where a formal requirement might exist, this requirement can easily be fulfilled by electronic means and therefore does not constitute an obstacle to eBusiness. The few exceptions to this rule, within family and real estate law, are well accepted within the European Union as they are mentioned as well in the various EU directives that are of relevance in this context.

D.2 Main legal barriers to eBusiness

As was shown in the above-mentioned report FORMEL there do not seem to be so many explicit or implicit legal barriers when it comes to electronic means in eBusiness.

- One possible obstacle might be the fact that some statutes stipulate certain technical solutions, such as the requirement of an "advanced" or "qualified"

[1584] See Chapter 7 Section 4 Swedish Book-keeping Act

electronic signature and therefore explicitly exclude less secure or different technical solutions.

- Another possible, however not legal, barrier might be the variety of different standards being used and the fact that not all public administrations have the technical means to support secure eBusiness transactions.

D.3 Main legal enablers to eBusiness

- As mentioned earlier, Swedish commercial legislation provides especially private parties with a great deal of flexibility when it comes to contracting and concluding agreements. In addition, all relevant EU directives in this area have been implemented into Swedish law, thus safeguarding a harmonisation of rules for eBusiness within the EEA.
- The fact that the legislator and the government furthermore have initiated inquiries and reports shows that the development within information communication technology and its impact on business is given an important weight and legislative measures are taken in the areas necessary to enhance eBusiness possibilities.
- In addition the usage of ICT within the public sector also contributes to the increased use of electronic means within the private sector.
- These factors contribute to the fact that the Swedish legal system provides a very good ground for eBusiness in general, both within Sweden and within the European Union and the EEA.

The Netherlands National Profile

A. General legal profile

Together with Aruba and the Netherlands Antilles, the Netherlands form part of the Kingdom of the Netherlands. This analysis is confined to the laws and regulations and the practice in the Netherlands.

The Netherlands is a constitutional monarchy, which means that the King is the head of state, forming the Government together with the Ministers. The Parliament (the Upper and Lower House of the States General) monitors the Government. At a lower administrative level, the Netherlands comprises twelve Provinces and 458 Municipalities (January 2006).

Regulations with respect to commercial contracts are embodied in laws that are drafted by the Dutch government. Private law rules governing eCommerce are mainly incorporated in the Civil Code[1585]. Criminal law rules which regard eCommerce are incorporated in the Criminal Code[1586] and the Economic Offences Act[1587].

In principle, the District Court[1588] deals with all civil disputes[1589], with the exception of, briefly put, disputes where the interest at stake is less than € 5.000,=, labour disputes, leasehold disputes, rent disputes, and disputes regarding matters involving undetermined value[1590]. These exceptions are dealt with by the Subdistrict Court[1591].

Appeals are lodged with one of the (five) Courts of Appeal[1592]. No appeal is possible in disputes that involve an amount lower than € 1750.=[1593]. The highest judicial authority in the Netherlands is the Supreme Court. The Supreme Court only hears points of law and does not assess the facts of the case[1594].

[1585] Civil Code (Burgerlijk Wetboek).

[1586] Criminal Code (Wetboek van Strafrecht), Stb. 1881, 35 most recently changed by law of 9 December 2004, Stb. 2004, 645.

[1587] Economic Offences Act (Wet op de ecomonische delicten) Stb 195, 258, most recently changed by law of 17 March 2005, Stb. 2005, 150.

[1588] *Rechtbank*; For a map of the Dutch District Courts and overall information about Dutch jurisdiction please visit www.rechtspraak.nl *(2006: information only available in Dutch).*

[1589] Section 42 Judiciary Organisation Act (*Wet op de Rechterlijke Organisatie)*.

[1590] Section 93 et seq. Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering, Stb 1928, 14, most recently changed by law of 9 Juli 2004, Stb. 2004, 370*).

[1591] *Rechtbank, Sector Kanton*

[1592] Section 60 Judiciary Organisation Act (*Wet op de Rechterlijke Organisatie*) in conjunction with Section 332 Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).

[1593] Section 332(1) Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).

[1594] Section 118(2) Constitution (*Grondwet, Stb. 1815,45, most recently changed by law of 20 January 2005, Stb. 2005, 52*).

While the judgments of the Supreme Court do not have binding force as a precedent, they carry a great deal of authority and are only rarely not followed. Dutch courts are not free to review laws and treaties against the Dutch Constitution[1595].

B. eCommerce regulations

In cases where legislation does not offer a clear rule, or when questions about the exact meaning of a rule arise, answers must be based on doctrine. Most questions regarding the validity and recognition of electronic documents are answered by doctrine (and subsequent legislation) as well as by (implemented European) rules of law.

In the following section of this study, the main doctrine and the rules of law in The Netherlands regarding the legal value of electronic documents are briefly commented.

B.1 eCommerce contract law

B.1.1. General principles

Formal requirements of agreements in The Netherlands

In general, to constitute an agreement, Dutch law demands consensus between parties about the essential elements of an agreement. As a rule the constitution of agreements is free of form[1596], i.e. there are no restrictions on form. A written document is (therefore) not obligatory. Exceptions to the general rule (freedom of form) are made for a number of formal (written) contracts[1597], where the lacking of a certain form can result in a contract that is null or in the possibility of annulment of the contract.

Despite the freedom of form, trade partners often prefer a certain document in which they fix the content of the agreement. In a dispute, the proof of the exact content of the agreement between parties often stands or falls with the possibility to be able to show a (written) document.

Electronic documents: definition?

The laws of The Netherlands do not provide a definition of the term (written) "document" (*geschrift*). One of the generally accepted definitions of "document" is: all matters that are carriers of comprehensible letters, figures and signs (*leestekens*), which in their mutual context express a thought[1598]. A *print* of an electronic document (e.g. an e-mail) falls under the scope of this definition.

[1595] Section 120 Constitution (*Grondwet).*

[1596] Section 3:37 Civil Code (*Burgerlijk Wetboek*).

[1597] E.g. contracts for the transfer of ownership of real estate and employment contracts.

[1598] See: H.W.K. Kasperen, C. Stuurman, *Juridische aspecten van e-mail*, Deventer: Kluwer 2001 (p. 46 et.seq.) also S.J.H. Gijrath, R.J. Korthek, 'Wetsvoorstel Elektronische handel: gemiste kansen bij elektronisch contracteren?', *Computerrecht* 2002,6 p.352-360 and the Rapport on "electronic performance of juristic acts", Lower House, 1997/1998, 24 036, nr, 84 (*Rapport "Elektronisch verrichten van rechtshandelingen, Kamerstukken II 1997-1998, 24 036, nr. 84*).

There is no widespread generally accepted definition of an "electronic document". For an interpretation of the term "electronic document" however it would be logical to follow the definition of the term "document".

Recognition and validity of electronic documents

It is not clear whether an electronic document that is not printed (a digital electronic document) can be regarded (to have the same value as) a written document. For certain categories of electronic documents the legislator has regulated (due to implementation of the European e-Commerce directive) that electronic documents are equated with written documents. They have, for the purpose of constituting a legal and binding agreement, the same value as a written document.

Section 6:227a Civil Code recognizes that the requirement of an arrangement being in writing, which necessarily needs to be fulfilled for certain types of agreements, is met when an agreement is constituted through electronic documents[1599]. Section 6:227a Civil Code states that if, for the constitution of a document, a written document is -legally- required, an electronic document will suffice if it meets certain guarantees.

Section 6:227a does not apply to agreements in which a written document is not necessary to constitute the agreement (freedom of form). As stated above, in that case any consensus between parties about the essential elements of the agreement constitutes the agreement. Parties can, in that case, decide to use electronic documents that do not necessarily meet the requirements prescribed by section 6:227a Civil Code[1600].

In the case of applicability of section 6:227a Civil Code, the requirements that have to be met by electronic documents concern: their ability to be consulted and a sufficient (degree of) guarantee for determining the authenticity of the document, the identities of the parties involved and the date of conclusion of the agreement.

It must be possible to determine the authenticity, the identity of parties and the date of conclusion to a "sufficient degree". The relative criterion "sufficient degree" needs to be interpreted on a case-by-case basis. The circumstances to be taken into account[1601] are: the state of the art, the nature of the agreement and the capacity in which the parties

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[1599] Literally: "by electronic means".

[1600] Amendment of the Civil Code, the Code of Civil Procedure, the Criminal Code and the Economic Offences Act, implementing Directive no. 2000/31/EC of the European Parliament and the Council of the European Union of 8 June 2000 on certain legal aspects of the information society services, in particular electronic commerce, in the internal market (PbEG L 178) (hereinafter: 'Directive on electronic commerce amendment Act'), TK (Lower House) 2001-2002, 28 197, no. 3 (p.53) (*Aanpassing van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering, het Wetboek van Strafrecht en de Wet op de economische delicten ter uitvoering van richtlijn nr. 2000/31/EG van het Europees Parlement en de Raad van de Europese Unie van 8 juni 2000 betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij, met name de elektronische handel, in de interne markt (PbEG L 178) (Hierna: 'Aanpassingswet richtlijn inzake elektronische handel'), Tweede Kamer, vergaderjaar 2001-2002, 28 197, nr. 3)*

[1601] Directive on electronic commerce amendment Act, Explanatory Memorandum, TK (Lower House) 2002-2003, 28 197, no. 3 (p. 53) (*Aanpassingswet richtlijn inzake elektronische handel Memorie van Toelichting, TK 2001-2002, 28 197, nr. 3 (p.53).*

are acting[1602]. The aim of section 6:227a Civil Code is equation of electronic and non-electronic documents. When interpreting the criterion "sufficient degree", there may not be required more guarantees from electronic documents than from written documents. Section 6:277a defines the maximum requirements, it is possible for the courts to determine that an electronic document that does no meet the standards of 6:227a can nevertheless be regarded as equal to written documents[1603].

Exceptions

Certain documents, such as marriage documents, are barred from applicability of section 6:227a Civil Code. For constitution of those agreements the form prescribed by law is required, e.g. a written document or a notarial deed. Agreements that (1) constitute the creation or transfer of rights on real estate (with the exception of rent-related rights) and agreements that (2) constitute the issue of personal or real rights by persons that do not act within the framework of profession or business conduct, are barred from applicability of article 6:227a Civil Code as well. They are only barred however, *to the extent in which the nature of the agreement*, or the legal relationship of which the agreement forms part, *should oppose constitution through electronic means*. This exception aims to leave the court some leeway to circumvent the scope of section 6:227a Civil Code. The manner in which the section is formulated reflects that the non-applicability of paragraph 1 is paramount, as well as that the burden of proof (of the non- applicability of section 6:227a Civil Code) is on the party invoking the non-applicability. The legislature has opted for this system because, as regards these agreements, there are some cases in which it may be desirable to conclude them by electronic means[1604].

Agreements for which (3) the intervention of a court, government authority or professional carrying out a public duty is necessary and agreements (4) that concern family law or inheritance law, are barred form applicability of section 6:227a Civil Code under any circumstance. The rationale for excluding application of section 6:227a Civil Code to these agreements completely, is that it is desirable, given the nature of these agreements, to hold on to the form requirements as they apply in the physical world[1605].

[1602] Directive on electronic commerce amendment act, Explanatory Memorandum, TK (Lower House), 2002-2003, 28 197, no. 3 (p. 53). (*Aanpassingswet richtlijn inzake elektronische handel,Memorie van Toelichting, TK 2001-2002, 28 197, nr. 3 (p.53).*

[1603] Directive on electronic commerce amendment act, Explanatory Memorandum, TK (Lower House), 2002-2003, 28 197, no. 3 (p. 53) and Memorandum of Reply, EK (Higher House) 2003-2004, 28 197, C (p. 5). (*Aanpassingswet richtlijn inzake elektronische handel, Memorie van Toelichting, 2001-2002, 28 197, nr. 3 (p.53) en Memorie van Antwoord, EK 2003-2004, 28 197, C (p.5)*

[1604] Directive on electronic commerce amendment Act, Explanatory Memorandum, TK (Lower House) 2002-2003, 28 197, no. 3 (p. 55) (*Aanpassingswet richtlijn inzake elektronische handel Memorie van Toelichting, TK 2001-2002, 28 197, nr. 3 (p. 55)).*

[1605] Directive on electronic commerce amendment Act, Explanatory Memorandum, TK (Lower House) 2002-2003, 28 197, no. 3 (p. 55) (*Aanpassingswet richtlijn inzake elektronische handel Memorie van Toelichting, TK 2001-2002, 28 197, nr. 3 (p.55)).*

Contractual freedom and agreements on form

The legal system of the Netherlands allows parties to conclude agreements on form (the form which their agreement needs to take to be binding). This arises from the principle of freedom of contract. Parties can - for example - agree that an agreement is only legally binding when it is embodied in a written document signed by all parties, or that an offer can only be accepted by e-mail or other electronic means.

Agreements on form are only possible for agreements that do not mandatory require a certain form by law. Agreements on form will mainly relate to commercial agreements, and it should be noted that the limitations in the law mainly relate to agreements that involve a consumer.

Electronic notifications

Under Dutch law, statements, including notifications[1606], are allowed in any form. Statements may also be inferred from certain conduct[1607]. Importantly, the statement needs to be a sign that the other party can observe and understand. Form restrictions on electronic notifications will occur if the law or an agreement [1608] provide differently.

Electronic notifications can therefore be sent if the statement may be made without any form restrictions. In that case, an electronic notification is not required to satisfy any conditions other than that the notification can be observed and understood by the other party. The method used for notification (e.g. letter, oral, e-mail) bares certain consequences, e.g. for the term of acceptance[1609].

In order to achieve its effect, an electronic notification needs to have reached the recipient. Consensus between parties about the manner in which the statement is made is not necessary. If the notification has reached the recipient, it will have effect[1610]. In case of notification by e-mail Dutch legal scholars generally support the so called "inbox-theory": an e-mail has reached the recipient when the e-mail reaches the inbox[1611].

For certain electronic notifications the Dutch legal system created more certainty about their effect. This concerns electronic notifications made to a recipient who offers a service that can be qualified as a "service of the information society"[1612] (the party that

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[1606] Defined as an expression of will or a statement from the sender upon which he wishes to rely against the receiving party of the message, such as the acceptance of an offer to conclude a contract, the termination of a contract of the communication of product information to a consumer.

[1607] section 3:37 Civil Code (*Burgerlijk Wetboek*)

[1608] The law however guarantees that certain specific expressions are always free of form. If this is the case, an agreement on the form of this expression is null[1608]. This could relate, for example, to the statement by a buyer in connection with default. See: C. Asser, A.S. Hartkamp, *Verbintenissenrecht*, deel ii, p. 220 (§ 222) (Asser-Hartkamp 4-II)

[1609] C. Asser, A.S. Hartkamp, Verbintenissenrecht, deel ii, Deventer: Kluwer 2005, p. 132 (§ 136) (Asser-Hartkamp 4-II).

[1610] See section 3:37(3) 3 Civil Code (*Burgerlijk Wetboek*).

[1611] J.H. Snijders, 'Het bereiken van een geadresseerde (per e-mail)', *Weekblad voor Privaatrecht Notariaat en Registratie (WPNR)*, 2001, p. 433-440 (deel I) and p.457-461 (deel II).

[1612] Service of the information society: a service that is generally provided for a consideration, by electronic means, at a distance and at the individual request of the buyer of the service, while the

offers such a service will hereinafter be referred to as: "service provider"). Such electronic notifications must relate to an offer, or the acceptance of an offer, by the sender to the service provider. Under circumstances the service provider is required to confirm receipt of the sender's electronic notification as soon as possible by electronic means[1613]. If the agreement is only concluded by means of e-mail (or a similar form of communication) this does not apply[1614].

Failure to confirm the notification of acceptance of an offer may entail a major disadvantage for the service provider: the other party is entitled to terminate the agreement as long as receipt of the acceptance has not been confirmed. If the service provider fails to confirm within reasonable time, the service provider is deemed to have rejected the offer[1615]. This rule is mandatory if the counter party is a consumer and may only be deviated from if the other party is a party acting in the conduct of a profession or business[1616].

The law does not prescribe specific substantive forms for the electronic confirmation other than that it must be electronic and that the electronic confirmation must be accessible to the other party to whom the statement is addressed[1617].

Electronic registered mail

Currently there is no set legal framework on electronic registered mail in The Netherlands. However, when using regular e-mail, there may be difficulties in proving whether or not it has reached a certain person. The burden of proof on reception lies with the sender.

Electronic archiving

A framework for the archiving of (electronic) documents has been implemented into the Dutch legal system. Companies are required to archive their financial and fiscal documents (electronic and otherwise) for a period of seven years[1618]. They are required to do this in a manner that the documents that are relevant for their tax obligations are comprehensible. It is not necessary to keep paper archives even if the original document is a paper document: they can be converted to -for instance- electronic archives. Electronic documents may be archived electronically but they may also be converted to another carrier. This possibility applies to all documents except to the balance sheet and

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parties are not simultaneously present at the same location, section 15d(3) Civil Code (Burgerlijk Wetboek).

[1613] Section 6:227c Civil Code (*Burgerlijke Wetboek*).

[1614] Section 227c(4) Civil Code (*Burgerlijk Wetboek*).

[1615] Section 227c(2) Civil Code (*Burgerlijk Wetboek*).

[1616] Section 227c(6) Civil Code (*Burgerlijk Wetboek*).

[1617] Section 227c(3) Civil Code (*Burgerlijk Wetboek*).

[1618] section 2:10 Civil Code and section 52 State taxes Act (*Algemene wet inzake Rijksbelastingen*). Documents regarding VAT-obligations for immovability's need to be archived for 9 years.

the account of gain and loss[1619]: when they are in paper, they have to be kept in paper form.

The (converted) electronic archive needs to be complete (this must be verified) and available during the entire term of seven years and it must be possible to make the archived information readable within a reasonable time period [1620].

No prior official permission is needed for the conversion of a paper archive to an electronic archive. The converted documents do not need to be retained for a certain period of time, next to the electronic archive. They can be destroyed after verification that the conversion was successful and complete.

Jurisprudence: paper equals electronic?

The Dutch Supreme court has, in its judgment of 15 January 1991[1621] determined that the administration of a magnetic disc of a computer of the Municipality of Rotterdam can be deemed equivalent to a conventional, purely written, administration with the same function, and thus could be deemed to form a written document (*geschrift)* as meant in article 225 Criminal Code. Of importance was that the data was stored durably and could be easily rendered accessible[1622].

There is not much jurisprudence regarding the acceptance of electronic documents as equivalent of written documents. With regard to statements not subject to form restrictions, it is generally assumed that these statements can be made electronically in the same manner as it is possible to make a statement verbally or through fax.

Section 6:227a Civil Code now ensures that electronic documents may, in certain cases, be considered on par with written documents. By increasing the reliability of the document as regards the sender and contents, the electronic signature has enhanced the reliability of electronic documents, as a result of which they can be more easily considered equivalent to non-electronic documents.

Directive 2000/31/EC

Directive no. 2000/31/EC concerning electronic commerce has been fully converted into Dutch national law[1623] through the Civil Code, the Judiciary organisation Act, the Criminal Code and the Economic Offences Act.

The transposition applies to services of the information society[1624]. The contract types that are excluded from the transposition are - *to a certain extent*[1625] - contracts on real

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[1619] Section 52(5) State Taxes Act (*Algemene wet inzake rijksbelastingen*).

[1620] See: I. LeJeune, S. Beelen en J. Cambien, 'BTW en het elektronisch bewaren van facturen - de grote sprong voorwaarts?', *Computerrecht* 2004, 5.

[1621] Hoge Raad 15 januari 1991, NJ (*Nederlandse Jurisprudentie*) 1991,668.

[1622] Hoge Raad 15 januari 1991, NJ (*Nederlandse Jurisprudentie*) 1991,668, ground 7.5 et seq.

[1623] For an overview of amended articles, see TK 2001/2002, 28 197, no. 3, p. 72 (transposition table directive belonging with the directive on economic commerce amendment Act).

[1624] See: SJH Gijrath, R.J. Korthek, 'Wetsvoorstel Elektronische handel: gemiste kansen bij elektronisch contracteren?', *Computerrecht* 2002,6 p.352-360.

[1625] The extent to which they are barred has to be judged on a case-by-case basis.

estate (with the exception of contracts on rent-related rights) and agreements that constitute the issue of personal or real rights by persons that do not act in the conduct of a profession or business.

Agreements for which the intervention of a court, government authority or professional carrying out a public duty is necessary, and agreements that concern family law or inheritance law are excluded.

Electronic signatures

Under Dutch law, an electronic signature[1626] has the same legal effects as a hand written signature if the method for authentication used in that regard is sufficiently reliable[1627]. The equivalence of the electronic signature applies both to the proprietary and evidentiary legal positions[1628].

The law provides several specific requirements that authentication must satisfy in order to be deemed sufficiently reliable: the signature should (i) be uniquely related to the signatory, (ii) enable identification of the signatory, (iii) be created by means that the signatory can control to the exclusion of any other person, and (iv) be connected to the document in such a way that any change in the data can be detected afterwards.

In addition to these four requirements, the law requires that the signature be based on a qualified certificate[1629] and is generated by safe means intended for the creation of electronic signatures[1630]. However, should these last two features be lacking, the court may not flatly conclude that the signature is therefore unreliable. The court is free to attach high or low evidentiary significance to the electronic signature, depending on the specific circumstances of the case[1631].

[1626] The (legal) definition of Electronic Signature is: a signature "that consist of electronic information which is attached to, or are logically associated with, other electronic information and that is used as means for verification of authenticity ".

[1627] Section 3:15a(1) Civil Code (*Burgerlijk Wetboek*).

[1628] Amendment of book 3 and book 6 of the Civil Code, the Telecommunications Act and the Economic offences Act , implementing Directive nr. 1999/93/EG of the European Parliament and the Council of the European Union of 13 December 1999 on a common framework for electronic signatures (PbEG L 13) (hereinafter referred to as: Electronic Signatures Act), Memorandum of Reply, EK (Higer House) 2002-2003, 27 743, nr. 35 p. 3 (*Aanpassing van Boek 3 en Boek 6 van het Burgerlijk Wetboek, de Telecommunicatiewet en de Wet op de economische delicten inzake elektronische handtekeningen ter uitvoering van richtlijn nr. 1999/93/EG van het Europees Parlement en de Raad van de Europese Unie van 13 december 1999 betreffende een gemeenschappelijk kader voor elektronische handtekeningen (PbEG L 13) (Wet elektronische handtekeningen), Memorie van Antwoord, EK 2002-2003, 27 743 nr. 35 p.3*)

[1629] section 3:15a(2)(e) Civil Code.

[1630] section 3:15a(2)(f) Civil Code.

[1631] Electronic Signatures Act, Memorandum of Reply, EK (Higher House) 2002-2003, 27 743 no. 35 p.4 *(Wet elektronische handtekeningen, Memorie van Antwoord, EK 2002-2003, 27 743 nr. 35 p.4*).

B.2 Administrative documents

The Dutch legislator has recognised that electronic communication between administration and residents/civilians can contribute to a more accessible administration[1632]. Specific legislation that enables the use of electronic means in communication with the government came into power on 1 July 2004: the Act on electronic administrative communication[1633]. Before July 1st 2004 however, electronic (mostly informal) communication between administrative organs and residents/citizens in The Netherlands was already used on a large scale[1634].

With the Act on Electronic Administrative Communication a framework is created which regulates that, and under which circumstances, electronic communication[1635] between the administrative organs and the Dutch residents/civilians can be equated with other forms of (written) communication. With this a general legal framework is created for electronic communication with the administrative authority. The Act does not compel the administrative authority to make use of electronic communication, but rather stipulates the conditions under which administrative organs can permit residents to make use of electronic communication.

The legislation creates the possibility of electronic communication. This possibility exists *in addition* to the possibility of use of other means of communication. The basic criterion is the choice of residents/civilians between electronic communication and other (traditional) means of communication. No person can be forced to use electronic ways of communication. A free choice to communicate electronically does not exist in all cases. The administrative organ first has to make the possibility of electronic communication available. If the administrative organ chooses not to enable electronic communication, the possibility of electronic communication is not enforceable by the civilian/resident.

The regulation aims to regulate the possibility of electronic communication in primary decision making, the procedure for filing a notice of objection**,** and the administrative appeal with all administrative organs. Appeal at the Administrative Court however is excluded from the abovementioned regulation[1636]. The legislation on electronic communication is applicable to a broad scope of administrative procedures. Practically, the possibility to communicate electronically in a specific case depends on the aspiration

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[1632] ". Act of 29 April 2004, on complementing the General Administrative Law Act with regulation on traffic (i.e. communication) by electronic means between residents (literally: citizens) and Government and modification of related regulation (Act on electronic administrative communication) Stb. 2004, 214, Explanatory Memorandum TK (Lower House) 2001-2002, 28 483, nr 3, p.1 (*Wet van 29 april 2004, houdende aanvulling van de Algemene wet bestuursrecht met regels over verkeer langs elektronische weg tussen burgers en bestuursorganen en daarmee verband houdende aanpassing van enige andere wetgeving (Wet elektronisch bestuurlijk verkeer), Staatsblad 2004, 214.*

[1633] Literally: "Act on electronic administrative traffic*.*

[1634] See Act on Electronic administrative communication Stb. 2004, 214, Explanatory Memorandum TK (Lower House) 2001-2002, 28 483, nr 3, p.5 (*Wet Elektronisch bestuurlijk verkeer, Memorie van Toelichting, TK, 2001-2002, 28 483 nr. 3, p 5*).

[1635] Electronic communication does not only encompass communication through e-mail, websites and intra- or extranet, it can also encompass sms (short messaging service). Sms however, will, due to its cursory nature, not fulfil the requirement of satisfactory reliability.

[1636] Memorie van toelichting bij "Aanvulling van de Algemene wet bestuursrecht met regels over verkeer langs elektronische weg tussen burgers en bestuursorganen" (Wet elektronisch verkeer), TK, 2001-2002, 28 483 nr. 3, p. 3

of the administration to enable electronic communication. Currently existing possibilities range from tax declarations (VAT and corporate income tax) to registration of a new company at the Chamber of Commerce to declaration of customs levies.

Although the Act on Electronic Administrative Communication does not explicitly aim to regulate electronic communication between administrative organs, in doctrine and in practice it is advocated that the scope of application of the act also sees on communication between administrative organs[1637].

C. Specific business processes

This section of the study will examine specific business processes. Specific examples of common document types will be examined to determine the validity and recognition of their electronic counterparts.

Discussed will be credit arrangements (bills of exchange and documentary credit), the transportation and storage of goods (bills of lading and storage agreements), cross border trade formalities and financial- and fiscal management (electronic invoicing and accounting).

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

Bills of exchange are used for various purposes. The bill of exchange is a very old institution and originates from around the thirteenth century[1638]. The bill of exchange evolved gradually from functioning as means of payment to a more multifunctional instrument for e.g. credit and investment.

The current Dutch legislation on bills of exchange is mostly based on the Geneva Convention providing a Uniform Law for Bills of exchange and Promissory Notes, from 1930, and is embodied in the Commercial Code[1639] (*Wetboek van Koophandel*). According to the Commercial Code a bill of exchange needs to contain a number of mandatory statements. If a bill of exchange lacks one of these statements it is regarded invalid, with a few exceptions[1640].

Although the Commercial Code does not specifically state that a bill of exchange needs to be a paper document, the law is indicative that a bill of exchange is typically laid

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[1637] See: G. Overkleeft-Verburg. "Het Wetsvoorstel elektronisch bestuurlijk verkeer: een valse start?" *NTB* (*Nederlands Tijdschrift voor Bestuursrecht*) 2002,10 p. 297-314.

[1638] F.G. Scheltema, W.R. Meijer, *Wissel en chequerecht*, Alphen aan den Rijn Samsom H.D. Tjeenk Willink, 6e druk p. 35 .

[1639] section 100 et seq. Commercial Code (*Wetboek van Koophandel*) Stb, 1826, 18, most recently changed by law of 4 March 2004, Stb.2004,117.

[1640] Under circumstances a bill of exchange can be regarded valid even it is incomplete. This is the case when the Bill of Exchange does not state the date of payment or the place of the bill of exchange is drawn and the place where the bill of exchange is payable, section 101 Commercial Code.

down in a paper document. However the statements that have to be incorporated in a bill of exchange can, for the most part, be created electronically, including the (electronic) signature.

Under Dutch law the electronic signature has the same legal consequences as a handwritten signature. In the Memorandum of Reply the Minister of Justice stated that when a signature is necessary for constitution of the agreement an electronic signature (that meets the requirements for authentication) is sufficient[1641]. In theory an electronic signature can therefore be used for a bill of exchange. This however does not answer the question whether an electronic document is suitable to replace a paper bill of exchange.

A study on commercial law and modern technology from 2001 has examined the functions of -e.g.- the bill of lading and the possibility to replace paper bills of exchange with electronic bills of exchange[1642].

The conclusion -on this specific question- was that electronic bills of exchange can perform the same function as their paper equivalent *when* using the technology to (1) be able to consult the electronic bill of exchange, (2) minimize the risk of fraud and (3) increase the strength of proof [1643]. Potential problems with the signature, which is required on the bill of exchange, might be solved by using an electronic signature. This electronic signature needs to be generated in a way that the authenticity is guaranteed sufficiently and it must be possible to create an original which is distinguishable from copies of the original.

Involvement of a trusted third party might be a solution to the problems that occur with regard to the difficulties with original and the non-distinguishable copies.

C.1.2. Documentary credit

Documentary credit plays an important role in international transportation. The (issuing) bank of the buyer (applicant) guarantees the seller (beneficiary) that a certain amount of money will be paid to the seller by the bank if the seller meets certain requirements. The seller substantially profits from this because the bank -in general- is a far more reliable debtor, and the buyer has certainty about the requirements he has to meet in order to get paid. Documentary credit can also be used as a credit instrument.

[1641] Amendment of book 3 and book 6 of the Civil Code, the Telecommunications Act and the Economic offences Act , implementing Directive nr. 1999/93/EG of the European Parliament and the Council of the European Union of 13 December 1999 on a common framework for electronic signatures (PbEG L 13) (hereinafter referred to as: Electronic Signatures Act), Memorandum of Reply, EK (Higer House) 2002-2003, 27 743, nr. 265a p. 10 (*Aanpassing van Boek 3 en Boek 6 van het Burgerlijk Wetboek, de Telecommunicatiewet en de Wet op de economische delicten inzake elektronische handtekeningen ter uitvoering van richtlijn nr. 1999/93/EG van het Europees Parlement en de Raad van de Europese Unie van 13 december 1999 betreffende een gemeenschappelijk kader voor elektronische handtekeningen (PbEG L 13) (Wet elektronische handtekeningen), Memorie van Antwoord, EK 2002-2003, 27 743 nr. 265a p.10).*

[1642] R.E. van Esch. J.W. Winter, G.J. van der Ziel, Afscheid van papier: handelsrecht en moderne technologie, Deventer W.E.J. Tjeenk Willink, 2001.

[1643] R.E. van Esch. J.W. Winter, G.J. van der Ziel, Afscheid van papier: handelsrecht en moderne technologie, Deventer W.E.J. Tjeenk Willink, 2001 p.31.

Documentary credit is based largely on convention. The law does not state an explicit legal framework for documentary credit, so formal requirements do not have to be met.

An important role in documentary credit is reserved for the ICC[1644] (the International Chamber of Commerce). The ICC has developed the Uniform Customs and Practices for Documentary Credit (UPC500). This is extended by the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (eUPC). Parties have to agree on application of these rules. Whatever the legal status of eUPC may be, its application on documentary credit agreements requires the parties to express their will to do so, both for paper and for electronic documents. If parties agree on the application of these rules they can -theoretically- use an electronic documentary credit.

The eUCP entered into force on April 1st 2002, and must be considered to be an extension to the UCP. In combination with the UCP, the eUCP intends to provide the necessary regulatory framework for the presentation of the electronic equivalents of paper documents under letters of credit.

The eUCP aims towards technological neutrality. Its main function is to redefine certain concepts of the UCP that must by necessity be interpreted differently in an electronic context. The eUCP appears to be entirely compatible with and complementary to the e-signature directive. Entity authentication and verification of integrity are key notions within the eUCP, as within the e-signature directive.

It is defendable that, from a legal point of view, a documentary credit can be constituted in electronic form. Since there is no explicit legal framework on documentary credit, however, it remains uncertain if and to what extent an electronic documentary credit is regarded equal with a paper documentary credit.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

In order to be able to organize the transportation of goods, a number of documents are issued. One of the possible documents used in transportation of goods over sea -maritime traffic- is the bill of lading. The bill of lading is a document issued and signed by the carrier[1645].

The bill of lading is a negotiable instrument; it represents the transported goods themselves. The Dutch legislation that applies to agreements on maritime traffic, and more specifically to bills of lading ("cognossementen"), is Book 8, title 5 of the Dutch Civil Code.

It is not surprising that a great deal of maritime transportation that starts or ends in The Netherlands involves international transport. The Netherlands is a member state of the Brussels Cognossementsverdrag of 1924 (hereinafter referred to as the Hague-Visby rules).

[1644] See http://www.iccwbo.org.

[1645] See G. van Empel, J.B. Huizink, *Betaling, waardepapier en documentair krediet*, Deventer: Kluwer 1997, p. 83.

In the Dutch legislation the Hague-Visby rules are rendered direct effect though article 8:371 lid 3 Civil Code when either (1) the bill of lading is made in a (Hague-Visby) member state, or (2) when the transportation takes place from a harbour in a (Hague-Visby) member state, or (3) when the agreement, whereof the bill of lading functions as proof, aims to claim effect of the Hague-Visby rules. Most international transports by sea are carried out under these rules. Another treaty that can apply on the international transportation of goods are the Hamburg Rules, as set out by UNICTRAL in 1978.

Neither the Dutch Civil code, nor the Hague-Visby rules define the term "bill of lading". The Dutch legislator is of the opinion that the lack of a (clear) definition has the advantage that the Court has the freedom to regard documents similar to bills of lading, as a bill of lading. A definition of the term bill of lading would bare the risk, according to the Dutch legislator, that a document that is intended as a bill of lading by parties, but does not meet the definition, would not be seen as a bill of lading, with can have big consequences for the parties involved[1646].

Although the law does not provide a definition of the term "bill of lading", it does specify which information can be included in the bill of lading and which standards must be met by the bill of lading. The standards that must be met are related to the date, signature, place of delivery and to the identity (or not) of the person to whom the goods should be delivered to[1647].

The Dutch Civil code does not state that the bill of lading needs to be in paper form. Commonly a electronic bill of lading is deemed possible although problems (see below) need to be overcome. A general framework of rules for the use of electronic bills of lading is drafted by the CMI. Parties involved may choose to voluntarily apply these rules to the bill of lading.

In practice the electronic bill of lading is used rather then a paper bill of lading. Problems in its use however do still occur. Some parties are not willing to accept an electronic bill of lading. For a number of parties the paper still has "emotional value". Use of electronic documents in combination with electronic documents does occur frequently.

C.2.2. Storage contracts

The storage of goods plays an important role in international commerce. Mass production, industrialisation and specialisation have led to the need for professional storage. The Dutch legislator has acknowledged this by emphasizing the use of the storage contract by professional parties. A storage contract is defined as an agreement in which one party, the depository custodian, binds himself to store and return goods that the depositor trusts to him[1648].

The storage of goods is, for the most part, regulated in Book VII of the Dutch Civil Code. Before this part of the (new) Civil Code came into force, storage contracts were only concluded after the goods, that where to be stored, had been brought to the power of the depositor. Under current legislation, transfer of goods to the depositor is not necessary for the conclusion of the contract. Parties are thus able to conclude a valid and enforceable storage contract for future storages.

[1646] Explanatory Memorandum, 14 049, Parlementairy history 8, p. 433.

[1647] Section 8:399 Civil Code.

[1648] Section 7:600 Civil Code.

Book VII, title 9 of the Civil Code, which regulates the storage of goods, does not contain mandatory rules. Parties can therefore, if they choose, decide on specific agreements. Dutch law does not contain specific regulation on the possible use of electronic storage agreements. Because the form of the storage agreements does not need to meet specific form requirements and since the regulation of storage agreements does not require a written document as a formal requirement, it is deemed possible to conclude (future) storage agreements by electronically. There is no clear standard on the criteria for the use of electronic storage contracts. Parties have the freedom to arrange this matter.

C.3 Cross border trade formalities: customs declarations

The Netherlands is an important junction of international transportation of goods and profits of an efficient handling and processing of customs formalities. Simplification of customs formalities contributes to efficiency in international transportation.

For transport (transportation of goods between countries within the EU) the use of electronic declarations is mandatory. The system used is Transit-NCTS (New Computerized Transit System). For using this method of filing customs declarations a permit is needed. Filing paper declarations is only possible for (private) travellers and in case of emergency. A case of emergency exists in case of a technical failure, when no communication through electronic messages is possible.

In case of import and export to or from the EU, the Dutch customs authority offers the possibility to file customs declarations through paper as well as electronically. For import EDI (Electronic Data Interchange) is used, for export EDIFACT (Electronic Data Interchange for Administration, Commerce and Transport) is used. Although the possibility of filing the customs declaration in paper is offered, the customs authority prefers electronic declarations.

In practice the possibility to handle cross border trade formalities electronically is experienced by (large) companies as very efficient.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing

Electronic invoicing can be a suitable solution for handling (part of) the financial administration quickly and effectively. The Dutch government has acknowledged this as early as 1992 when the Dutch tax authority started a test (limited to a number of participants) on using EDI (Electronic Data Interchange) for invoicing. Shortly thereafter a more definite regulation enabled electronic invoicing through EDI.

By law of 18 December 2003[1649] the Dutch legislator implemented directive 2001/115/EG which aims to simplify, modernize and harmonize the conditions laid down for invoicing in respect to value added taxes. The Act on VAT (*Wet op de omzetbelasting*) was altered accordingly.

For The Netherlands the implementation of the directive means an extension of the data an invoice needs to contain[1650]. The legislator aimed to implement the directive in a manner that imposed as less administrative burden on the business sector as possible.

The additional options that where allowed by the directive were largely disregarded. When trade partners make use of electronic invoicing by means of EDI (Electronic Data Interchange) they need to make use of a paper document[1651] .

Storage of electronic invoices is allowed in other member states and third countries outside the E.U[1652]. The invoices have to be stored for a period of 7 years[1653].

[1649] Act of 18 December 2003 on alteration of the Turnover Tax Act 1968 with the aim of simplification, modernization, and harmonisation of the currently aplicable conditions in the field of VAT, (Directive on jnvoicing), Stb. 2003, 530 *Wet van 18 december 2003, houdende wijziging van de Wet op de omzetbelasting 1968 met het oog op de vereenvoudiging, modernisering en harmonisering van de ter zake van de facturering geldende voorwaarden op het gebied van de belasting over de toegevoegde waarde (Richtlijn facturering), Stb. 2003,530.*

[1650] Act of 18 December 2003 on alteration of the Turnover Tax Act 1968 with the aim of simplification, modernization, and harmonisation of the currently aplicable conditions in the field of VAT, (Directive on jnvoicing), Stb. 2003, 530 Explanatory Memorandum, TK (Lower House) 2002-2003, 29 036, nr.3 p.4 (*Wet van 18 december 2003, houdende wijziging van de Wet op de omzetbelasting 1968 met het oog op de vereenvoudiging, modernisering en harmonisering van de ter zake van de facturering geldende voorwaarden op het gebied van de belasting over de toegevoegde waarde (Richtlijn facturering), Stb. 2003, Memorie van toelichting, TK 2002-2003, 29 036, nr. 3 p.4.*

[1651] Section 35b (2b) Turnover Tax Act (*Wet op de Omzetbelasting*).

[1652] Act of 18 December 2003 on alteration of the Turnover Tax Act 1968 with the aim of simplification, modernization, and harmonisation of the currently aplicable conditions in the field of VAT, (Directive on jnvoicing), Stb. 2003, 530 Explanatory Memorandum, TK (Lower House) 2002-2003, 29 036, nr.3 p.8 (*Wet van 18 december 2003, houdende wijziging van de Wet op de omzetbelasting 1968 met het oog op de vereenvoudiging, modernisering en harmonisering van de ter zake van de facturering geldende voorwaarden op het gebied van de belasting over de toegevoegde waarde (Richtlijn facturering), Stb. 2003,530, Memorie van toelichting, TK 2002-2003, 29 036, nr. 3 p.8.*

[1653] Section 2:10 Civil Code and section 52 State taxes Act (*Algemene wet inzake Rijksbelastingen*). Documents regarding VAT-obligations for immovables need to be archived for 9 years.

C.4.2. Electronic accounting

Every business is obliged to account for their financial situation. Dutch law does not constitute a explicit legal framework for electronic accounting. In the Netherlands it is possible to account electronically as well as in paper form. The paper form however is only very rarely used, and only by very small businesses. From January 2005 businesses are obliged to report several taxes, including VAT and corporate income tax, to the tax authorities by electronic means. The accounting itself can be done either in paper or electronically,

The annual reports needed to be filed in paper at the Chamber of Commerce, until January 2006. From then on it will be -under some conditions and only for intermediates- possible to file the annual reports electronically. This is the first step towards complete electronic processing of financial data.

The Ministries of Justice and Finance have initiated the "NTP" (Dutch Taxonomical Project - *Nederlands Taxonomie Project*). The NTP aims to develop a method to make it simpler for corporations to file their financial data through electronic means, through "XBRL[1654]". The Chamber of Commerce has aimed to be able to process annual reports embodied in XBRL starting January 1st 2007.

D. General assessment

D.1 Characteristics of Dutch eCommerce Law

- Dutch commerce legislation has always allowed the parties involved a lot of freedom. This expresses itself -for instance- through freedom of form in contract law. Parties can, *with the exception of certain more formal documents -which have to meet specific (non electronic) standards-*, either agree on a certain form or constitute their agreements free of form.

  Dutch eCommerce laws are consistent with this principle. With the exception of more formal types of documents, parties are able to use electronic documents for the constitution of an agreement.

- Before the implementation of the eCommerce directive in Dutch law, the evidential value that was accredited to electronic documents was judged by the court according to the circumstances of the matter. The currently existing eCommerce laws provide certainty on this matter when the agreement requires a written document (and does not involve one of the named exceptions of article 6:227a Civil Code) and the electronic documents involved, meets the guarantees as set out in article 6:227a Civil Code.

- With regards to administrative documents, electronic communication is possible on a large scale. In the future electronic contact between residents/civilians and the Dutch administrative organs will expand.

[1654] XBRL is an (XML based) open standard for the compiling and (electronically) exchanging of business reports and data through Internet.

- For negotiable instruments this is different. Traditional papers are frequently used. Although the law often does not explicitly impose obstructions, custom and lacking technical possibilities may.

D.2 Main legal barriers to eBusiness

- The Dutch government is quite dynamic when it comes to enabling the practical use of electronic communication. Dutch legislation therefore (in most instances) aims to formulate legislation in a way that is technology neutral. In that respect the legal barriers to using eCommerce are not substantial.
- The technology neutrality however does provide some uncertainty about the legal validity of an electronic document. Trade partners might therefore be reluctant to use certain electronic documents, especially in where the original document needs to be unequivocally identified, or when cross-border validity becomes a concern.

D.3 Main legal enablers to eBusiness

- Dutch legislation allows trade partners a lot of freedom in contracting. As stated, parties have a lot of freedom when it comes to form requirements. The Dutch Government is very active in stimulating the use of electronic communication. The implemented directives regarding eCommerce and eSignatures have contributed to the use of electronic communication.

Turkey National Profile

A. General legal profile

The Turkish State is a Republic (Constitution Art.1) and the Turkish Republic is a democratic, secular and social state governed by the rule of law (Constitution Art.2). As for the administrative structuring, Turkey consists of 81 provinces, 933 districts (sub-regions of provinces) and 3226 municipalities.

Since Turkey is a unitary state, the laws are binding throughout the whole country. As Turkey is a member of the Continental European Civil Law System, just like any other laws of the Country, the Commercial Code and Code of Obligations reflect the features of the said legal system. The Commercial Code, being a separate and individual Code, is under the influence of Laws of many European countries. As for the Code of Obligations, constituting an integral part of the Civil Code, it is adopted from the Swiss Civil Code-Code of Obligations. Currently and alongside with numerous other laws, draft amendments of both the Commercial Code and the Code of Obligations have been prepared in order to ensure the legal harmonization in line with the EU negotiation process.

Under the Turkish judicial system, the Courts are independent in the discharge of their duties, (Constitution Art.138/1) and thus no organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars or address recommendations or suggestions (Constitution Art.138/2). No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial (Constitution Art.138/3).

As for the Turkish judicial organization; the Judicial Courts are organs charged with criminal and civil judgment. They are three tiered[1655]. The first degree judicial courts are spread through out the country in accordance with the essence of administrative unit. The basis of these courts, called first degree or degree courts, is formed by "Courts of First Instance". Courts of First Instance dealing with civil law matters are called "Civil Courts of First Instance", which are single judge courts. In places where commercial transactions are prevalent, there are Commercial Courts of First Instance consisting of three judges.

Commercial disputes of which the amount or value exceeds 5490.-YTL (approx. 2.580 EUR) are tried by the Civil Court of First Instance or Commercial Court of First Instance both having the character of first degree civil courts; whereas the cases including an amount or value less then the aforementioned are tried by Civil Courts of the Peace. The District Courts, as second degree judicial courts, examine and adjudicate applications to be conducted against the judgments and decisions of first degree courts that are not final. The appeal against the decisions given by courts of justice is handled by the High

[1655] "Regional Courts of Justice" constituting the "Second Degree" are founded by virtue of Law no: 5235, dated 26.09.2004. The said Law has entered into force in 01.04.2005 and the date for the Regional Courts of Justice to initiate their duties throughout the country, will be announced by The Ministry of Justice until latest 01.04.2007. (Provisional Art. 2.) Until the said date, within the judicial system 2 graded, judicial order will prevail instead of 3 graded. Aybay, Aydın/Aybay, Rona; Introduction to Law, Istanbul 2005, pg. 256, fn. 72.

Court of Appeals having the character of a last instance court. The High Court of Appeals reviews the decisions given by the commercial courts and generally all civil and criminal courts from the standpoint of contradiction to law.

B. eCommerce Regulations

Notwithstanding the discussions in the Turkish legal jurisprudence over issues with respect to the validity and recognition of electronic documents, provisions and studies related to electronic documents are starting to be included within e-government projects and legislative regulations that are being carried out in recent years. In this section, with respect to the legal validity of electronic documents, the fundamental principles in Turkish jurisprudence and provisions set forth by the legislative regulations that are currently in force or draft bills regulations will be evaluated.

B.1 eCommerce contract law

B.1.1. General principles

"Electronic contracts" in a broad sense entail the contracts that are concluded by means of electronic communication devices and methods.[1656] Under Turkish Law the term "electronic" used in the sense of "electronic contract" emphasizes the devices used merely in the conclusion and occasionally in the execution of the contract. According to jurisprudence[1657], just because of its abovementioned feature there is no need to create such a separate and particular contract category as "electronic contracts" and to stipulate special rules to be applied to such contracts.

Accordingly, it is possible for the provisions of the Code of Obligations regarding the conclusion, validity and execution of contracts to be applied to contracts concluded in an electronic environment to the extent that these rules are applicable in terms of the features of these contracts. In that sense, there is no special provision in the Code of Obligations relating to the electronic contracts[1658].

Generally Turkish Law is considerably flexible as to the validity of the contracts. Under Turkish contract law, it is sufficient for the parties to declare their mutual and compatible will and to have consensus on the essential elements of the contract to ensure the conclusion of a contract [1659]. With respect to the form of contracts the Turkish

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[1656] Falcıoğlu, Mete Özgür; Electronic Sales Contract and Its Conclusion Under Turkish Law, Ankara 2004, pg. 78; Sağlam Atabarut, İpek; Electronic Contracts, Istanbul 2003, pg. 50.

[1657] Özdemir Kocasakal, Hatice; Determination of the Applicable Law and Competent Jurisdiction in the Resolution of the Disputes Arising From Electronic Agreements, Istanbul 2003, pg. 37-38;

[1658] Art. 9/A of Law Regarding the Protection of the Consumer setting forth the definition of the distant contracts is a provision where the definition of the electronic contract is legally expressed: " the contracts that are concluded in written, visual, telephone and electronic environment or by means of use of other communication devices and without face to face contact with the consumers and by which the instantaneous or afterwards delivery or performance of the goods and services are agreed"

[1659] Code of Obligations Art.. 1,2.

Code of Obligations recognizes the principle of freedom of contracts as a rule.[1660] Therefore, in cases where a form is not explicitly required by law (for example the sales and purchase of movable goods) the parties can express their wills verbally. Nevertheless, the law may stipulate a precise form (such as an official form, a written form etc.) as a condition for the validity of some contracts such as bailment, assignment of claims, promise of donation. In cases where the law requires a contract to be concluded in a precise form, as a rule the stipulated form is a "validity condition"[1661]. Thus, contracts that are not concluded in the statutorily required form are void.[1662]

With regards to the contracts that are required to be concluded in written form, the draft bill of Code of Obligations[1663] which is currently held under consideration before the Prime Ministry, points out the signature as the most important element of the written form. According to Article 14/f.1 of the Draft Bill of Code of Obligations, it is mandatory in the contracts that are required to be concluded in written form to have the signatures of the parties incurring a debt. On the other hand, by virtue of Article 14/f.2 and unless otherwise is stipulated by law, texts that can be sent and stored by means of a written letter, by a telegraph of which the original is signed by the party incurring a debt, by fax provided that it is confirmed and by other similar communication devices or secure electronic signature, supersedes written form. By virtue of Article 15 regulating the signature; "it is obligatory for the signature to be affixed by the party incurring debts in handwriting. A secure electronic signature has the same legal effect and consequences as the hand-written signature", therefore ensuring that an electronic signature is accepted to be equivalent with the signature in handwriting.

The Electronic Signature Law[1664]' that was published in the Official Gazette dated 23.01.2004 and that has entered into force on 23.07.2004 states that the Secure Electronic Signature has the same legal effect and consequences as the hand-written signature. The Turkish Electronic Signature Law that was prepared based on EU 99/93/EC Directive includes provisions with regards to the consequences of electronic signatures in terms of substantive law and evidence law[1665]. Unlike the EU 99/93/EC Directive, the Turkish Electronic Signature Law does not make a distinction between a qualified electronic signature and an advanced electronic signature[1666]; but it merely puts a legal emphasis on secure electronic signatures based on qualified electronic certificates[1667]. As a consequence of this emphasis, as explained above, it is merely the

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[1660] Code of Obligations Art. 11/f.1 "The validity of the contract is not bound to any form unless there is an explicity in law"

[1661] Code of Obligations Art.. 11/f.2.

[1662] Such as sales and purchase contract for real estates.

[1663] http://www.kgm.adalet.gov.tr/borclarkanunu.htm.

[1664] http://www.tk.gov.tr/eng/pdf/Electronic_Signature_Law.pdf.

[1665] Keser Berber, Leyla ; A new regulation field for the telecommunication board: e-signature, http://www.virtuallawjournal.net/?nodeid=29&lang=en.

[1666] Keser Berber, Leyla/Beceni, Yasin/Sevim, Tuğrul ; The Improvement and Consequence Report of National Coordination Commission's Working Group on Electronic Signature Law, Istanbul 2005, http://bthukuku.bilgi.edu.tr/documents/e-imza_hukuk_calisma_grubu_raporu.pdf.

[1667] The secure electornic signature is defined in Article 4 of Electronic Signature Law as follows:
„ARTICLE 4. — Secure Electronic Signature is an electronic signature, which;
a) exclusively belongs to the signatory,
b) is cerated only by means of secure electronic signature creation device that is under the

electronic documents signed by secure electronic signatures that will have the same legal effect as written documents that are signed on paper; and it is clearly set forth as a legal interpretation that only electronic documents signed by secure electronic signatures have power of proof in terms of evidence law and will be deemed conclusive proof until proven otherwise.

Although Article 6 of the Electronic Signature Law states that secure electronic signatures shall have the same legal effect and consequence as hand-written signatures in terms of substantive law, the law remains silent about the legal effects and consequences of electronic documents signed by secure electronic signatures from a substantive law perspective. At that point, the interpretation to be conducted in the light of the basic principles set forth by the Electronic Signature Law and the Code of Obligations leads us to the above stated conclusion, and in other words it may be said as an outcome that electronic documents signed by a secure electronic signature and written documents signed by hand-written signatures on paper will be subject to the same legal consequences.

Under Turkish law the existence of a written document is not typically required for the conclusion of a contract.[1668] However, the obligation of abiding by a form of a certain kind may be required by a mandatory regulation. Nevertheless, in case of a dispute, the proof of such legal relation is admissible on the condition that it is concluded in that certain form. In such cases the form has the character of a "condition of proof" and a rule of judicial procedure.[1669]

As for the electronic signature's power of proof, Article 22 of the Electronic Signature Law states that secure electronic signatures shall have the same power of proof as the hand-written signature; whereas with respect to the power of proof of electronic documents signed by secure electronic signature Article 23 of Electronic Signature Law states:

> *"ARTICLE 23.- The below stated Article 295/A is added following Article 295 of Law of Civil Procedure no:1086, dated 18.06.1927*
>
> *ARTICLE 295/A- Electronic data created duly by means of a secure electronic signature shall have the effect of a bill. Such data shall serve as conclusive evidence until otherwise is proved."*

The above quoted provision attributes a power of conclusive evidence to the data (documents) created by means of secure electronic signature in terms of any dispute. The characteristic of conclusive proofs is that they are binding to the judge, who is obliged to accept a matter that is proven by one of the conclusive evidences as being accurate. In other words, the judge does not have discretion over the said evidence.

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exclusive disposal of the signatory,
c) enables the identification of the signatory based uppon qualified electronic signature
d) enables the determination as to whether any subsequent alteration has been made in the electornic data that is signed " This definition is a mixed definition including the requitements attached to advanced electronic signature by virute of Article 5/I of EU 99/93/EC Directive. For detailed information please see Keser Berber/ Beceni/ Sevim, a.g.e.

[1668] However, law may require a written form for the validity of some contracts. Such as; bailment, assignment of claims, promise of donation.

[1669] According to Article 288 of Civil Procedure Law; transactions of which amount exceeds 430 ytl, at the time of conclusion; shall be proved by a bill. http://www.hukuki.net/kanun/5236.15.text.asp.

As an evaluation from a Commercial Law perspective with regards to electronic documents, the Turkish Commercial Code in force (TTK)[1670] states that the evidence and its submission in commercial cases is subject to Civil Procedure Law (HUMK)[1671] (TTK Art. 4). According to Article 288/f.1, all legal transactions of which the amount at the time of conclusion exceeds 430.-YTL (approx. 200 EUR), (irrespective of having a commercial character or not) shall be proven by a bill (conclusive evidence).

In addition to the above mentioned evidence and proof rules set forth by HUMK, the parties of a contract are allowed to conclude an evidence contract (HUMK Art. 287-289). In both civil and commercial contracts, the parties may agree without restriction upon the evidence to be used in proving the disputed matters. In that case, the court is bound by such contract of evidence concluded by and between the parties.[1672]

The legal and commercial disputes of which the value and amount exceeds 430 YTL can be proven by electronic documents which are not signed by a secure electronic signature, but only on the condition that there is a contract of evidence between the parties satisfying the requirements set forth in Article 287-289.

Under Turkish Law and by virtue of Article 20, paragraph III of the Turkish Commercial Code no: 6762, in order for notices and notifications intended to cause the other party to fall under default or to terminate or revoke the contract to be valid, such notices and notifications shall be made by means of a public notary or a registered and reply-paid letter or telegraph. Notices and notifications regarding all kinds of matters between merchants except for the ones stated in Article 20/III of Turkish Commercial Code and the ones that are not subject to exceptions in terms of special transactions (such as notifications for registration in the share ledger) can be made in any form including electronic forms. However, notices and notifications made in such forms may always be subject to objection, and do not have any effect unless the other party admits that such notification is directed to him. This rule applies to notifications to be made between individuals subject to civil law as well.

Even though notifications within this scope can be made by drawing on various technologies,[1673] or by using a secure electronic signature and time stamp as stated within the scope of Electronic Signature Law no: 5070, or upon a mutual agreement of parties over the procedure of an electronic notification and by eliminating the obstacles that may arise in terms of validity and evidence law, currently this method has not yet been preferred for any concrete matter.

Under Turkish law, the archiving obligation in a general sense is attributed to merchants by virtue of the last paragraph of Article 66 of Turkish Commercial Code stating: *"Merchants are obliged to keep documents and papers that they receive due to affairs relating to their business such as letters, correspondences,, telegraphs, invoices, scales and documents indicating their payments, copies of the letters, correspondences and telegraphs that they have written and documents such as contracts, guarantees,*

[1670] http://www.mevzuat.adalet.gov.tr/html/997.html.

[1671] http://www.mevzuat.adalet.gov.tr/html/435.html.

[1672] Kuru, Baki/Arslan, Ramazan/Yılmaz, Ejder; Textbook for Civil Procedure Law, Ankara 2005.

[1673] These technologies may be defined technically as all technologic system, process and applications inalterably and undeniabley determining whether the electronic document has been sent to the determined target source (the party to which the notification is to be made), when and by whom it has been sent, whether and when the electronic document is received by the addressee.

bailment and other letters of commitment and court orders, in an orderly manner as files." The term for merchants' above quoted liabilities is 10 years as from the date of issuance of such documents according to Article 68/I of the Turkish Commercial Code.

Merchants are also obliged to keep the mandatory commercial books for 10 years as from the last date of record and as from the date of arrangement of accounts. With respect to physical conditions as to how the merchants shall fulfill their archiving obligation, the last paragraph of Article 66 states that the documents shall be kept in an orderly manner as files. Other than the aforementioned, there is no stipulation as to a concrete archiving obligation and method regarding electronic documents for merchants. However, Article 64 and 65 of the Draft Bill of the Turkish Commercial Code aim to emphatically introduce the possibility of electronic archiving into Turkish law.

Under Turkish Law there is no existing court decision yet regarding electronic documents, electronic signature and electronic contracts.

B.1.2. Transposition of the eCommerce directive

There has not been any study in Turkey yet concerning the systematic transposition of the Electronic Commerce Directive in Turkish Law. However, the provisions regarding service providers in Articles 14 and 15 of the Directive are regulated within the scope of intellectual property in Annexed Article 4 of the Code of Intellectual and Artistic Works.

Nevertheless, when the sources of positive law under Turkish Law are to be reviewed it can be observed that several issues suggested in the EU e-Commerce Directive are regulated in sources of positive law from the aspect of those who provide or benefit form the service. Basically, the elements of "information society services"[1674] as defined in EU 98/34/EC Directive[1675] are regulated in Article 9/A of the Consumer Protection Law no: 4077[1676], as amended by Law no: 482, under the heading "Distant Contracts"[1677] in terms of the services provided to the consumers. The Regulation Concerning the Procedures and Principles for the Application of Distant Contracts issued by the Ministry of Industry and Commerce based upon Article 31 of the Consumer Protection Law no: 4077 and Article 9/A that is added to said Law by Law no: 4822 and published in the Official Gazette no: 25137 dated 13 June 2003 contains regulations that are in conformity with Article 5 and 9/I of the e-Commerce Directive.

There is a sector specific regulation in Turkish Law with regards to "unsolicited commercial communication" stated in Article 7 of the e-Commerce Directive. The said

[1674] "at a distance", "by electronic means", "at the individual request of a recipient of services"

[1675] Directive 98/34/EC, Art.1.

[1676] The definitions set forth in Article 3 of the Law Concerning the Application of Law no:4077, under the heading "Definitions" where the terms regulated by that Law are explained, are in compliance with sub paragraphs (b), (d) and (e) of Article 2 of e-Commerce Directive.

[1677] Art. 9/A of Law Regarding the Protection of the Consumer setting forth the definition of the distant contracts is a provision where the definition of the electronic contract is legally expressed: " the contracts that are concluded in written, visual, telephone and electronic environment or by means of use of other communication devices and without face to face contact with the consumers and by which the instantaneous or afterwards delivery or performance of the goods and services are agreed".

regulation[1678] forbids the operators authorized by the Telecommunication Authority and the receivers to communicate including through e-mail for the purpose of political propaganda in the absence of assent. Furthermore, the said regulation grants the subscribers and receivers the right to reject the communications addressed by the operators for the purpose of marketing, thus based on an opt-out system. In addition, there are legal regulations in Turkish Law in compliance with Article 6[1679] and 8[1680] of the e-Commerce Directive.

With regards to electronic contracts there are no separate and specific provisions in the Turkish Code of Obligations; therefore and as explained above in detail it is accepted by the Turkish legal jurisprudence that the current rules regarding the form and conclusion of contracts are applicable to electronic contracts as well.

Various mandatory legislation requires certain contracts to be concluded in a written form as either a validity condition or a condition of proof. According to Turkish Law, contracts that are required to be concluded in official form (such as sales and purchase contracts for real estates, heritage contracts or contracts that are statutorily required to be subject to a special procedure (such as marriage) and commitment contracts (such as bailment and guarantee contracts) cannot be realized by means of a secure electronic signature (Electronic Signature Law Article 5/f.2). Therefore, the contracts falling under the said legal transactions are legally precluded from being concluded electronically.

Under Turkish Law, the use of electronic signatures is not a mandatory element for contracts to be concluded in an electronic environment. Nevertheless, due to the consequences of substantive law and evidence law attached to the "secure electronic signature" by the Electronic Signature Law no: 5070, it is an essential factor for the contracts to be concluded by secure electronic signature in terms of ensuring the transaction security.

[1678] See. Regulation Concerning The Process of Personal Data and Protection of Confidential Information in Telecommunication Sector. Art. 20

http://www.tk.gov.tr/Duzenlemeler/Hukuki/yonetmelikler/Kisisel_Bil_Yon_06_02_04.pdf

[1679] Regulation Concerning Principles and Application for Commercial Advertisements and Announcements published in the Official Gazette dated 14.06.2003, no 25318; sets and example for the regulations in Turkish Law in compliance with Article 6 of e-Commerce Directive

[1680] Article 9 under the heading "Internet" of the Turkish Bar Association's Ad Ban Regulation published in the Official Gazette dated 21.11.2003 sets an example for the regulations in Turkish Law in compliance with Article 6 of e-Commerce Directive as it regulates the information and presentations disclosed by attorneys to public through internet.

B.2 Administrative documents

There is no general regulation in Turkey with regards to the use of electronic documents in administrative processes between the citizens and public authorities. However, specific characteristics of administrative procedures realized in an electronic environment are stipulated in related regulations. Additionally, the regulations and standards regarding the use of electronic documents between citizens and public authorities will be determined upon the initiation of the e-government gateway application.

With regards to the use of electronic documents between the public authorities, the "Regulation Concerning Procedures and Principles for Official Correspondences"[1681], covering all public organizations and institutions, aims to ensure the accurate, fast and secure exchange of data and documents between the mentioned institutions. The security of electronic documents created, sent and stored in an electronic environment by public organizations and institutions, shall be fulfilled by electronic signatures, by virtue of Article 17/4 of the Regulation. Furthermore, "The Guide For Interoperability Principles" that has entered into force by means of the Circular of Prime Ministry no: 2005/20 sets the standards regarding the use of electronic documents in the public arena.

In terms of fulfilling obligations concerning social security and financial obligations, essential steps have been taken within the framework of e-government applications[1682]. Futhermore; the "e-document project" conducted by the Undersecretariat of Customs[1683] aims to promote the implementation of foreign trade transactions by the institutional parties involved in the business process by using standard e-documents in an electronic environment, and to provide an effective, fast and efficient and reliable e-business infrastructure.

With respect to e-Government, as the Emergency Action Plan prepared by the 58th Government of Turkey includes the e-Transformation Turkey Project, by virtue of the Circular of Prime Ministry no: 2003/12, published on 27 February 2000, the goals, institutional structure and application principles of the e-Transformation Turkey Project are determined. As mentioned in the Circular of Prime Ministry no: 2003/12, the primary objective of the e-Transformation Turkey Project is to prepare the conditions to establish a government structure using participatory, transparent, effective and simple business processes in order to provide a more qualified and fast public service to the citizens.[1684]

[1681] Decision of Council of Ministers Date: 18/10/2004 No : 2004/8125, OG, 2.12.2004, No : 25658, http://mevzuat.basbakanlik.gov.tr/mevzuat/metinx.asp?mevzuatkod=3.5.20048125.

[1682] Application of e-Declaration enabling the tax payers to conduct their declarations electronically (https://e-beyanname.mb-ggm.gov.tr/index.html); is an electronic portal established for the employers to submit the insurance premium documents of their employees through internet and make their accrual payments relating to their declarations by means of automatic payment and internet banking. e-Declaration application (http://www.ssk.gov.tr/wps/portal#).

[1683] http://www.gumruk.gov.tr/Content.aspx?cT=0&cId=0_1_12_2_5.

[1684] The objective of this project is as follows;
- Re-arrangement of policies and legislation regarding information and communication technologies after reviewing the EU acquis communitaire and adopting the action plan set for the candidate countires within the scope of eEurope+ to Turkey,

C. Specific business processes

In this section of the study, we will take a closer look at certain capita selecta of the applicable Turkish legislation and legal and administrative practice. Specific examples of common document types will be examined to assess the validity and recognition of their electronic counterparts, along with an analysis explaining the (lack of) prevalence of any allowable electronic document types.

The section below is organised according to four stages in the electronic provision of goods on the international market. They comprise credit arrangements, transportation and storage, cross border trade formalities and financial/fiscal management.

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

A Bill of Exchange is a document issued and signed by the exporter, indicating that the importer has paid or committed to pay the amount (amounting to the value of the exported good) in a certain term in the future to the exporter. Bills of Exchange are used by the exporter in order to be able to claim payment from the importer in return for the transportation of goods. Bills of Exchange in their current position are the result of quite a long development phase (the Hague and Geneva Conventions)[1685]. As Turkey is a party to the Geneva Convention, it transposed the provisions of the said Convention into the Turkish Commercial Code system[1686]. The Bill of Exchange is used in the form of a bill and a bond, and bills are predominantly preferred in foreign trade[1687]. Bills of Exchange are subject to the general principles that are applied to negotiable instruments[1688].

A bill is a valuable paper requiring its holder to pay a sum of money. Bills can change hands by endorsement and become subject to legal action by protest in cases where the

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- To develop mechanisms that will enable the citizens to participate in the decision making process in the public area by means of information and communication technologies,
- to contribute in the process of formulating the public administration in a transparent and questionable manner

- To foster implementation of good governance principles in the provision of public services by benefiting from information and communication technologies in the broadest sense,
- To generalize the use of information and communication technologies,
- The integration, monitoring and evaluation of repeated and overlapping investment projects of the administration in order to reduce the waste of source in the field of information and communication technologies and providing requisite coordination between the public institutions,
- To guide the private sector activities in the light of the above cited principles.

[1685] Öztan, Fırat; Kıymetli Evrak Hukuku (Law of Negotiable Instruments), Ankara 2004, pg. 65; Proy, Reha/Tekinalp, Ünal; Kıymetli Evrak Hukuku Esasları, (Principles of Negotiable Instrument Law) İstanbul 2001, pg. 104 vd.

[1686] Poroy/Tekinalp, pg. 107-108.

[1687] http://www.igeme.org.tr/TUR/pratik/belgeler.pdf,

[1688] TCC Art. 557-565.

debtor does not accept the bill or does not make the payment. Bills contain various essential functions in the new economic order: in terms of its development history the first function of a bill is being a "commercial paper" (means of payment). Bills may also be used as a "short term investment vehicle" and "guarantee vehicle"[1689].

There is no definition of a bill in the Turkish Commercial Code. Nevertheless, the bill has the legal character of a remittance and the mandatory and noncompulsory elements that bills shall contain as a condition of form are stated in Turkish Commercial Code[1690]. One of the mandatory elements required by Turkish Commercial Code in order for a negotiable instrument to have a character of bill is the hand-written signature of the drawer.[1691] The important thing here is that the signature that the bill bears shall be a hand-written signature. [1692] Even though the Law does not explicitly mention a use of "paper", the fact that the drawer shall sign the bill text with his hand-written signature and that a documentary stamp shall be affixed on the bill by virtue of the Documentary Stamp Duty Law leads us to the conclusion that the bill must be paper-based.

Nevertheless, as mentioned before, numerous amendments took place in Turkish Law in recent years having regard to the electronic developments. In fact, it has been stated before that the Draft Bill of Code of Obligations accepts the secure electronic signature to be equivalent with the hand-written signature by virtue of Electronic Signature Law no: 5070, and that it stipulates that for the contracts that are required by law to be concluded in written form, secure electronic signatures fulfill this condition. In this line, and with respect to Bills of Exchange, the Draft Bill of Turkish Commercial Code contains numerous new provisions regarding the use of electronics. Article 1504 of the Draft Bill however precludes the Bill of Exchange (bill, bond, check) from being issued electronically, even if only for a limited period of time. The reason for this is that quite strict conditions of form are attached to these bills in Turkish Law as a member of Continental Europe Civil Law and that the legislator is not willing to give up this convention until it deems the technologic developments to be absolutely trustworthy.

Accordingly, as mentioned in the last paragraph of the related article, in case the Ministry of Justice determines that the secure electronic signature is widely used in foreign countries, and upon the decision of the Council of Ministers, the Bills of Exchange will be allowed to be issued by secure electronic signatures as well.

The legal situation being as explained above, international trade creates solutions in line with its own needs and can reach the legal results that it needs in practice. As mentioned above, community applications provide services for the implementation of the documents and transactions used between parties in an electronic environment. The framework of these services and the mutual validity of the transactions implemented and the documents sent in an electronic environment are determined by the contracts that are agreed to by the parties as they participate in the community application, and the needed legal function is ensured, even though in a limited way.

[1689] Bond is a promise of payment issued by the debtor and directed to his creditor. It is usually presented by the holder at the due date to the creditor through the banks. It is can be endorsed. The subsequent explanations will merely evaluate the bill.

[1690] TCC Art. 583.

[1691] TCC Art. 583/8.

[1692] TCC Art 668/f.1.

C.1.2. Documentary credit

Although documentary credit is a popular method of payment in the international field, it is not regulated under Turkish legislation yet. The differences in the commercial and law systems of the countries oblige the application of international rules rather than national law systems, which is also more beneficial. Since the free will principle prevails in documentary credit systems, also in Turkey there was no need for a specific regulation on the documentary credit[1693].

The UN (United Nations) and ICC (International Chamber of Commerce) have issued special rules regarding the documents and terminology. The Uniform Custom and Practice for Documentary Credits/UCP. No.500 was reviewed and published by the ICC in 1993, in which it explained the documents related to documentary credits and the specific information related to the specific documents. Some amendments adopted on electronic production of the documents were made in the UCP 500 in 2002 (+eUCP, 2002). There are studies on less time consuming and more convenient applications of documentary credits by the standardisation of the necessary documents of the documentary credits[1694]. All these internationally accepted rules are also applicable in Turkey[1695].

The eUCP extends the documentary credits into the electronic era. It does not have any provisions regarding the issuance or notifications of electronic documentary credits, since either UCP or commercial practice provides its applications. The eUCP was drafted independently from specific technologies and improving electronic commerce systems. In other words, there is a certain convenience in using the specific technologies and systems for the electronic production of documentary credits; however no definition of them exists. Technology constantly improves and changes. Therefore the eUCP leaves the parties to agree on the technologies and systems to be used in their contract.

UCP 500's power stems from neither a law nor a treaty or commercial custom, but solely from a reference declaring the applicability of the UCP 500. UCP 500 thus becomes the part of the agreement[1696]. It is not sufficient only to notify ICC on the consensus for the application of UCP 500. It should be expressly stated in the documentary credit[1697].

There are more than two hundred documents that are required by the Turkish Customs to be originally produced. In the frame of the "e-Document Project in Foreign trade, e-Foreign trade transaction project" conducted by the coordination of the Undersecretariat of the Prime Ministry for Foreign Trade and Customs the number of necessary documents have been decreased. It is intended to facilitate the common electronic

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[1693] Kostakoğlu, Cengiz; Documentary credit and the disputes arising from the bank credit legislation, Istanbul 2001.

[1694] http://www.igeme.org.tr/TUR/pratik/belgeler.pdf, s. 2

[1695] Turkish Banks Association declared via Intenational Chamber of Commerce (ICC) that UCP 500 is approved by Turkish Banks.

[1696] Reisoğlu, Seza; Documentry credits and the problems in practice from the legal aspect. http://www.tbb.org.tr/turkce/konferans/sr%2Dkonferans%2Dseza.doc.

[1697] Şanlı Cemal/Ekşi Nuray; International Commercial law, Istanbul 2005, s. 83-84; Bağrıaçık Atilla/Kantekin Seyfettin; Foreign Trade documentary Credit Transactions in practice, Istanbul 1995.

sharing of information and documentation, thus rendering commercial transactions more convenient by reducing the amount of the documents involved.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

The bill of lading is called a "negotiable instrument", which has a specific importance under Turkish Law. A bill of lading is a type of negotiable instrument which is issued by the transportation carrier or by the captain (or authorised agent) to the shipper, unilaterally acknowledging that they have received the shipment of goods and that they have been placed on board a particular vessel which is bound for a particular destination and states the terms under which these goods received are to be carried[1698]. It is used in maritime trade for the carriage of goods, and is also internationally accepted.

The bill of lading is regulated by the Turkish Commercial Code, subtitle Maritime Trade[1699]. The Turkish Commercial Code acknowledges two types of bills of lading:

1. Shipped bill of lading: the bill of lading is issued following the shipment.
2. Bill of lading given to the shipper upon receipt of the goods: the bill of lading is issued following the delivery before the shipment.

Issuance of the bill of lading is solely possible upon the request of the shipper. Apart from that there is no other requirement by the commercial law. The bill of lading shall be issued by the carrier.

The form of the bill of lading: the bill of lading is a unilateral note payable of the carrier, a written declaration according to Article 1097 and at seq. of the Commercial Code. Consequently, it should be in compliance with the form requirements of the Code of Obligations which necessitates an original signature.

On the other hand, international evolutions and the developments in electronic commerce were taken into consideration and regulated differently in the draft of the Turkish Commercial Code. When the draft Code is approved, the rules are expected to allow the use of electronic signatures with regard to Bills of Lading (article 1228 of the draft Code). The written form requirement will be fulfilled by the secure electronic signature as a result of this provision and of the Articles 14 and 15 of the draft Code of Obligations.

[1698] Çağa, Tahir/Kender, Rayegan; Maritime Trade Law II, Istanbul 2004, p. 65.

[1699] TCC md. 1097 vd.

C.2.2. Storage contracts

The storage agreement was regulated under section 19 of theCode of Obligations entitled "Storage"; subsections storage, illegal consigning, warehouse contract and consignment to the hotel holder.[1700]

The components of the storage contract are as follows: the existence of the good to be preserved, the promise of the storage agent to preserve the good in a secure place; for the trust relationship between the parties it should be accepted that the party may demand the good back from the storage agent at any time; and as a last point the parties shall agree on these components for the constitution of the contract. However, there is no need for the delivery of the goods in question. Therefore the storage contract is a consensual contract[1701].

There is no form requirement on the validity of escrow contracts. The contract shall be concluded by the consensus of the parties. However, the goods in question must be delivered for the existence of the preservation obligation of the escrow agent. This obligation shall rise with the delivery of the goods. Therefore the escrow contract is a non-reciprocal type of agreement.

There is no specific form requirement under the law for storage contracts. On the other hand, it is totally acceptable for the parties to stipulate a written form requirement. In this perspective it is possible to conclude the agreement by signing electronically, because the draft Code of Obligations permits secure electronic signatures to satisfy the written form requirements.

Although the Code of Obligations grants this kind of liberty to the parties on the form requirements, the parties may envisage a written requirement for the conclusion of the agreement in order to prove it before the court in the case of a dispute.

The Articles 473-477 of Code of Obligations and 744 at seq. of the Turkish Commercial Code regulate "the warehouses" or "the public warehouses". Apart from these articles, there is the Public Warehouse Law no: 2699 dated 11 August 1982[1702]" (PWL) and the Public Warehouses Regulation no: 84/8429 dated 13 August 1984 (PWR).

The definition of a "warehouse" is located in Article 744 subsection 1 and in Article 2/a of the PWR[1703]. In the framework of these provisions, "public warehouse means a warehouse which runs business by selling or pledging the goods that are unrestricted, duty free or under monopoly."

Consequently there are two different negotiable instruments issued by the warehouses. One of these is the warehouse receipt, which proves the possession of the goods. On the other hand, the warehouse keeper's warrant proves the pledge of the goods delivered to the warehouse and its form requirements and negotiation forms regulated under Article 746 of the Turkish Commercial Code. Article 746 of the TCC subsection 7 requires the "signature" of the manager of the warehouse. The draft TCC Article 1054 does not permit the electronic signature on the warehouse receipt and warehouse keeper's

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[1700] The draft Code of Obligations Article. 561-580, http://www.kgm.adalet.gov.tr/borclarkanunu.htm

[1701]Yavuz, Cevdet; Obligation law lectures (Specific provisions), Istanbul 2001, s. 467 at seq. .

[1702] http://www.mevzuat.adalet.gov.tr/html/594.html.

[1703] Yavuz, s. 475 vd.

warrant. As a result subject to Turkish Law, these documents shall still be originally signed in the future[1704].

C.3 Cross border trade formalities: customs declarations

As envisaged in the Ankara Agreement in 1963, by which also the European Community - Turkey contact was established, the Customs Union Agreement came into force in January 1996. Legally it is the outcome of the Community Council Resolution dated 6 March 1995[1705]. Following the accession into the Customs Union, in order to adopt the legislation and the documents, the Standard custom declaration came into force.

Custom declarations shall be issued by between the owners of the good or their legal agent or attorneys. The custom declarations shall be completed by duly registrating the record book, the registration number, date and stamp. In order to receive the custom declarations electronically, there is a provision in the Regulation of the undersecretariat of the prime ministry for foreign trade as follows:

> *Article 19- The custom authorities in official automation require the custom declaration stamped by the Association Approval Code during the exportation. The goods are not allowed to leave the country unless the goods have the stamp in question.*

In accordance with the above-stated regulation, there is an application of the e-Community on the custom declaration in Turkey[1706].

It is the intention of the Association of Exporters General Secretary to provide the maximum convenience and benefits to its members by electronically exchanging information such as the approval of the Custom Declaration. By doing this, the work load will be reduced, and it will be possible for the staff to focus on their main mission. Thus the Exporter's Association not only records the Custom Declaration and provides statistics but also takes an important role in the development of the export.

The E-Community project provides for the exchange of documents between its members and the Association and also provides the payment or deduction of the partial contributions via internet banking or on the account. In this manner waiting in long queues or being obliged to carry cash is not an inconvenience to be faced anymore.

The E- Community project is negotiated among the Undersecretariat of the Prime Ministry for Foreign Trade, the Customs Secretariat and Exporter's Association. The project has considerable importance for being a model on exchanging and enhancing the information between official authorities.

The E-Community project is the first project that provides an efficient usage of the XML standard in information technology. The information sent in the EDI format and additional information can be sent to the servers of the associations without any repetitive operation. The E-Community project is one of the first attempting to introduce

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[1704] Article. 1504/subsection.1: Policy, bond, checque, warehouse keeper's warrant and the similar documents shall be issued by the electronic signature. Also these documents shall not be accepted, submitted or bailed with the electronic signature.

[1705] http://www.deltur.cec.eu.int/i-gumruk1.html.

[1706] http://www.ebirlik.org.

the electronic signature method rather than the traditional original signature and stamp method.

C.4 Financial/fiscal management: electronic invoicing and accounting

C.4.1. Electronic invoicing[1707]

One of the most important steps to be taken on the electronic realisation of commercial transactions is the usage of the electronic invoice. The usage of the electronic invoice will prevent considerable time consumption and also support the companies by granting an advantage on costs and competition. It also will provide a reduction of unregistered income and trigger the value added by entering into e-state projects.

The density of the transactions every each day require more convenient methods than paper. This necessity is of great practical importance especially in countries which have adopted sophisticated society paradigms. There are considerable steps being taken on this issue in Turkey. One of these steps is the "preparation work of the usage of the electronic invoice" regulated under the E-Transform Turkey Project 2005 action plan section 49. In this respect, the Ministry of Finance shall arrange studies on the usage of the electronic invoice by the parties, the standards involved and any other measures.

The e-Invoice is legislated by the European Union through directive 2001/115/EC. According to this directive the member states shall implement the necessary legal regulations regarding the e-invoice.

In respect with the above mentioned issues the Ministry of Finance has initiated the necessary project studies with Istanbul Bilgi University Information Technology Law Research Centre regarding the e-invoice.

The expected targets of the project to be realised are as follows:

- Forming a framework arrangement in compliance with the e-Invoice.
- Forming a framework model in compliance with the business models, legal substances and standards of the European Union.
- Forming a model concept related to issuing, sending, receiving, preserving, submitting, transferring into the business of the invoice,

[1707] Keser Berber, Leyla; Electronic Invoice and the digital financial auditing of the companies, Ankara 2006.

C.4.2. Electronic accounting

Various implementation and regulation drafting activities in connection with Electronic Accounting are being carried out in Turkey. Article 242[1708] of the Tax Procedure Law (which is the main regulation with respect to the subject matter) defines a number of key notions as follows:

- *"Electronic book" is the whole of the electronic records that contain the information which is, under this Law, required to be in the statutory books irrespective of the form provisions.*
- *"Electronic document" is the electronic records that contain the information which is, under this Law, required to be in the documents that are prepared compulsorily irrespective of the form provisions.*
- *"Electronic records", which constitute electronic books and documents and are retained in an electronic environment, are the smallest information unit that is accessible and penetrable through electronic methods.*

According to the same articlen, the provisions regarding traditional paper books, records and documents in this Law and other tax laws will also apply to electronic books, records and documents.

The Ministry of Finance may determine the procedure and rules with respect to the creation, recording, transmission, protection and submission of electronic books, documents and records. It may also introduce an obligation of transmission of the electronic information that is contained the books and records to the Ministry of Finance or to any other real or legal person that the Ministry of Finance indicates. Information transmission may be carried out using any kind of electronic information transmission tool, including the Internet. The Ministry of Finance may regulate and supervise the standards and formats that will be complied with.

In connection with electronic accounting, the Ministry of Finance prepared the "Tax Procedure Law General Communiqué Draft" and sought the public opinion regarding the matter under its authority granted by article 242 of the Tax Procedure Law. The draft communiqué provides some requirements for electronic book and document use. As a result, the taxpayer who wishes to benefit from electronic bookkeeping must:

- do the bookkeeping according to the balance sheet;
- have concluded a full certification agreement with a chartered accountant;
- have an electronic book and document system that is regarded sufficient with respect to the hardware, software, personnel and any other point of view by the Revenue Office.

The taxpayers who would like to keep their accounts electronically should obtain an approval for a preparatory period that will take a maximum of 5 years by submitting a full report to the Ministry. This report should detail their books and documents that they would like to keep electronically, hardware and accounting software that makes up their electronic accounting systems, an explanation of how their recordings are created and kept, and which also contains their personnel and system security, and a staged plan regarding the retention and transmission of the electronic book documents in an electronic data format. The taxpayers will keep the books and documents which they

[1708] http://www.mevzuat.adalet.gov.tr/html/1045.html.

wish to keep electronically in both electronic and paper forms during the preparatory period. The taxpayer who successfully completes the preparatory period will be granted a permit for electronic bookkeeping and electronic document. The taxpayers may keep their books and documents only in electronic form from the beginning of the data period that follows the permit date.

The Ministry of Finance created an Internet Tax Office under the Tax Offices Automation Project (VEDOP) and regulated electronic tax returns to ensure that tax returns, notifications and their annexes are submitted more easily and faster, and to substantially decrease the number of mistakes in filling in the tax returns and provide better service to the taxpayers.

In accordance with Articles 28 and 257 of the Tax Procedure Law, tax declarations may be sent by the taxpayers directly, or by their designated agents via the electronic medium, and in both cases they will be regarded as provided by the taxpayer and evaluated as declared by the taxpayer. In this context, there is no difference between declarations sent via the Internet or other electronic information communications means or medium, and those communicated on paper in the legal outcomes they produce/ re: their legal effect[1709].

Despite the facultative nature of the e-Declaration practice, according to the Tax Procedure Law general communiqué no: 346, an electronic declaration of the Annual Income Tax Return, Corporate Tax Return, and Temporary Tax Return is obligatory for those taxpayers liable to pay an Income Tax and a Corporate Tax whose total assets are more than 200,000 New Turkish Lira (approx. 94.000 EUR) as of 31 December 2004, and who have a total turnover in 2004 of more than YTL 400,000 (approx. 187.500 EUR), and who pay tax in real procedure due to their commercial, agricultural and occupational activities. Those who are liable to pay Special Consumption Tax, Special Communication Tax and Gaming Tax are also obliged to submit the corresponding returns in electronic form.

It is envisaged to set up and audit an Electronic Accountancy Records Archive System Project (EMKAS), which is still in the process of being developed by the Ministry of Finance, together with the 72 different kinds of accountancy related documents found on paper.

The draft Turkish Commercial Code also contains articles concerning electronic accountancy. The decree of the draft code (article 64 and following) will be technology neutral, and will allow the use of electronic documents for bookkeeping purposes, subject to the conditions to be communicated by the Ministry of Finance in a communiqué.

[1709] e-Declaration Guide, PricewaterhouseCoopers, Turkey, December 2005

D. General assessment

D.1 Characteristics of Turkish eCommerce Law

- The legal regulations with respect to substantive law (such as commercial law and law of obligations) in Turkey, on one hand, contains the rules that are in line with the EU Directives and member state implementations and, on the other hand, introduces solutions in accordance with the developments in electronic commerce.
- Particularly, in principle, it recognizes the freedom of contracting in concluding agreements electronically. It is stated that providing secure electronic signatures in terms of the contracts that have to be made in writing under the law (which is an exception to the above) will ensure this, whereas, in terms of the contracts that must be made with strict formalities, the electronic signature has not been allowed. As far as commercial law is concerned, for instance, until the preparation of a bill of exchange, cheque, or warrant with a secure electronic signature is widely recognized, the use of electronic signature is not allowed for now. Therefore, apart from the electronic documents that may be prepared under law, paper documents will remain in use for some time in terms of commercial relations in national and international relations.
- However, the international regulations also play an unifying role for Turkey. For instance, CMI Rules with respect to electronic bill of lading and eUCP are within this scope. The rules that do not refer to a specific technology and which can be made applicable through a reference in the contract provide a definite and homogeneous character.

D.2 Main legal barriers to eBusiness

- From a purely legal perspective, the Turkish legal system presents some significant hindrances relating electronic contracts[1710]. One of the factors, which hinder parties to prefer electronic contracts in Turkey, is administrative organization. For instance, Article 1 of the Code of Stamp Duty is one of the most important hindrances on electronic contracts. Not long after the Code of Electronic Signature was presented, it is been judged that stamp duty is owed for electronic documents as for paper documents by the amendment on the Code of Stamp Duty on 31.7.2004[1711]. This clause, which equates paper contracts with

[1710] Keser Berber, Leyla; Some Barriers Ahead of E-Signature and E-Commerce in Turkey, http://turk.internet.com/haber/yazigoster.php3?yaziid=12864.

[1711] Article 1 – The documents stated in no (1) annexed to the Law are subject to stamp duty.

The documents term in this Law are the documents that are written and signed and the documents that proves or identifies something and the electronic signature containing documents that are created in the magnetic field as electronic data.

The documents that are prepared in foreign countries and embassies and consulates of foreign countries will be subject to tax provided that they are submitted to the official offices or subject to the endorsement or transfer transactions or benefited from.

electronic contracts in the perspective of financial liabilities, has to be removed to encourage the widespread use of e-contracts and e-signatures as well as to open the barriers to e-trade.

- Another hindrance is rooted in The Code of Electronic Signature, Article 5/f.2 clause. In this clause, there is a sentence which is intended to protect users against possible damages.

  > *"The secured electronic signature is not allowed to be used in legal operations which are subject to an official duty or a special formality by the law and in assurance contracts."*

  The main problem is that the scope of the mentioned article is too large and uncertain. Legal operations which are subject to an official duty or a special formality and assurance contracts have not been defined clearly in our legislation, therefore it needs specialty to determine and comment each one of them. It does not seem possible that secured electronic signature users would know or comment on those legal operations and assurance contracts which each may be the subject of controversy even in legal doctrine.

  The excessively large and uncertain scope of the legal operations and assurance contracts in which the secured electronic signature is not allowed is quite enough to prevent this new practice to spread and develop. Users would avoid using the electronic signature for legal operations even in the slightest doubt. On the other hand, there would be malicious people who would want to make some legal operations by electronic signature even knowing that it is not allowed, and that would damage the confidence in the system. Users who are harmed by these operations would directly address the Electronic Certificate Service Providers, which are required to provide adequate and correct information about the usage of signature, and the financial liability insurance companies.

  In the same paragraph it is stated that it is strictly prohibited to use secured electronic signatures in "assurance contracts" without exceptions, which is highly narrowing the usage of electronic signatures, especially in the eBanking Business.

- Specifically, assurance clauses are frequently seen in many contracts in operation especially in bank loan contracts, and assurances such as guarantees or surety bonds or assurance letters are requested. Apart from the assurance contracts, which are prepared separately from the main contract, all contracts that include assurance clauses or request assurances will be determined to be in the scope of assurance contracts, so that electronic signatures will not be used for them. Otherwise, the invalidity of the e-signatures in the main contracts and legal operations may be claimed due to the assurance clauses. In this case, no bank or financial company or insurance company etc. will not use or allow using e-signatures without assurance.

- By an amendment in the Code of Electronic Signatures Article 5, it has to be clarified and stated clearly in which legal operations and contracts the use of e-signatures is not allowed, and also by an amendment in the Regulation in the same sense. The aspects and conditions of such amendments have to be determined.

- Also, it is wise to make an amendment to Article 1504[1712] of the Turkish Commercial Law Draft, which is at the moment in Parliament's Subcommittee, before it becomes law. In this article, by taking the circulation power into account, the bill of exchange and the cheque, of which it is stated that they cannot be prepared with the secure electronic signature, will have to be re-evaluated in the light of international practices. Given that uncovered cheques are an important problem in Turkey, electronic cheque operation could create great advantages on recording the system under control.

D.3 Main legal enablers to eBusiness

- The freedom of contract principle, which dominates Turkish contract law is also valid for commercial contracts and allows parties to shape legal relations between them as they wish. Especially the electronic signature provides the parties the opportunity to engage in binding electronic international commerce, which increases their freedom. The situation regarding electronic documents in Turkey is framed in EU e-signature and consumer protection law; even if all has not been gathered under an e-commerce law, many issues in EU directives which are to be adapted into domestic laws are found adapted in Turkish Law by the laws in effect or law drafts or law preparation works.
- The greatest study, which will remove the administrative hindrances over electronic documents and remove legal arrangements, which requires paper documenting, is doubtlessly the e-state project named "the e-transformation Turkey"[1713]. Given that in the scope of this project, the projects which are undertaken by the state establishments and which are in the action plans[1714] prepared so far in the scope of the project and the studies which to be undertaken after "The Information Society Strategy Report" which is prepared by State Planning Organization and which is expected to be approved in next days, it is clearly seen that many projects are designed to end exchanging and archiving paper documents. In this context, it is worth mentioning the National Court Network Project which is undertaken by the Ministry of Justice and which is aimed to require courts to use electronic media; e-invoice, e-account and electronic official books operations of the Ministry of Finance; a series of projects which are aimed to achieve digitisation in health care by the Ministry of Health; after all these projects are in effect, Turkey would be stepping into the "paperless world" in the perspective of national and international relations. In fact, the e-proclamation presented by the Ministry of Finance and the e-declaration presented by the Social Security Organization has demonstrated clearly what the savings of paper, labour and time can be.

[1712] III- Secure Electronic Signature

Article 1504 – (1) Bill of Exchange, bond, cheque, warrant or similar bills may not be prepared with the secure electronic signature. Transaction with respect to these bills such as submission, acceptance and guarantee may not be carried out with the secure electronic signature.

[1713] http://www.bilgitoplumu.gov.tr

[1714] OG, 1.4.2005, P. 25773, http://rega.basbakanlik.gov.tr

United Kingdom National Profile

A. General legal profile

The United Kingdom of Great Britain and Northern Ireland is a constitutional monarchy with a bicameral Parliament comprised of the House of Lords and the House of Commons. Separate Parliaments function for Scotland and Northern Ireland (the latter currently being suspended) and a consultative assembly operates in Wales. There are also several related territories (such as the Channel Islands and the Isle of Man) which share some, but not all, UK laws.

Although reference is often made to United Kingdom law, there is in reality no such single jurisdiction. Whilst the laws and legal systems of England and Wales have been effectively identical, Scots law, and to a lesser extent the legal system of Northern Ireland, retain an independent existence. In the case of Scotland, the Act of Union specifically preserved the separate Scottish legal system. In many respects this is different from the English common law system. During the formative periods of Scots law in the early Middle Ages contacts were closer with continental nations such as France and Holland than with England, and continental notions of law featured strongly in the Scottish system. Inevitably, following the Act of Union, the influence of the larger neighbour was felt and English and Scots laws have become closely aligned in many respects. Especially in the field of commercial law, itself increasingly shaped by EU developments relatively few significant differences exist. In this report, the term UK Law will be used to denote situations where the legal approach is common throughout the constituent states with specific reference made to situations where differences exist between Scots and English law.

Disputes regarding commercial relations are typically dealt with by the civil courts although extensive use is also made of arbitration processes. Disputes up to a set level of complexity and loss are heard by the County Courts in England and Wales and the Sheriff Court in Scotland. Above that level they are heard by the High Court of Justice, or the Outer House of the Court of Session in Scotland. Appeals lie to the Court of Appeal or the Inner House of the Court of Session and thereafter to the House of Lords. Matters involving EU law may also be referred to the European Court of Justice. With the notable exception of actions for defamation in the English courts, civil cases are heard before a judge sitting without a jury.

B. eCommerce regulations

Questions relating to the validity and recognition of electronic documents are based either on statute law and its interpretation by the Courts or through the application of common law principles derived from judicial decisions over what might be a period of centuries.

B.1 eCommerce contract law

B.1.1. General principles

Under English Law the formation of a contract requires four (4) elements:

(a) offer;

(b) acceptance;

(c) consideration (some form of payment whether in cash or in kind); and

(d) the intention to create legal relations. A social agreement, for example to meet for a meal, will not be classed as a legally binding contract on the basis that no reasonable person would expect such an agreement to carry legal consequences.

Scots law does not require consideration as a pre-requisite for a valid contract but where nothing is received by one party the contract will be enforceable only if it is recorded in writing.

In making the offer a person expresses an interest in entering into contractual relations with regard to particular subject matter with a third party. Under English Law, if a reasonable person interprets an offer as such (regardless whether it was intentionally made) the communication is considered to be an "offer". This is dealt with in more detail below.

Simply advertising a product or service or displaying items in a shop will not normally be considered to be an offer, but an "invitation to treat" [1715]. The effect of this is that in terms of contract, a customer makes an offer to purchase which may or may not be accepted by the seller. Images, prices, and descriptions of products on a website will usually amount to an invitation to treat[1716]. Similarly, emails containing such information

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[1715] *Pharmaceutical Society of Great Britain* v *Boots Chemist (Ltd)* [1951] 2QB 795

[1716] In 1999, the national retailer Argos advertised on its website televisions for £3.00 (instead of £300.00). Buyers attempted to purchase the goods, but once it had realised its mistake the retailer withdrew the goods from sale and did not supply the goods to the buyers. The goods' appearance on the site was considered by the retailer to be an invitation to treat. Buyers attempted to argue that there was in fact an offer by Argos. Although the case did not reach the courts, one significant factor was undoubtedly that the price listed on the web site was so far removed from that generally required for goods of the kind in question that a court would have been unlikely to have enforced the agreement under the doctrine of mistake. Although parties are generally bound by their actions or words, if it must have been clear to the other contracting party that an offer or acceptance was made in error, the resulting contract will be voidable.

are likely to be interpreted by the Courts as invitations to treat. One factor which may complicate matters in the context of e-commerce web sites is that a potential customer may be required to supply details of credit or debit cards. The supplier's system will normally initiate the payment process immediately these details are received. Having accepted payment it may be difficult to deny the existence of a contract although most web sites terms and conditions will seek to exclude liability in the event, for example that the goods or services required are no longer available,

The acceptance of an offer creates an enforceable contract. To be considered a binding acceptance, the acceptance must be an unconditional and unqualified acceptance of the offer actually made. A communication that changes the terms of the original offer will be a counter-offer, which itself must be accepted by the offeree (the person to whom it is offered) before it becomes binding. In complex cases the parties may proceed though a lengthy series of offers and counter offers before reaching agreement on all essential elements.

UK contract law does not, in most cases, require a contract to be in a specific form for it to be legally binding. Contracts may be made in any manner thought desirable by the parties. Contracts may be made verbally or may even be inferred from the conduct of the parties. If a customer hands goods to a supermarket check out assistant who accepts payment, it is clear that a contract has been concluded although the parties may not have exchanged a word. Increasingly contracts may be entered into with no human intervention either in the case of one of the parties where a consumer contracts with a web site or, perhaps through the use of systems of EDI and stock management systems, on the part of both sides.

For the avoidance of subsequent doubt what was agreed, it is general practice for the terms of a contract to be recorded in writing. In a relatively small number of cases, there are legal requirements that the terms of a contract be recorded in writing or in a document and in a smaller sub set of these there will be a requirement that the parties' adoption of the terms of the agreement should be attested by means of signatures. For the vast majority of contracts, the issue whether conclusion is by some form of electronic communication is of no legal significance. The Financial Law Panel has stated:

> *"The meaning and scope of 'documents, instruments, records and things in writing' does not seem to us to be an issue at all."*

English Law has generally adopted a positive approach in determining whether electronic communications can have the same effect as those on paper. In *Victor Chandler International v Commissioners of Customs and Excise and Another* , ("*Victor Chandler*" [1717]) the Court of Appeal held that an electronic file amounted to a document. The Court held that the word "document" was intended in the context of the Betting & Gaming Duties Act 1981 to refer to held information, the computer file was analogous to paper and the essential characteristic which turned the file into a "document" was the presence of recorded information.

Following the broad interpretation in *Victor Chandler*, the Courts have been reluctant to interpret the definition of "document" in any narrower way. Furthermore the approach taken in *Victor Chandler* allows for a flexible interpretation when determining the lawfulness of an electronic document, as the main criterion there for determining what amounted to a "document" was the holding of data.

[1717] [2000] 2 All ER 315

Similarly, the Interpretation Act 1978[1718] defines "writing" and the function of writing as

> *"typing, printing, lithography, photography and other modes of representing or reproducing words in invisible form, and expressions referring to writing are construed accordingly."*

The effect of the phrase "words in invisible form" has been the subject of some debate. Electronic communications generally have a dual form, being on the one hand displayed on a VDU screen, and on the other transmitted as a series of binary data. It has been suggested by the Law Commission[1719] that for as long as the data remains in binary form it will not satisfy the definition as contained in the Interpretation Act (because that data cannot be said to be "visible").. In their report on the legal issues relating to e-commerce, the Law Commission concludes that:

> 3.6 Whilst each requirement for writing must be interpreted in its specific statutory context, we assume for these purposes that the statutory context is neutral (that is, it does not assist in determining whether or not the requirement for writing is capable of being satisfied by an electronic communication). In the absence of a context-specific definition, the Interpretation Act definition of writing will apply:-" Writing" includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.
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> 3.7 We interpret the Interpretation Act definition as meaning that writing includes its natural meaning as well as the specific forms referred to. The natural meaning will include any updating of its construction; for example, to reflect technological developments.
>
> 3.8 The phrase "words in a visible form" does however seem to limit the whole definition. That is, while typing etc. are included in writing, any writing must involve words which are visible. Electronic communications generally have a dual form: first, their display on a screen; secondly, their transmitted/stored form as files of binary (digital) information. The inclusion of "words in a visible form" means that the latter alone cannot satisfy the Interpretation Act definition of writing; the words must be in visible form. 7
>
> 3.9 … , we believe that e-mails and website trading will generally satisfy the Interpretation Act definition of writing, but that EDI will not. We believe that e-mails and website transactions fall within the natural (updated) meaning of writing if on no other basis than by falling within the category of "other modes of representing or reproducing words in a visible form".

A further element which may be required is that contractual documents be signed by or on behalf of the contracting parties. Again, the legal systems of the UK have adopted a flexible and pragmatic approach in determining what may constitute a signature. There is no requirement for any degree of legibility, and machine generated marks have been held to be sufficient. However, in relation to the signatures of documents, the case of

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[1718] See, Schedule 1. The Interpretation Act is a statute of general application, providing interpretation of specific expressions used in other statutes.

[1719] Electronic commerce: formal requirements in commercial transactions. Advice from the Law Commission December 2001.

Goodman v Eban Ltd[1720] states that the validity of a given signature is to be determined by considering the function it performs. The signature is valid if it acts as evidence of the authenticity of the document. The case also laid down the rule that a signature need not be in the name of a natural person. In other words, *Goodman* opened the door for the validity of electronic signatures under English Law.

The recent case of *Nilesh Mehta v J Pereira Fernandes SA* ("*JPF*") [1721] concerned the nature of electronic signatures in relation to a winding up petition. Under Section 4 of the Statute of Frauds Act 1677, a guarantee is not enforceable unless it is in writing or there is a memorandum or note of the agreement signed by the guarantor. In the JPF case Nilesh Mehta, a director of Bedcare Limited, asked a member of staff to send an email to the solicitors acting for JPF to consider adjourning a winding-up petition hearing for one week in return for which a personal guarantee was offered to JPF. The wording of the email contemplated that formal documents would be entered into in the matter of the personal guarantee. The email itself was not signed but the head of the email showed that it came from the employee's address. The email address was the same as that which had been used for the sending of other documents. The proposal was accepted but then the employee did not honour the guarantee. Initially, JPF was awarded summary judgment (a judgment which meant that at face value JPF was able to rely on the guarantee) against the employee. Mr Mehta appealed this earlier decision on two grounds:

(i) Whether the email constituted a sufficient note or memorandum of the agreement for the purposes of Section 4 of the Statute of Frauds; and
(ii) Whether the presence of an email address at the top of an email which occurred automatically through the act of transmitting the email, could amount to a signature either by or on behalf of the employee for the purposes of Section 4 of the Statute of Frauds.

The High Court held that the email message satisfied the statutory requirement of writing but could not be classed as a signature. The email in question had been sent from the address *Nelmehta@aol.com*. Previous messages between the parties had been sent from that address. There was no further reference to Mr Nehta's name in the body of the email. The judge concluded:

> In my judgment the inclusion of an e mail address in such circumstances is a clear example of the inclusion of a name which is incidental in the sense identified by Lord Westbury in the absence of evidence of a contrary intention. Its appearance divorced from the main body of the text of the message emphasises this to be so. Absent evidence to the contrary, in my view it is not possible to hold that the automatic insertion of an e mail address is, to use Cave J's language, "… intended for a signature…". To conclude that the automatic insertion of an e mail address in the circumstances I have described constituted a signature for the purposes of Section 4 would I think undermine or potentially undermine what I understand to be the Act's purpose, would be contrary to the underlying principle to be derived from the cases to which I have referred and would have widespread and wholly unintended legal and commercial effects. In those circumstances, I conclude that the e mail referred to in

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1720 1954 1 QB 550

1721 [2006] EWHC 813 (Ch) (07 April 2006)

> Paragraph 3 above did not bear a signature sufficient to satisfy the requirements of Section 4.[1722]

It would appear, however, that even a typed representation of the appellants name would have been sufficient evidence of his intention to be bound by the text of the email to be classed as a signature.

Within the United Kingdom, ISO 7799 and 27001 (formerly BS 7799) are the Standards for electronic signatures. Compliance within the Standards is required by all companies that either administer electronic signature services on behalf of third parties or manufacture such systems.

The Standards relate to the provision of information security management systems by those companies offering digital signature services and ensure parity amongst all such providers. However, these Standards establish how an electronic signature should function and not what an electronic signature

Electronic Registered Mail

At the time of writing this report the Royal Mail Group is responsible for the delivery of mail within the UK and out of the UK through Post Offices. It does not currently operate a system for electronic registered mail. Various companies offer electronic tracking of parcels but they do not offer an electronic registered mail delivery service.

Electronic Archiving

At the time of writing, there is no specific legislation pertaining to the electronic archiving of documents. However, the Records Management Society (a special interest group made up of archivists and records managers across the UK) has as one of its goals, the aim of establishing common technical standards for data preservation. To this end it created the Digital Preservation Coalition ("DPC") which is a cross-sectoral membership organisation dedicated to securing the preservation of digital resources in the UK. At present it is running a survey to reveal the extent of the risk of loss or degradation of digital material held in the United Kingdom's public and private sectors, the results of which it hopes will enable it to influence and inform the development of a UK digital preservation strategy. The DPC has a long term aim of establishing a British standard, to which all members can adhere, on the preservation of digital material. The DPC has no formal Government backing but does present its findings to the Government where relevant.

[1722] At para 29.

B.1.2. Transposition of the eCommerce directive

The major UK implementation of the e-Commerce Directive is through the Electronic Commerce (EC Directive) Regulations 2002[1723] which came into force in the UK on 21 August 2002 . These Regulations implement Articles 3, 5, 6, 7(1), 10 to 14, 18(2) and 20. Although there are numerous differences in terminology between the Directive and the Regulations it does not appear that any of these relate to a matter of substance. It is clear in any event from decisions of the UK courts that priority will be given to the terminology of the Directive. As has been said in one recent case in respect of the Database Directive and its implementation:

> Art. 7 of Directive 96/9 is the basis of the UK legislation. The parties and courts have worked directly from this, without bothering with the UK legislation – as generally happens in all IP cases involving rights created pursuant to a Treaty. [It makes one wonder, yet again, why the legislators bother with a re-write].[1724]

The Regulations provide for a range of circumstances in which the legislation is not to have effect. Regulation 3 provides that:

> (1) Nothing in these Regulations shall apply in respect of--
>
> (a) the field of taxation;
>
> (b) questions relating to information society services covered by the Data Protection Directive and the Telecommunications Data Protection Directive and Directive 2002/58/EC of the European Parliament and of the Council of 12th July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications);
>
> (c) questions relating to agreements or practices governed by cartel law; and
>
> (d) the following activities of information society services--
>
> (i) the activities of a public notary or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,
>
> (ii) the representation of a client and defence of his interests before the courts, and
>
> (iii) betting, gaming or lotteries which involve wagering a stake with monetary value.

These provisions appear to be in line with the Directive's recitals defining the scope of the legislation.

[1723] SI 2002/2013 Also relevant within the financial services sector are the following regulations; SI 2002 No.1775 The Electronic Commerce Directive (Financial Services and Markets) Regulations 2002; SI 2002 No.1776 The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2002; SI 2002 No.2015 The Electronic Commerce Directive (Financial Services and Markets) (Amendment) Regulations 2002; SI 2002 No.2157 The Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002.

[1724] British Horseracing Board Ltd & Ors v William Hill Organization Ltd [2005] EWCA Civ 863 (13 July 2005) at para 8.

The Directive requires in Article 18 that Member States shall ensure the rapid availability of court orders designed to terminate any infringing conduct. In addition to general provisions in this respect, the provisions of Part 8 of the Enterprise Act 2002 provide that a range of consumer protection agencies will have power to ask the court to prohibit infringing conduct by specified parties.

The UK authorities did not transpose Article 9(1) of the Directive within the Regulations, taking the view that the requirements of the Directive were already met in domestic law either generally or through the provisions of the Electronic Communications Act 2000. Section 8 of the Act, which was concerned in part to implement the provisions of the Electronic Signatures Directive, provides in part that:

> 1) Subject to subsection (3), the appropriate Minister may by order made by statutory instrument modify the provisions of-
>
> (a) any enactment or subordinate legislation, or
>
> (b) any scheme, licence, authorisation or approval issued, granted or given by or under any enactment or subordinate legislation,
>
> in such manner as he may think fit for the purpose of authorising or facilitating the use of electronic communications or electronic storage (instead of other forms of communication or storage) for any purpose mentioned in subsection (2).
>
> (2) Those purposes are-
>
> (a) the doing of anything which under any such provisions is required to be or may be done or evidenced in writing or otherwise using a document, notice or instrument;
>
> (b) the doing of anything which under any such provisions is required to be or may be done by post or other specified means of delivery;
>
> (c) the doing of anything which under any such provisions is required to be or may be authorised by a person's signature or seal, or is required to be delivered as a deed or witnessed;
>
> (d) the making of any statement or declaration which under any such provisions is required to be made under oath or to be contained in a statutory declaration;
>
> (e) the keeping, maintenance or preservation, for the purposes or in pursuance of any such provisions, of any account, record, notice, instrument or other document;
>
> (f) the provision, production or publication under any such provisions of any information or other matter;
>
> (g) the making of any payment that is required to be or may be made under any such provisions.
>
> (3) The appropriate Minister shall not make an order under this section authorising the use of electronic communications or electronic storage for any purposes, unless he considers that the authorisation is such that the extent (if any) to which records of things done for that purpose will be available will be no less satisfactory in cases where use is made of electronic communications or electronic storage than in other cases.

A vast range of transactions might be affected by this power. It was indicated in Parliament that for England and Wales:

> *The Lord Chancellor is exploring, with the assistance of the Law Commission and the Land Registry, what is necessary to allow conveyancing in particular to be done electronically.*[1725]

Much publicity has been given to the recognition of electronic signatures, but the power will also extend to permitting firms to supply accounts in electronic form and to give shareholders notice of meetings by e-mail. It may well be that government will be major users of the provision in connection with oft-quoted targets that 25% of government services should be available electronically by 2002, 50% by 2005 and 100% by 2008.

The task of updating the statute book will be a massive one. It has been estimated that there are in the region of 40,000 references to paper signatures, documents and records.[1726] The range of topics covered and the variety of expressions used in these statutes was considered to be such that it would be impracticable for a straightforward abolition of requirements for writing to be considered. What remains uncertain is the timetable for action. It was stated in Committee by the Minister for Small Businesses and E-Commerce that:

> *"I am keen for the powers provided under clause 8 to be used extensively to modernise the statute book as quickly as possible. As I said on Second Reading, my right hon. Friend the Minister for the Cabinet Office, who is responsible for e-government, is already working with other Government departments to ensure that each Department examines the statutes for which it is responsible in order to ascertain in which cases it can move rapidly to introduce electronic equivalents. A timetable for completing that has not yet been specified, but I am drawing to the attention of my colleagues in different Departments the need to move with considerable urgency. We are leading by example in my own Department, which is already preparing under clause 8 a draft order that relates to company law, to enable us to consult on it early in the new year and have it ready for introduction as soon as the Bill becomes law and clause 8 comes into effect.*[1727]

Concerns were expressed in Parliament that the provisions of section 8 might be used to compel persons doing business with the government to engage in electronic communications. Section 8(6) provides, however, that any order made 'may not require the use of electronic communications or electronic storage for any purpose'. What may serve as a greater incentive for the use of electronic communications is the provision of some form of discount. Here, it is provided that regulations may make:

> *Provision, in relation to cases in which fees or charges are or may be imposed in connection with anything for the purposes of which the use of electronic communications or electronic storage is so authorised for different fees or charges to apply where use is made of such communications or storage.*[1728]

To date, relatively little use has been made of the power conferred by the Electronic Communications Act. Around 10 statutory instruments have been made providing mainly for service of administrative documents in electronic form. The relative lack of activity may be indicative more of the fact that legal provisions do not provide a significant

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1725 HC Official Report, SC B (Electronic Communications Bill), 14 December 1999, col 73.

1726 HC Official Report (6th series) col 41, 29 November 1999.

1727 HC Official Report, SC B (Electronic Communications Bill), 14 December 1999, col 75.

1728 Section 6(4)(h).

barrier to the use of electronic documents than to any lack of governmental commitment to the facilitation of this form of contracting.

B.2 Administrative documents

Under UK law and Court procedure, a distinction is made between the admissibility per se of a document signed electronically and whether in fact the signature complies with law and jurisprudence (as set out in B.1 above). An electronic signature, or the certification by any person of such a signature, is admissible in evidence in relation to any question as to the authenticity or integrity of a particular electronic communication or in particular electronic data[1729]. It is for the Courts to decide in each case whether an electronic signature has been correctly used and the weight that should be attributed to it[1730], evidentially speaking.

In order for electronic signatures to be considered fully valid in English Law, it was recognized[1731] that restrictions need to be removed from legislation. Section 8 of the ECA gives the power to modify other legislation, (most pertaining to interaction with the Government). For example, the Companies Act (the UK's principal statute concerning the regulation and administration of corporations) was amended by the Companies Act (Electronic Communications) Order 2000 (SI 2000/3373) to enable companies to use electronic means to delivery company communications, to issue shareholder proxy and voting instructions and in order to incorporate the company. Other examples of electronic signatures permissible under English Law include permitting National Health Service (NHS) prescription forms to be issued electronically provided they are duly signed using an electronic signature (National Health Service (Charges for Drugs and Appliances) (Electronic Communications) Order 2001) and permitting the use of electronic communications in town and country planning processes (Town and Country Planning (Electronic Communications) (England) Order 2003).

1729 Section 7(1), Electronic Communications Act

1730 Section 8 Civil Evidence Act 1995

1731 By powers granted to the Government under Section 8 of the ECA

C. Specific business processes

C.1 Credit arrangements: Bills of exchange and documentary credit

Bankers' documentary credits were developed in the UK to satisfy the needs of sellers and buyers. Within the UK, the majority of documentary credits incorporate the Uniform Customs and Practice for Documentary Credits ("UCP 500") which is published by the International Chamber of Commerce. UCP 500 is based solely on the presentation of original paper documents and it is therefore unable to recognize electronic credits.

Similarly, bills of exchange continue to be delivered in hard copy form. Such bills are used for commercial purposes to comply with the varied legal stipulations regarding the assignments of debt in various jurisdictions. The debt itself is embodied in a document which is passed to the recipient upon delivery. The difficulty with making such a system electronic is that it would then be possible for one party to transmit the same electronic bill of exchange to more than one party (known as a "pledge of documents"). The Law Commission have commented

> *The definition of a bill of exchange in the Bills of Exchange Act 1882, s2 includes a number of paper-based concepts. We believe that their cumulative effect is that the definition cannot be satisfied by a series of electronic messages which might perform, in effect, the same functions.*[1732]

Although the Commission accept that many of the functions of bills of exchange could be replicated electronically, this would remove the instruments from the scope of the legislation and would deprive holders of a good deal of the statutory protection afforded under the Act.

A pledge of documents can provide security to a financial institution which make a payment based on a documentary credit (as set out above). At present there is no electronic pledge system in the United Kingdom. The creation of such a system would need to occur at the same time as the creation of an electronic bill of lading, which also has yet to be introduced (see C.2 below).

C.2 Transportation and storage of goods

As mentioned above, English Law on the sale of goods does not impose any contractual form requirements (except in limited circumstances, as set out above). The passing of property under English Law therefore depends upon the intention of the parties (also set out above). According to English Law, that intention may be expressed or implied into the contract between the Buyer and Seller.

Section 19 of the Sale of Goods Act 1979 ("SGA") refers to circumstances where a bill of lading (a document which embodies the right to the title in the goods) is made out to "sale or order"[1733]. According to English Law, it is a general principle that a buyer cannot

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1732 'Electronic Commerce: Formal Requirements in Electronic Communications', Advice from the Law Commission. December 2001.

1733 SGA S.19(2)

acquire a better title to goods than that which the seller had (for example a buyer cannot acquire title in goods purchased from a seller which the seller has stolen from another). Prior to the adoption and use of electronic documents it was common practice that property in goods would pass at delivery of the goods despite a seller having possession of goods/document of title to such goods (although property has passed to an earlier buyer).

The Factors Act 1889[1734] which governs such relationships defines a "document of title" as one "… used in the ordinary course of business as proof of the possession or control of the goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented." Therefore it could be argued that electronic contracts for carriage are documents of title within this definition.

In the United Kingdom, contracts for carriage by road are governed by the SGA. Contracts for international carriage by road are governed by the Convention on the Contract for the International Carriage of Goods by Road 1956 ("CMR"), which is given force in the UK by the Carriage of Goods by Road Act 1965. Under this Act, consignment notes under the CMR are not documents of title but provide evidence of the contract itself and also of the condition of the goods which are so delivered. The wording of the Act refers to the document as a physical object and therefore it would appear that an electronic communication will not suffice for the purposes of a consignment note.

Similarly, with the carriage of rail the uniform rules concerning the contract for international carriage of goods by rail Uniform Rules concerning contracts for International Carriage of Goods by Rail ("CIM") as contained in Appendix B of the Convention concerning International Carriage by Rail 1980 ("COTIF") again says that consignment notes are not documents of title. However, there has been a move to allow the use of an electronic functional equivalent of consignment notes in respect of consignment of goods by rail.

As regards goods that are carried by air, there is no electronic consignment note (known as an air waybill). Under the Convention for Unification of Certain Rules for International Carriage by Air signed in Montreal on 28 May 1999, the consignor need no longer agree to consent to means other than a document being used as an air waybill[1735].

In relation to carriage of goods by sea the Bolero scheme was launched in 1999. It has the backing of the European Commission and is conducted by a number of carriers, traders, financial institutions and communications companies. In brief, Bolero has as its centre a core messaging platform through which all messages are routed. The core messaging platform aims to remove any insecurity that traders may feel in using electronic bills of lading across the Internet. Essentially, the Bolero system uses public key cryptography. Each member of the scheme is issued with a pair of keys which are called the private and public key. The private key is unique to each member and kept secret by that member and the public key is known to all users. The user therefore digitally signs each message with his private key. The message is sent to Bolero whereupon they are verified they are the sender using the corresponding public key.

In essence, therefore, Bolero acts as a trusted third party and as a result has developed a Title Registry which records the changes in ownership of goods as they are bought and

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1734 S.1(4)

1735 cf: Advice from the Law Commission December 2001, op. cit.

sold. Bolero functions by requiring members to enter into an agreement for the use of the system and as between themselves. It has its basis in the Bolero Rule Book. The Bolero Rule Book provides that any change in ownership of Bolero bills of lading and the right to possession of the goods in relation thereto are achieved by novation. In short, this means that the original contract with the carrier effectively is dissolved when the goods are transferred from seller to buyer. The contract is replaced by a brand new contract between the carrier and the new party with the interest in the cargo. In acting as a carrier's agent, Bolero acknowledges that the carrier holds the goods to the order of the new cargo interest.

By adopting the principle of novation as the means of transferring the contract from one party to the other the system avoids the requirements for written assignments of goods that exist in many jurisdictions.

English Law has been chosen as the system of law governing the Bolero Rule Book. However, it should be noted that the underlying contracts forming the transaction itself will be governed by the jurisdiction as nominated from time to time by the contracting parties.

C.3 Cross border trade formalities: customs declarations

We have confined our analysis of cross border trade formalities and financial/fiscal management to initiatives introduced by HM Revenue and Customs ("HMRC").

HMRC is the organization responsible for ensuring lawful importation and exportation of goods in and out of the UK. For businesses that are involved in the import of non EC goods into the UK or which clear goods, the New Export System ("NES") applies. The NES is a form of electronic Customs licensing.

The electronic licence is stored by the Government department so issuing. The licence details the import declaration (including the nature, the number, and source of the goods) and the details contained in the licence are compared with the imported goods to ensure that the goods comply with those stipulated in the licence.

Recognised Customs Agents are linked to NCTS and will submit electronic NCTS on behalf of their respective customers. A list of such Customs Agents is held by HMRC.

HMRC is constantly reviewing its processes and its aims to facilitate international trade electronically to the extent that all notifications, licensing and transactional documents are dealt with electronically.

C.4 Financial/fiscal management

The rules governing electronic invoicing in the United Kingdom are the Value Added Tax (Amendment) (No. 6) Regulations 2003[1736] (the "Amendment Regulations") which came into force on 1 January 2004. These regulations implement the Council Directive amending the 6th VAT Directive regarding VAT conditions for invoicing[1737]. Regulation 5 states that an electronic invoice is one which "is provided by a person registered for VAT by electronic transmission that purports to be a VAT invoice in respect of a supply of goods or services". Sub section 2 of that regulation states that document will not be treated as a VAT invoice unless both the supplier and the customer are able to guarantee the authenticity of the origin and integrity of the contents by means of (i) an advanced electronic signature; (ii) EDI; (iii) where the document relates to supplies of goods or services made in the United Kingdom by such other electronic means as may be approved by the Commissioner in any particular case.

In 2003 HM Customs & Excise (as it then was) issued guidance in its Notice 700/3 setting out the requirements for the issuing, receiving and storing of VAT invoices in an electronic format. The guidance recommends that electronic invoices sent electronically should be stored electronically. To store them in a paper-based system, the party issuing the invoice must write to the National Advice Service to obtain prior approval before doing so. All electronic invoices must be stored for a period of at least six years and such invoices may be stored outside the European Union but it is recommended that the access to such records is maintained online.

Note, there is no obligation on parties in the United Kingdom either to issue or to receive electronic invoices. Indeed, if a party does not wish to receive an electronic invoice, it may ask its supplier to issue it with a paper invoice in place of the electronic one. If such a party is unable to meet the conditions for transmission and storage of electronic invoicing as set out in the Amendment Regulations, it is left with no alternative, but to have to issue paper invoices.

HMRC accepts VAT returns using an electronic document called the "eVAT return". Third parties may enrol in the service and HMRC allocates an Agent ID and activates a personal identification number or "PIN". Clients need to use the Agent ID to allow the third party to act on their behalf by appointing the agent. This then allows the filing of VAT returns by eVAT.

The above procedure is the same of those companies that wish to pay employees' tax online, and also for those individuals who must submit their own personal annual tax return.

Companies which are registered in England and Wales must file annual accounts with both the Register of Companies and HMRC. Even if the company is dormant, the accounts must be filed and their form must confirm to the stipulations in the Companies Act 1985 as well as conforming to prevailing United Kingdom accounting practice as determined by HMRC from time to time. Failure to file accounts in a timely manner results in a financial penalty being levied. Although Companies House and HMRC do accept certain documents and accounting returns electronically, annual accounts must still be submitted to both authorities in hard copy form. This is due to the stipulation that such documents bear an original signature at the time of submission.

1736 SI 2003 No. 3220.

1737 Directive 2001/115 EC.

D. General assessment

D.1 Characteristics of Belgian eCommerce Law

- Although there has been the introduction of specific legislation to regulate and legalise electronic documents and electronic signatures in the UK, English Law has always been sufficiently flexible to allow the use of electronic documents and signatures. Moreover, English Law has always interpreted definitions of "document" and "signature" sufficiently broadly to facilitate current e-commerce.

D.2 Main legal barriers to eBusiness

- Although there are specific instances where regulations needed to be introduced by the Government using the provisions in Article 8 of the ECA (as set out above) these are a minor amendment to the jurisprudence in this area. However, that such regulations and amendments have been introduced in English Law indicates a willingness on the part of the Government to facilitate to the greatest extent possible use of electronic documents and signatures.

D.3 Main legal enablers to eBusiness

- This in turn leads to the practical benefit that it is possible for a business to, for example, import goods under an electronic licence, enter into contracts for sale, electronically transfer those goods according to electronic contracts for carriage, render a VAT invoice to the buyer electronically, and finally to submit an electronic VAT return to the relevant authority.
- Through application of both statute and Common Law, English Law has created a legal environment in which the use of electronic documents and signatures is commonplace.

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