

The Research on Legal Regulation About the Risk of Electronic Contract Error

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Abstract

Recently, there are ongoing legal issues about the electronic contract mistake. Due to the lack of relative law, it is difficult for judges to make the decision. According to the current legal practice around the world, judges are prone to change the traditional way to make the decision. They require enterprises to take the responsibility caused by the electronic contract mistake. This paper will discuss how to manage the risk of electronic contract mistake under the theory of risk management. In the first part we will discuss why we should use the theory of risk management to discuss this problem. In the second part, we will discuss the loophole in the current management of electronic contract. In the third part, we will discuss how to use the theory of risk management to manage the risk of electronic contract mistake.

Key words: Electronic contract error; The theory of risk management; Avoiding risk

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INTRODUCTION

There are two kinds of mistakes of electronic contract. The first is subjective mistake. It refers to the mistake

caused by men. For example, if the context of contract is wrongly inputted by staff, this kind of mistake is what we call subjective mistake. The legal case of Dang Dang which is on the docket is caused by the subjective mistake. The second kind of mistake is objective mistake. It refers to the mistake caused by the breakdown of computer and network.

When mistakes occurred in the contract, the contract parties usually bring the suit to the court. Judges will make the decision of whether the contract is valid or not according to the law. No matter what the decision is, one of the parties will bear the loss. That is because if the contract is valid, the party who made the mistake will suffer from the loss caused by the inconsistent declaration of will. However, if the contract is void, the decision will violate the other party's reliance interests. This unexpected loss is called "risk". As more and more people prefer to choose what they need online, the influence of electronic contract mistake is becoming serious. How to help enterprises to manage the risk is the main topic this paper should discuss.

1. THE THEORY OF RISK MANAGEMENT AND DISTRIBUTION OF ELECTRONIC CONTRACT ERROR RISK

1.1 The Theory of Risk Management and Distribution of Electronic Contract Error Risk in Our Law

Enterprise risk management (ERM) in business includes the methods and processes used by organizations to manage risks and seize opportunities related to the achievement of their objectives. It describes an approach for identifying, analyzing, responding to, and monitoring risks and opportunities.¹ Facing the risk in enterprise

¹ http://en.wikipedia.org/wiki/Enterprise_risk_management.

management, Managers of enterprises should identify the risk at first according to their enterprises characteristic. And then, when enterprises are in the risk, managers should endeavor to analyze what kind of risk it is. Next, they have to respond to the risk without hesitation. During that process, managers are supposed to monitor the risk of their enterprise. This is the managing chain that ERM introduced. According to this theory, in electronic trading, risk management is a continuous process. The goal of risk management is to use minimum cost to obtain the maximum benefit. In order to achieve this goal, we need to consider two aspects: first is that we need a method to assign the risk which should be provided in our law; second, enterprises need a standardized procedure to achieve the goal of sustainable control. When the e-business mistake occurs, the government and enterprise should identify, analyze, respond to and monitor the risk. When we use the risk management theory to explain the contract risk management provided in our current law, we can find the following three facts. To begin with, based on the principle of fairness, the contract party who can control the risk will take the responsibility caused by the risk. This is an effective way to assign responsibility. Besides, the law fully respects the will of contract party and tries to lower the cost of assigning the responsibility. The third is that, if the contract is based on the fraud, malice, the party who make the goal of contract cannot be achieved, will take the responsibility. Electronic contract is one of the modern contracts. According to the rules in our law, if mistakes occur in electronic contract, party will negotiate to solve this problem. Otherwise, the judges will award the right of revocation to the party who made the mistake.

1.2 Why We Need Risk Management Theory to Manage the Risk Caused by the Mistake of Electronic Contract?

The mistake easily occurs in every step of assigning the electronic contract, especially the contract assigned by electronic agent. Most of the time, the electronic contract mistake is just because of the negligence of the staff. And such negligence can bring huge losses to businesses and consumers. In such dynamic business activities, enterprises need to monitor each process, aiming to manage and control the risk. Risk management theory emphasizes the importance to involve enterprise supervision in business activities. Judging from the judicial practice in many countries at present, the judges prefer asking the e-business take on more risk after the mistake of contract occur. According to traditional civil law theory, based on the party autonomy principle, if mistake occur in the contract, the party who make the mistake shall enjoy the right of revocation of the contract. At the same time, if the contract is revoked, people who revoke the contract should compensation the people who have reliance interests.

Although people get compensation, but they really hope to get to perform the contract. So, compared with the cancellation party, the counterpart of contract bear more risk of loss because of reliance interest. But when the mistake of electronic contract occurs, the judges are prone to asking the e-business take on more risk. Not only because the judges believe that the law should protect the reliance interests of the relative party, also because the judge will consider which of the contract parties can bear more loss caused by risk. According to the risk curve, the more assets the contract party has, the more likely it will suffer from the risk.

Compared with ordinary consumers, enterprises own assets greater than the consumers, so the enterprise will have more ability to bear risks. Therefore judges prefer to change the traditional practice in modern judicial practice, requiring companies to take on more risk. In view of this, the enterprise should try to manage the contract on the risks of mistake, and risk management theory helps them manage this risk. From that point of view, the dynamic risk management theory can be well applied to manage e-commerce risk caused by mistake.

1.3 The Loophole in the Current Management of Electronic Contract

1.3.1 The Legislation Cannot Keep the Step With the Development of Society

We lack the common operation standard to manage the contract risk. In our country, the Contract Law and The General Principles of the Civil Law have not mentioned anything about the common operation standard of electronic contract (Wang, 2011, p.81). This is because the legislation cannot Advance as society does. As we all know, the Standardization process will greatly reduce the mistake, so as to manage risk. If we don't pay much attention to the common operation standard, those nonstandard operation risks are likely to cause huge losses. Especially for the B2C and B2B electrical contractor, they sign a large amount of electronic contract every day. If electrical contractor don't follow the specification processing, they will easily make inestimable mistake. At the same time, it is difficult to assign responsibility because of the lack of related process specifications. Because each party of the contract believe that they have followed the rules to sign the electronics contract according to their own standard, then when they have disputes, it is difficult to satisfy both sides with a single solution.

1.3.2 The Current Law Has Not Provided the Distinctive the Assignment of Responsibility From the Traditional Contract

Under the current law, the data message of the contract is treated as a written contract. When mistakes occur, judges should use Relevant provisions of General Principles of the Civil Law" and Contract Law, giving the right to cancel the contract to the party who made

the mistake. However, as mentioned above, if judge follow the traditional rule to deal with the mistake of the electronic contract, some problems will occur in this case. First of all, it is not conducive to protection the right of the party who has reliance interest. Second (Lu, 2009, pp.15-17), if mistake is brought by the breakdown of Electronic Data Systems, how to solve the problem is what we need to think about. Although we have the rule to assign the responsibility when the Electronic Data Systems break down as it is prescribed in Paragraph 1 of Article 63 of the Telecommunications Ordinance: "Use of telecommunication network transmission of information content and its consequences shall be the responsibility of the telecommunication users." But this can really solve the problem? We have doubt about the answer. Because this provision just assigns the responsibility between telecom enterprises and users, and it doesn't indicate the assignment of responsibilities between users. For problems mentioned above, we can't solve the problem only in accordance with the existing law. Legislators must set rules according to the characteristics of electronic.

1.3.3 The Manager of Enterprise Lack Risk-Avoidance Awareness

Although enterprise will set relevant internal rules to manage risk caused by mistake, but the lack of risk-avoidance awareness is a common problem especially for small electrical business. If Dang Dang website has strict internal specification and standard when the staff input the context of the contract, they can manage the occurrence of mistake. Price is a substantial requirement of offer. If one party treats the requirement so careless, it is hard to require others to assume responsibility. Especially for enterprises that choose automatic processing of electrical business sales system, when the mistakes are made by their system, it is more difficult to require the other party to take the responsibility. Otherwise, the decision will violate the fair connotation. Therefore, it is important to strengthen enterprise's risk-avoidance awareness.

1.3.4 The Enterprise Lacks Effective Risk Management System

If an enterprise lacks awareness of the risks, then it will not focus on the establishment of risk management mechanisms. Risk management is a dynamic process. Forecasting, assessment, response and processing constitute a complete process and each step is indispensable. Now many suppliers do work hard in the risk response and handling, but they have not been aware that the prediction and assessment of risks is the most effective and inexpensive way to reduce the risk at any time. If we only make up the mistake when we have suffered from the loss, the losses caused by so many tangible benefits will be difficult to restore, especially the credibility of the electricity supplier in the customer. Credibility is an important condition for bettering their

business. Therefore, an effective risk management mechanism will be an important guarantee for the survival and development of enterprises.

2. HOW TO USE THE RISK MANAGEMENT THEORY TO MANAGE THE MISTAKE CAUSED CONTRACT MISTAKE

Risk management theory controls the risk of damage mainly from the four aspects: identification, analysis, response and monitoring of risk. The author will use ERM theory to find out the solutions aimed at the existing problems from two aspects: state management and enterprise management in the following article.

2.1 How Enterprise Manage the Risk Caused by the Contract Mistake With Our Government Help

2.1.1 Government Helps Enterprises to Improve Their Capabilities of the Identification, Analysis and Response to the Risk of Mistakes of Electronic Contracts by Publicity Work

In this process, firstly government should not only help businesses to identify the risks posed by the electronic contract mistake, but also to improve awareness of the risks in the process. Government adapts a series of measures, such as videos and news reports, using of the power of the media to achieve this purpose. Also enterprises will learn how to analyze the risk, and how to take better measures to deal with the risk through the seminars held by government. Government should reassign the responsibility which was caused by electronic contract mistake through legislation work and get consumers involved into the process of supervision of price mistake risk.

2.1.2 Government Should Reassign the Responsibility Which was Caused by Electronic Contract Mistake Through Legislation Work and Get Consumers Involved Into the Process of Supervision of Price Mistake Risk

The relative law should clarify whether the e-business have right of revocation when they make mistake about contract price. The author think that in order to protect the reliance interests of the other party, whether independent electrical contractor of shopping, just like Amazon or electrical business have added "hesitation period" provision in the contract (Sun, 2012, pp.24-27), should be given the right of revocation. That is because the other party in the electronic contract which does not like ordinary contract, is entirely relying on merchant's description to choose their own needs. As the parties of General Contract can get the contract information by various means, so they can find out whether the unusual price belongs to the mistake of the parties. Some scholars

put forward that we should give right of revocation to the party who made mistake in principle, but we still should consider consumer's subjective meaning, to find if they are in good faith. The author of this article agrees with this point of view. Because if the contract is based on malicious, then the consumers' behavior break the emperor clause in civil law and the principle of good faith (He, 2012, p.135). So in this case, you should give the right of revocation to the party who make the mistake. Although some scholars think that the party's subjective state of mind is difficult to judge (Ji, 2008, p.41). Should consumers to bear such risks? Why we should require the consumers to take the obligation to correct the mistake which is caused the other party? Authors believe that we should make consumers to bear such risks. Based on the principle of good faith, the parties should be honest to each other. The aim to a contract is to make people get what they need rather than make people get benefit from the mistake. Therefore it is appropriate to require the consumers to take notification obligation. Thirdly, government should help enterprise to establish the operation standard of e-business, so that they can manage some mistake. Simultaneously, government should suggest the enterprise to add the "hesitation period" provision in their contract. As Amazon has done, e-business informs the consumers only after the delivery of your contract will be set up by the expressed way. This provision helps to maintain stability in the trading, avoiding changes in formed contract.

2.2 How the Enterprise Manage the Contract Mistake Risk by Themselves

2.2.1 Enterprise Should Enhance Their Awareness of Mistake Risk of Electronic Contract by Identifying and Analyzing the Risk

Firstly, the enterprises should well recognize the mistake risks itself posed by the electronic contract. To achieve these two goals can be by means of a seminar organized by the professional legal staff or government, guild. Only when enterprises identify and analyze the risk of mistakes of electronic contracts by themselves, they can improve their own awareness of the risks posed by the electronic contract mistake. Only enterprise aware that the risks posed by the electronic contract mistake are serious, companies will actively seek measures to solve the problem.

2.2.2 Enterprise Companies Will Actively Seek Measures to Face the Risk

Enterprises should actively learn advanced practices from other enterprises about the effective way to manage risk. The most important thing is that enterprises must establish a set of internal standardized processes to deal with risks.

Enterprise can reduce the risks arising from electronic contract mistake through the specification operation process.

Authors suggest that enterprises should establish the internal standardized process in following specification these areas. First of all, it should add a "hesitation period" provision. The "hesitation period" is used to inspect their mistake in the contract. It is also provide a chance for consume to withdraw their contract. The "hesitation period" provision should indicate that the order is received but contracts with customers have not been established. Also, the provision should tell the consumer that the explicit time for establishing the contract and mutual rights obligations in this period. Second, in order to find the mistake in contract during "hesitation period", the enterprises should employ a number of staff to inspect the contract mistake. To make this job more efficient, enterprise can input a range of price in advance. Therefore the software can check whether the price is abnormal after the consumer order by them. If the software finds the abnormal price, the staff will review the price again.

2.2.3 Enterprise Should Supervise the Process of Signing Electronic Contract to Reduce the Mistake

In fact, enterprise can manage much of the price mistake by adding the "hesitation period provision. However, to better work, enterprises should always monitor the process of signing electronic contract to reduce the mistake. Two aspects need to be inspected. One is the website. The staff should constantly supervise the change of price in the website, especially after they input the new price. Another is computer system. Usually, network staff should pay attention to the maintenance of the network system, so as to manage mistake of price caused by breakdown network system.

The risk of electronic contract price mistake is an inevitable problem in the development of electronic business. In order to promote electronic business, and maintain electricity supplier business reputation, e-business must be proper to manage the risk and manage risk.

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