

**PLI'S SEVENTH ANNUAL INTERNET
LAW INSTITUTE**

LORI E. LESSER
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JULY 14, 2003

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Introduction

A growing body of case law supports that properly-executed electronic contracts will have the same validity and enforceability as their paper counterparts. Uncertainty remains, however, as to what constitutes proper execution, in terms of both parties' acceptance and other contractual requirements. Uniform laws such as UETA (Uniform Electronic Transactions Act) and UCITA (Uniform Computer Information Transactions Act) differ widely in terms of scope and successful adoptions by individual states. In these early years of statutory protection for electronic agreements, common sense grounded in classic contract principles may provide the best guidance of all.

The Validity of On-Line and Electronic Contracts

I. ELECTRONIC CONTRACTS – CASE LAW

A. SHRINKWRAP CONTRACTS ENFORCEABLE

1. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing forum selection clause in fine print on cruise ship ticket).
2. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (holding that “[s]hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general”).
3. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (enforcing arbitration clause in contract delivered in box with personal computer; noting that *ProCD* is not limited to software but is applicable to contracts in general).
4. *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998) (noting that parties disputed validity of license by video game maker to end-users to create new game levels, but declining to rule on issue as unnecessary).
5. *M. A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000) (enforcing limitation of liability clause in license delivered with software).

6. Exceptions to Enforceability

- a. *Kocek v. Gateway, Inc.*, 104 F. Supp.2d 1332 (D. Kans. 2000) (refusing to enforce arbitration provision in standard agreement included in computer box; rejecting *ProCD/Hill* reasoning and holding that plaintiff's keeping computer did not constitute express assent to the standard agreement).
- b. Pre-*ProCD*: *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991) (rejecting validity of warranty disclaimer in box-top license under UCC § 2-207).
- c. Pre-*ProCD*: *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993) (rejecting terms of shrinkwrap license pursuant to UCC § 2-207; following *Step-Saver*).

B. CLICKWRAP AND BROWSEWRAP
CONTRACTS ENFORCEABLE

1. User Clicks "I Accept"

- a. *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (upholding contract when defendant typed "agree" into online document).
- b. *Hotmail Corp. v. Van\$ Money Pie Inc.*, 47 U.S.P.Q.2d 1020, 1998 WL 388389 (N.D.Cal. April 16, 1998) (enforcing anti-spam provisions in clickwrap Terms of Service).

- c. *Kilgallen v. Network Solutions, Inc.*, 99 F.Supp.2d 125 (D. Mass. 2000) (forum selection clause in NSI online registration agreement enforceable; such clauses enforceable unless unreasonable).
- d. *Stomp, Inc. v. Neato, L.L.C.*, 61 F.Supp.2d 1074 (C.D.Cal. 1999) (noting that merchants can use clickwrap agreements to limit their amenability to lawsuits in foreign fora).
- e. *Williams v. America Online, Inc.*, No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001) (refusing to enforce forum selection clause contained in Terms of Service agreement in part because AOL software presented clickwrap only after installation was complete, preventing opportunity to accept terms; finding unreasonable the default response set to "I agree").
- f. *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002) (holding that consumer received adequate notice of forum selection clause in an electronic contract).
- g. *Moore v. Microsoft Corp.*, 293 A.D.2d 587 (2d Dep't 2002) (upholding forum selection clause where plaintiff was required to click on "I agree" button before downloading software).
- h. *I. Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp.2d 328 (D. Mass. 2002) (clickwrap agreement enforceable because "I agree" box during installation was explicitly manifested assent to terms of contract).

i. *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200 (Tex. App. 2001) (upholding forum selection clause in online contract for registering Internet domain names that required users to scroll through terms before accepting or rejecting them and proceeding to make the purchase).

j. *DeJohn v. .TV Corp, Int'l*, 245 F.Supp.2d 913 (C.D. Ill. 2003) (upholding enforceability of contract whose terms were only available when applicant clicked on hyperlink).

2. User Has Choice of "I do not accept"

a. *Caspi v. The Microsoft Network, LLC*, 323 N.J. Super. 118 (N.J. App. Div. Jan. 5, 1999) (clicking "I Agree" versus "I Don't Agree" enforceable as to forum selection clause; consumers had opportunity to scroll through terms of use before clicking agreement).

b. *Groff v. America Online, Inc.*, No. PC 97-0331, 1998 WL 307001 (R.I. Super. 1998) (upholding forum selection clause in AOL user agreement where user could click "I Agree" or "I Disagree").

3. Posted Terms of Use

a. *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 32 (2d Cir. 2002) (Internet users not bound by license mandating arbitration when provision was buried on second page of free software download program; license unenforceable for lack of mutual assent).

- b. *Pollstar v. Gigmania, Ltd.*, 170 F.Supp.2d 974 (E.D. Cal. 2000) (refusing to dismiss contract claim based on online clickwrap agreement; court noted that agreement may be valid and enforceable, even though it was on different webpage linked to home page).
- c. *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp.2d 238 (S.D.N.Y. 2000) (posted terms of use for Internet database bind corporate competitor from taking information; defendant conceded it was aware of restrictions even though it was not required to click on "I agree" button).
- d. *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV99-7654-HLH, 2000 U.S. Dist. LEXIS 12987 (C.D.Cal. Aug. 19, 2000), *aff'd*, 2001 WL 51509 (9th Cir. 2001) (fine print link to terms and conditions insufficient to create binding contract; not direct competitors).

II. ELECTRONIC CONTRACTS – FEDERAL STATUTE

A. E-SIGN: ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT, 15 U.S.C. §7001, ET SEQ.

- 1. Scope: electronic records and signatures in interstate or foreign commerce
 - a. "Electronic" – technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities (§7006(2))

- b. "Electronic signature" - electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record (§7006(5))
- c. "Transaction" - transaction between two people relating to business, consumer or commercial affairs, including sale, lease, exchange, licensing or disposition of real property, personal property, goods, intangibles, services (§7006(13))

2. Purpose

- a. Address concerns about adoption of divergent state laws and uncertainty about timeframe for UETA adoption
- b. Non-discrimination against electronic contracts
 - (1) "a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form" (§7001(a)(1))
 - (2) *Specht v. Netscape Comm. and America Online*, 306 F.3d 17 (2d Cir. 2002) (noting that ESIGN settled issue that relevant provision of online agreement was "written").
 - (3) contract "may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation" (§7001(a)(2))

- c. No effect on substantive rights
 - (1) requirement under statute, regulation or law other than that contract must be in writing, signed or in non-electronic form (§7001(b)(1))
 - (2) requirement for the content or timing of consumer disclosure (§7001(c)(2) or any other warning, notice, disclosure or record required by statute, regulation or law (§7001(f))
 - d. Voluntary – Does not force person to use electronic record or signature (§7001(b)(2))
3. Coverage
- a. Pre-emption – Pre-emption of inconsistent state law except:
 - (1) exact NCCUSL form of UETA, or
 - (2) substantive state-law exception to UETA that is consistent with E-SIGN, technology neutral and if enacted or adopted after E-SIGN, makes specific reference to E-SIGN (§7002(a))
 - b. Transactions in or affecting interstate or foreign commerce (§7002(a))
 - c. Specifically includes insurance (§7001(i)) and protects insurance agents and brokers (§7001(j))

- d. Notaries - can attach electronic signature to signature or record (§7001(g))
- e. Electronic agents - no denial of legal effect, validity or enforceability of contract because delivery involves electronic agents, if action of agents is attributable to person to be bound (§7001(h))
- f. Transferable records - for UCC Article 3 notes relating to real property-secured loans, person with qualified electronic control is "holder" (§7021)
- g. Exclusions (§7003)
 - (1) wills, codicils, testamentary trusts, adoptions, divorce, family law
 - (2) UCC other than §§1-107, 1-206 and Articles 2 and 2A (written waiver, statute of frauds, sales of goods and licensing)
 - (3) court orders or court documents
 - (4) notices of utilities termination or cancellation, primary residence agreements (foreclosure, rentals, mortgages, home equity loans)
 - (5) termination of health or life insurance (excluding annuities)
 - (6) product recalls, documents accompanying transportation of hazardous materials or pesticides
 - (7) Report on continuing necessity of exceptions due to Congress before June 30, 2003 (§7003(c)(1))

(8) Federal regulatory agencies may determine particular exceptions no longer necessary (§7003(c)(2))

4. Technology neutral
 - a. Pre-empts state law restrictions that “require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification” (§7002(a)(2)(A)(ii))
 - b. Does not require digital signature (*e.g.*, using keys or encryption) above standard “electronic signature”
5. Record retention – “in a form that is capable of being accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record” (§7001(d))
6. Consumer protection – if statute requires that a writing be provided to consumer, an electronic record suffices if (§7001(c))
 - a. consumer affirmatively consents and does not withdraw;
 - b. consumer is provided clear and conspicuous statement of rights;
 - c. consumer receives prior statement of hardware and software needed for record retention, consents electronically in way demonstrating that he/she can access information in same electronic form

(although failure doesn't necessarily mean contract is unenforceable (§7001(c)(3)); and

- d. if hardware or software changes, consumer is provided statement of new requirements and chance to withdraw consent

- 7. International – Secretary of Commerce shall promote international use and acceptance of electronic signatures, in accordance with (i) UNCITRAL 1996 Model Law on Electronic Commerce; (ii) reliability by parties; and (iii) non-discrimination across jurisdictions (§7031)

III. ELECTRONIC CONTRACTS – UNIFORM AND INDIVIDUAL STATE LAWS

A. UETA: UNIFORM ELECTRONIC TRANSACTIONS ACT, DRAFTED BY NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (JULY 1999)

- 1. Scope: electronic records and signatures relating to a transaction (Section 3)
 - a. “Electronic” – relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities (Section 2(5); same as E-SIGN)

 - b. “Electronic signature” – an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record (Section 2(5); same as E-SIGN)

- c. "Transaction" – set of actions between at least two persons relating to conduct of business, commercial or governmental affairs (Section 2(16); same as E-SIGN without examples of transactions)

2. Purpose

- a. Non-discrimination against electronic contracts

- (1) Record or signature may not be denied legal effect or enforceability because of electronic form (Section 7(a))
- (2) Contract may not be denied legal effect or enforceability solely because electronic record was used in its formation (Section 7(c))
- (3) Electronic record and signature satisfy legal requirements of written record and signature (Section 7(c) and (d))

- b. No effect on substantive rights

- (1) "Agreement" defined as "bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations and procedures given the effect of agreements under laws otherwise applicable to a particular transaction" (Section 2(1))
- (2) Prefatory note – substantive rules of contracts not affected by UETA

- c. Voluntary
 - (1) Parties must consent to electronic transaction; consent determined by context, conduct and circumstances (Section 5(b))
 - (2) Cannot waive right to refuse future electronic transactions (Section 5(c))
- 3. Coverage
 - a. Adopted by 40 states and District of Columbia; 2003 UETA bill introductions in Massachusetts, Missouri and Vermont (New York and Illinois have not adopted UETA)
 - b. UETA in its exact form not pre-empted by E-SIGN (E-SIGN, §7002(a)); severability clause (Section 20)
 - c. Defers to state laws on substantive matters (*i.e.*, signature, attribution, and mistake (Prefatory note))
 - d. Broader than E-SIGN; specifically addresses more topics
 - (1) Attribution – An electronic record or electronic signature is attributable to person if it is the act of that person and attribution can be demonstrated by security procedures (Section 9)
 - (2) Errors – effect of errors or changes may be avoided if party did not comply with agreed to security procedure or if electronic agent did not allow party to promptly correct

- a mistake, if party has not received benefit from consideration; otherwise, law of mistake applies (Section 10)
- (3) Evidence - no discrimination against electronic evidence (Section 13)
- (4) Notaries - can attach electronic signature to signature or record (Section 11)
- (5) Electronic agents - contract may be performed by one or more electronic agents; substantive law applies (Section 14)
- (6) Delivery - default rules define when record is "sent" and "received" and place of sending or receipt (Section 15)
- (i) Must be "properly addressed"
 - (ii) Can be "received" without recipient's knowledge
 - (iii) Does not cover content; could be unintelligible
4. Transferable records - Same as E-SIGN - unless otherwise agreed "control" creates "holder; covers notes, broader than just real property loans (Section 16)
5. Consumer Protection - UETA does not contain detailed consumer protection provisions but only requires mutual consent by parties to conduct transactions electronically. Consent can

be inferred from circumstances surrounding the transaction (Section 5(b))

6. Exclusions (Section 3)
 - a. Wills, codicils, testamentary trusts (Section 3(b));
 - b. UCC other than E-SIGN exceptions (UCC provisions on payment systems beyond scope and UCC Articles 5, 8 and 9 themselves address electronic transactions (Prefatory note))
 - c. UCITA
 - d. Specific state-law exceptions
 - e. Can apply to parts but not all of a transaction
 - f. Can generally agree to vary UETA by private contract (Section 5(d))
7. Technology neutral – does not define or use “digital signature,” but uses broad definition of “electronic signature”; neutral as to “specific technology” or “general technology”
8. Record retention (Sections 8 and 12) – less specific but similar to E-SIGN; UETA merely requires records remain accessible for later reference; ESIGN requires that electronic records remain accessible to all persons entitled to access by law for the period required by such law

9. State agencies – choose individually to take electronic records (Section 17)

B. UCITA: UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT DRAFTED BY NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (NCCUSL) (JULY 1999), AS AMENDED BY 2002 REVISIONS

1. Scope: computer information transactions

- a. “Computer information” means “information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy” (Section 102(a)(10))
- b. “Computer information transaction” means “an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information. The term includes a support contract under Section 612 (correction and support contracts). The term does not include a transaction merely because the parties’ agreement provides that their communications about the transaction will be in the form of computer information” (Section 102(a)(11))

2. Purpose

- a. Originally intended to become Article 2B of the Uniform Commercial Code (“UCC”)

- b. Pulls back UCC protections for licensees, reduces warranty protection and scope; limits privileges and defenses under U.S. copyright law (Sections 406, 501, 502)
 - c. Pro-licensor forum for disputes (Sections 109(b) and (c))
 - d. Use equals acceptance (Section 205(c))
3. Coverage
- a. Substantive law governing computer information transactions (Section 103(a))
 - b. Specific provisions on coverage of mixed transactions (i.e. computer information and goods and computer information and motion pictures) (Section 103(b))
 - c. Exclusions (Section 103(d))
 - (1) Financial services and insurance services transactions;
 - (2) Most motion pictures other than in mass-market transactions; sound recordings and musical work;
 - (3) Compulsory licenses;
 - (4) Employment contracts (other than with an individual hired as independent contractor outside the news reporting industry);
 - (5) Contracts which do not require delivery of information as computer information or in which the form of

information as computer
information is insignificant;

(6) Unless otherwise agreed, certain
telecommunications products or
services; and

(7) Transactions governed by UCC
articles 3, 4, 4A, 5, 6, 7, or 8

4. Adoption: Adopted by two states
(Virginia and Maryland adopted the
1999 version); considered by few others
 - a. "Bomb-Shelter Legislation"; some states
(Iowa, North Carolina and West Virginia)
have enacted anti-UCITA statutes
 - b. New York legislation would declare UCITA
clauses voidable by New York residents as
against public policy
 - c. Strong opposition by libraries and life
insurance industry
 - d. August 2002 revisions made to address
concerns (*i.e.*, electronic self-help banned;
state consumer protection law trumps
UCITA; protection of right to criticize;
preservation of remedies for known
material defect; express authorization for
reverse engineering for interoperability;
special open-source software provisions)
 - e. NCCUSL withdrew resolution for approval
of amended UCITA from the American Bar
Association house of delegates in February
2003

5. Citations by courts

- a. *Specht v. Netscape Communications and America Online*, 306 F.3d 17 (2d Cir. 2002) (citing UCITA provisions for insight into online circumstances that defendant argued as giving plaintiffs inquiry notice).
- b. *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corporation*, 284 F.3d 1323 (Fed. Cir. 2002) (“UCITA provides guidance on the U.C.C.’s view of the common law”).
- c. *AGT International, Inc. v. Level 3 Communications, LLC.*, 2002 U.S. Dist. LEXIS 21536 (2002) (“Although UCITA does not govern the transaction between” the parties, “it does provide additional support for the contention that the industry custom is to grant a perpetual license for licenses of software...”).
- d. *I. Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F.Supp.2d 328 (D. Mass. 2002) (mentions existence of UCITA as being inspired by Article 2 of UCC).
- e. *M.A. Mortenson Company, Inc. v. Timberline Software Corporation and Softworks Data Systems, Inc.*, 140 Wn.2d 568 (Wash. 2000) accepting parties’ proposition that Article 2 of UCC applies to licensing of software and holds that use of software constituted assent to agreement; finding support for holding in UCITA, stating that UCITA embraces the theory of “layered contracting”).

C. ESRA: ELECTRONIC SIGNATURES AND RECORDS ACT (CHAPTER 57-A OF THE NEW YORK CONSOLIDATED LAWS, §101, *ET SEQ.*, AS AMENDED BY CHAPTER 314 OF THE NEW YORK CONSOLIDATED LAWS OF 2002 ON AUGUST 6, 2002

1. Scope

- a. "Electronic" - "technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities" (Section 102(1))
- b. "Electronic signature" - "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record" (Section 102(3))
- c. Original electronic signatures definition was amended on August 6, 2002 because it was not broad enough to "fully support and facilitate the execution of all online agreements or other electronic transactions" and now conforms to definition in E-SIGN
- d. "Electronic record" - information, evidencing any act, transaction, occurrence, event or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities" (Section 102(2))

2. Purpose

- a. Non-discrimination

(i) “an electronic record shall have the same force and effect as those records not produced by electronic means” (§105(3))

(ii) “an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand” unless otherwise provided by law (§104(2))

b. Voluntary - no entity or person is required to use electronic record or electronic signature unless otherwise provided by law (§109)

3. Coverage

a. Relation to E-SIGN

(1) Drafted before E-SIGN and UETA

(2) Pre-emption by E-SIGN if inconsistent on interstate contracts; amendment of August 6, 2002 implemented to ensure compatible interpretation and application of both laws

b. Governs intrastate contracts

c. Does not address consumer notice issues; covers court orders and documents

d. Exceptions

- (1) Wills, trusts, health care proxies, powers of attorney (all but contractual beneficiary designations) (§107(1))
- (2) Negotiable instruments where possession is title, unless sufficient electronic version can be maintained that cannot be altered or copied (§107(2))
- (3) Real property instruments (§107(3))
- (4) Exceptions provided by NY office of technology (§107(4))

4. State Regulations

- a. New York Office of Technology (“OFT”) shall administer law, promulgate regulations and develop guidelines for the improvement of business and commerce by electronic means (§103) and establish rules and regulations on the use of electronic signatures and authentication (§104(1))
- b. OFT permanently adopted regulation, Title 9 NYCRR Part 540 on October 18, 2000, establishing “implementation standards and procedures for the use and authentication of electronic signatures and the utilization of electronic records.” Effective as of October 18, 2002, the regulation was revised by emergency adoption to reflect the amendments to ESRA of August 6, 2002.

- c. OFT also developed guidelines on e-signatures, e-signature security and e-records. These guidelines are available at <http://www.oft.state.ny.us/esra/esra.htm>.
 - d. Report due by November 2004 (Section 3(2))
5. Privacy (§108)
- a. Electronic records same as written records for freedom of information purposes (§108(1))
 - b. Authenticators must keep electronic information confidential except as necessary to authenticate signature (§108(2))
6. Government Entities - allowed but not required to use electronic records; cannot refuse written records, unless otherwise required by law (§105)
6. Evidence - electronic admissible under CPLR Article 45 (§106)
- a. *The People v. McFarlan*, 744 N.Y.S. 2d 287 (N.Y. Sup. Ct. (N.Y. Cty.) 2002) (second print-out of computer-generated photo of defendant admissible into evidence pursuant to ESRA).
 - b. *Charles D'Arrigo v. Alitalia*, 745 N.Y.S.2d 816; 2002 N.Y. Misc. Lexis 728 (N.Y. Civ. Ct. (Richmond Cty.) 2002) (entry of claimant's complaint onto computer by employee of defendant is writing New York law).

IV. ELECTRONIC CONTRACTS – INTERNATIONAL

A. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) – MODEL LAW ON ELECTRONIC SIGNATURES (2000)

1. Scope

- a. “Electronic signature” – data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory’s approval of the information contained in the data message (Art. 2(a))
- b. “Certificate” – a data message or other record confirming the link between a signatory and signature creation data (Art. 2(b))
- c. “Signatory” – a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents (Art. 2(d))
- d. “Certification service provider” – a person that issues certificates and may provide other services related to electronic signatures (Art. 2(e))

2. Purpose

- a. Builds on Article 7 of the UNCITRAL Model Law on Electronic Commerce

- b. Applies where electronic signatures are used in the context of commercial activities (Art. 1)
 - c. Does not override any rule of law intended for the protection of consumers (Art. 1)
 - d. Effect may be varied by agreement (Art. 5)
 - e. Encourages technological neutrality (Art. 3)
 - f. Provides standards for the requirements of an electronic signature (Art. 6)
3. Coverage
- a. Conduct of the signatory – outlines the duties and liabilities of signatories (Art. 8)
 - b. Conduct of the certification service provider – outlines the duties and liabilities of certification service providers (Art. 9)
 - c. Trustworthiness – provides factors for determining whether the methods used by a certification service provider are trustworthy (Art. 10)
 - d. Conduct of the relying party – outlines the reasonableness requirements for a relying party (Art. 11)
 - e. Recognition of foreign certificates and electronic signatures – establishes criteria for accepting foreign electronic signatures (Art. 12)

4. Requirements

- a. Electronic signature must be as reliable as appropriate for purpose for which data message was generated, in light of all the circumstances (Art. 6(1))
- b. Signature creation data are, within context in which they are used, linked to the signatory and no other person (Art. 6(3)(a))
- c. Signature creation data are, at the time of signing, under control of signatory and of no other person (Art. 6(3)(b))
- d. Any alteration to the electronic signature, made after the time of signing, is detectable (Art. 6(3)(c))
- e. If purpose of legal requirement for signature is to provide assurance as to the integrity of information, any alteration to that information after signing is detectable (Art. 6(3)(d))
- f. Allows enacting states to specify any person or entity as being competent to determine which electronic signatures satisfy the provisions of Article 6 (Art. 7)

B. DIRECTIVE ON A COMMON FRAMEWORK FOR ELECTRONIC SIGNATURES FOR THE EUROPEAN UNION (DIRECTIVE 1999/93, DECEMBER 13, 1999)

1. Scope

- a. "Electronic signature" - data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication (Art. 2, §1)
- b. "Advanced electronic signature" - an electronic signature which meets the following requirements:
 - (i) it is uniquely linked to the signatory;
 - (ii) it is capable of identifying the signatory;
 - (iii) it is created using means that the signatory can maintain under his sole control; and
 - (iv) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable. (Art. 2, §2)
- c. "Signatory" - a person who holds a signature-creation device and acts either on his own behalf or on behalf of the natural or legal person or entity he represents (Art. 2, §3)
- d. "Certificate" - an electronic attestation which links signature-verification data to a person and confirms the identity of that person (Art. 2, §9)
- e. "Qualified certificate" - a certificate which meets the requirements laid down in Annex I and is provided by a certification-service-provider who fulfils the requirements laid down in Annex II (Art. 2, §10)

- f. "Certification-service-provider" – an entity or a legal or natural person who issues certificates or provides other services related to electronic signature (Art. 2, §11)

2. Purpose

- a. "The purpose of this Directive is to facilitate the use of electronic signatures and to contribute to their legal recognition."
(Art. 1)
- b. Non-discrimination against electronic signatures
- c. Provides a framework for certification-services
- d. No effect on substantive rights. "It does not cover aspects related to the conclusion and validity of contracts or other legal obligations where there are requirements as regards form prescribed by national or Community law nor does it affect rules and limits, contained in national or Community law, governing the use of documents."
(Art. 1)

3. Coverage

- a. Had to be implemented by EU member states by July 2001 (Art. 13, §1)
- b. Certification-service-providers play a large role in electronic signature process; Annex II of the directive provides standards for certification-service-providers.

4. Legal effect of electronic signatures
 - a. Member states must ensure that *advanced electronic signatures* that are based on a *qualified certificate* and are created by a *secure signature creation device* satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data. (Art. 5, §1(a))
 - b. Advanced electronic signatures that meet the aforementioned qualifications are also admissible as evidence in legal proceedings. (Art. 5, §1(b))
 - c. However, Members States cannot deny the legal effectiveness, or admissibility as evidence in a legal proceeding, of an electronic signature solely because (Art. 5, §2):
 - (i) the electronic signature was in electronic form, or
 - (ii) the electronic signature was not based upon a qualified certificate, or
 - (iii) the electronic signature was not based upon a qualified certificate an accredited certification-service-provider, or
 - (iv) The electronic signature was not created by a secure signature-creation device.