

The Formation of Contract Online

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Abstract: The main concern is to analyse the validity of contracts made over the Internet. This is an important distinction. Under English common law, an agreement becomes legally binding when four elements of formation are in place: offer, acceptance, consideration and intention to create legal relations. For contracts entered into over the Internet, the Electronic Commerce (**Directive**) Regulations 2002 introduces new pre-contract formalities, in particular for consumers and businesses which do not agree otherwise¹. Along with these formal requirements, law and statute limits the content of a contract. This section focuses on the formation of a contract, examining each of the four factors in turn, highlighting those additional features special to the Internet.

I. Pre-Offer Information

The Electronic Commerce Directive and Regulations oblige almost every owner of a website established in EU to provide certain information to its visitors, whether the website permits transactions or not. We examine these new requirements by first assessing where a website owner is ‘established’. We then consider the manner of provision and nature of the information which EU-established entities must make available to all visitors to a website.

II. Establishment of Providers

The Electronic Commerce Directive and regulations do not have extra-territorial reach; they bind only those established within the EU. With websites and servers, the concept of establishment, however, is not so straight. Popular websites are hosted simultaneously on many so-called duplicating ‘mirror servers’. These increase resilience. But they may be situated anywhere on the planet. Consequently, they may be many thousands of miles from the headquarters of those who control them.

III. Location of Servers Not Conclusive

The Electronic Commerce Regulations take a pragmatic view of where a provider is established:

“Established service provider” means a service provider who is a national of Member State or a company or firm as mentioned in Article 48 of the Treaty and who effectively pursues an economic activity using a fixed establishment for an indefinite period, but the presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider...²

In effect, therefore, moving one’s servers around the world does not change where one is established. To determine establishment one must look first to an economic activity being pursued from a fixed establishment for an indefinite period. Employees working in a leased building are the sort of situation envisaged here. One cannot conclude anything from the mere fact that servers are, or are not, inside the building.

IV. Multiple Establishments

Complications arise where more sophisticated companies have multiple locations providing support to a particular website. Imagine the following. A website company’s headquarters is in Japan but a team based in California handles technical control of the website. Meanwhile, all the text on the website is written by a group of UK freelance journalists which posts finished articles to an editor in a small office in Oxford, and customer support is handled from Ireland. The site’s credit card processing is conducted in Germany and all goods are shipped from local distribution centres around the world. Where is this company established?

The Regulations and Directive clearly envisage such scenario. we are told, ‘in cases where it cannot be determined from which of a number of places of establishment a given service is provided, that service is to be

¹ 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, OJ L179/1.

² Regulation 2(1), part definition.

regarded as provided from the place of establishment where the provider has the centre of his activities relating to that service.³

There is a concern associated with this definition being used to interpret where a multiple-state-established service provider is established for the purposes of the directive and regulations. The recital and definition would seem to suggest that different services may have different centres of activities relating to them. What follows from this is the possibility that the service of, say, ordering a product from a website is centred within the UK but the service of delivering it is centred in the U.S. In other words, one service is EU-centred; the other, from the same website, may not be. In such circumstances, the service provider may be unsure whether the legislation applies. As will be explained, however, the contractual sanctions for not complying with the Regulations are severe enough that such a service provider is advised to assume that they are established in the EU, for the purposes of the Regulations.

V. General Information to All

If a service provider is established in the EU, they must make available certain general information about themselves. This information must be made available to the recipients of their service ‘in a form and manner which is easily, directly and permanently accessible’. If a service provider fails to do this, they may be liable in damages by their visitors for breach of statutory duty⁴.

Information to be Made Available

The scope of the information to be made available is straight forward. It is as follows:⁵

1. the name of the service provider;
2. the geographic address at which the service provider is established;
3. the details of the service provider, including his electronic mail address, which make it possible to contact him rapidly and communicate with him in a direct and effective manner;
4. where the service provider is registered in a trade or similar register available to the public, the register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
5. where the provision of the service is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
6. where the service provider exercises a regulated profession-
 - (i) the details of any professional body or similar institution with which the service provider is registered;
 - (ii) his professional title and the Member State where that title has been granted;
 - (iii) A reference to the professional rules applicable to the service provider in the Member State of establishment and the means to access them;
7. Where the service provider undertakes an activity that is subject to value added tax, the VAT number; and
8. Where prices are referred to, these shall be indicated clearly and unambiguously and, in particular, shall indicate whether they are inclusive of tax and delivery costs.

Form and Manner of Information

The above information must be ‘made available to the recipient of the service... in a form and manner which is easily, directly and permanently accessible’⁶. Unlike specific transactional information mentioned below, the above information may be made available at any time during the encounter with the website visitor. This said, one should note that this information must be easily accessible. Burying the information after numerous other pages on a website is unlike to satisfy this requirement. A link from the homepage to a list of this information is probably the most obvious way to make the information available. Some website operators may choose to include this information within their standard ‘Terms and Conditions’. This too is likely to be acceptable but with one caveat. This information must be made available ‘permanently’. Consequently, websites must not be designed so that the information is; say, only available while one is conducting a particular activity. The information must be able to access even after a visitor has enjoyed the site.

³ Regulation 2(1). Recital 19 is similar.

⁴ The Electronic Commerce Regulation 2002, reg 13.

⁵ The Electronic Commerce Regulation 2002, regs 6(1) (a)- (g) and 6(2).

⁶ Regulation 6(1).

Transactional Information Prior to Order

If a service provider is established in the EU and is soliciting orders from visitors, it must provide specific information about its transactions to potential consumers and businesses who do not agree otherwise. This information must be provided to the recipients of their service ‘in a clear, comprehensible and unambiguous manner’.

If a service provider fails to do this, they may be held liable by their visitors for damages in breach of statutory duty⁷. In addition, they must allow a consumer to identify and correct input errors prior to placing their order. If the service provider does not make this facility available, the consumer may rescind the contract.⁸ Should the customer so cancel, the service provider may apply to the court to order that the consumer may not rescind the contract.⁹

Provision of Information: Clear, Comprehensible and Unambiguous Manner

The scope of the information to be provided in a ‘clear, comprehensive and unambiguous manner’ prior to the order being placed is simple to understand.¹⁰ It nevertheless may be complex to implement and include on certain websites. There are six headings below which give details of the information required and special concerns of each requirement:

- (1) Technical steps to conclude contract.
- (2) Filing of concluded contract.
- (3) How to identify and correct input errors.
- (4) Languages offered for contract.
- (5) Relevant codes of conduct.
- (6) Terms and conditions for storage and reproduction.

VI. Offer

Having provided visitors with the requisite information described above, websites can (finally) get on with the formalities required to bind customers to contracts. It is discussed below that an offer, met with suitable acceptance, consideration and an intention to create legal relations can form a contract with every party who gains access to their site... For example, the owner may want to contract with parties from the local rather than from any country. Owners of websites should therefore ensure that the advertising aspect of the site is construed as an ‘invitation to treat’, not as an offer.

VII. Web-vertisements

One fundamental of e-commerce is that suppliers use websites to conduct business. Like a billboard, a website advertises products and services, but unlike a billboard it can also assist the supplier to complete the sale. In doing so, a website can be designed to advertise the features of a product or services; it can even allow a viewer to examine the product or services. The Internet in effect fuses the advertising and the shop. The law, in contrast, has distinguished between advertising and shop displays¹¹. This unique commercial situation has legal ramifications.

Shop invitations

Old and much-considered authority explains that the display of goods and their prices in a shop window or on shop shelves are not offers to sell those goods; they are merely invitations to any customers to make an offer to make the purchase. The mechanics are that a customer makes an offer to the retailer, which the retailer may choose to accept or reject. Website owners should desire the same legal mechanics, whether there are supplying to businesses or, in particular, to customers. Indeed, by doing so, these website owners contracting with consumers will be more easily able to comply with the ‘placing of the order’ rules of the Electronic Commerce Directives¹².

⁷ Regulation 13.

⁸ Regulation 15.

⁹ Regulation 15.

¹⁰ Regulation 11.

¹¹ Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd [1952] 2 QB 795

¹² Article 11.

Advertisement Offers

For the purpose of offers, the law distinguishes shop displays from certain advertisements. It is therefore essential that those who wish to contract over the Internet understand this difference. The law assesses advertisements in two categories: those which promote unilateral contracts and those promoting bilateral contracts. A unilateral contract is one in which money, generally, is offered to another party to perform some act without that person promising anything in return. A person accepting the offer does not need to communicate this fact to the offeror or to complete the contract; he simply needs to do what is required of him.

This legal notion has been confirmed by the Court of Appeal¹³. A travel agent's physical premises displayed the standard ABTA scheme of protection notice. This included the statement: 'ABTA [a travel agent became association] arranges for you to be reimbursed the money that you have paid for your holiday [if there are financial difficulties with the agent].' The travel agent became insolvent and the claimant sought to recover the cost of the holiday from ABTA. The Court of Appeal held that this published statement would constitute an offer and, as such, was accepted and formed a contract with the claimant and any customer doing business with the travel agent.

A bilateral contract, in contrast, has both parties making a promise. Each offer is usually accepted by a communication of the other's promise.

Web invitations

The owner of a website has little reason to prefer a unilateral contract to a bilateral contract, and where possible should seek to be viewed by the courts as a shopkeeper. The main point to make is that the law looks not simply at the words used for a contract, but the objective intention behind them. This means that if a website would induce a reasonable person into viewing statements on the pages as offers, so will a court. In *Bowerman*, Hobhouse, LJ states this succinctly:

The document as reasonably read by a member of the public would be taken to be an offer of a legally enforceable promises....It suffices that ABTA intentionally published a document which had that effect.

A contracting party cannot escape liability by saying that he had his fingers crossed behind his back.'

Therefore, an owner of a website must err on the side of caution in creating a web invitation.

VIII. Misrepresentations

The distinction between an invitation to treat an offer is that an offer, met with acceptance, may form a contract. An invitation to treat does not serve as an offer: the courts construe that taking up the invitation is an offer. The distinction does not entitle a website to induce a consumer to enter a contract by using misleading statements. If a factual statement prior to a contract being formed is classified as misleading, the induced party may be entitled to claim damages, rescind the contract, or even both. If an individual is concerned that an invitation to treat or statement on a website may constitute such a misrepresentation, he should take proper legal advice. It is worth noting that the established law and statute on misrepresentation are equally and fully applicable to a contract formed over the Internet as to one formed in other ways. Website owners who simply use their sites as a 'billboard' for contracts that are formed in other ways must therefore consider that the content of their site may induce someone to enter a contract. It makes no legal difference to the law of misrepresentation that the misrepresentation is on a website but that the contract is not formed over the Internet. They must also ensure that they provide the General Information as described above.

IX. Timing and Location of Offers

That an offer was made provides two useful pieces of information: when the offer was made and where it was made. When a court deems an offer made is often vital. At any moment up to acceptance, an offer can be retracted. Where an offer was made has some relevance to the applicable law for a contract, in the absence of choice.

When an offer is made

It is often relevant for the purposes of a contract to determine when an offer is made. Under the electronic Commerce Directive for consumers or non consumers, any offer can be revoked before acceptance. Therefore, the first question to answer is when an offer was made. The need for discussion arises because electronic communications are often delayed in transmission and a court will have to decide whether a revocation of the communication will be deemed to take effect before the conclusion of the contract.

¹³ *Bowerman v Association of travel Agents Ltd* [1995] *NLR* 1815.

Consumer's offers

The Electronic Commerce Directive appears, at first glance, to simplify greatly when a consumer's Internet offer is deemed received: 'the [offer]... [Is] deemed to be received when the part[y] to whom [it is] addressed is able to receive [it]¹⁴'.

Delayed offers

Adams v Lindsell is old and approved authority as to an offer is deemed to take effect. In this case wool was offered for sale by a letter sent to the claimants. Because of a mistake made by the offerors the letter arrived two days late at which time it was promptly accepted. The court held that the contract was formed on acceptance, despite the offer being delayed. The court indicated, more than once, that its decision was partially founded on the reason for delay being the offeror's mistake. If the offeror had included a time limit on the efficacy of the offer, however, a late acceptance would not have bound them.

Despite the technology, email can suffer from the same delays and problems as experienced by the defendants in *Adams v Lindsell*. People wrongly consider email and even website offering to be quick method of communication and compare it to a fax, or perhaps even a telephone.

Post, faxes and emails

An email is more like a posted letter being delivered to a pigeon hole ready for collection. Emails are not instantaneous, unlike faxes and telephone calls. An email message is sent to an Internet service Provider (ISP) who, like the Royal Mail, attempts to deliver it as quickly and accurately as possible. But as with the Royal Mail, mistake can occur and emails can arrive garbled, late or even not arrive at all. The similarities with the Royal Mail deliver the mail to only the 'first stop' outside England. The same applies to emails: they are passed between many different carriers to arrive at their final destination.

Unlike a telephone call and fax, some emails are delivered not to the recipient's desk, but to an electronic pigeon hole for collection. This pigeon hole is called an 'inbox'. Many users of email must dial their ISP to check on the arrival of an email; often users must collect their email, it is not 'delivered' to them.

Emails can be misaddressed, delayed by any server or router on the way, and worse than ordinary mail, they may not be 'collected' for some time after delivery. This is a situation comparable to sending an offer to a pigeon-hole abroad. Many parties are involved in the transmission of the message, and even on arrival the recipient must act to retrieve it.

Before dealing with the English and European legal resolutions to this situation, a technical point must be made. Certain email system permit a 'read' and a 'receive' receipt usually informs the sender that the email has not been received by the individual, but by his ISP; if analogies are useful, the receipt informs when the individual retrieves the email may not be read for some time.

X. Acceptance

There is little special about the terms of an acceptance made over the Internet, as opposed to one made in any other way. The acceptance must unequivocally express assent to all the terms of the offer. Much has been written about what constitutes such an acceptance. It is useful here to draw out the special methods of accepting over the Internet.

It has been mentioned that an email can have a 'read' and a 'receive' receipt. Receiving one of these will not constitute an acceptance of an emailed offer. An automatically generated receipt of an offer is not an acceptance of the terms of an offer. Even an email sent in reply that states the recipient's intention to reply in due course will not be an acceptance¹⁵.

An acceptance needs to assent to an offer. It does not, in general, need to be in writing, or by another means of communication. For this reason, where a website is established to make or complete contracts, its owner should be aware of what conduct may bind him. This is of paramount importance. Contracts made over the World Wide Web are rarely completed by two humans: a website operates automatically according to a set of instructions, often called a script. In this respect, it is crucial that the owner of a website understands how a contract can be completed because, generally, a website operates without supervision.

This section examines two scenarios: one, where, as advised, a website accepts an offer and second, where it makes one.

¹⁴ Article 11(1) and reg 11(2).

¹⁵ See OTM Ltd v Hydranautics [1981] 2 Lloyd's Rep 211.

Website acceptance and acknowledgement

Having discussed when and how offers can be made it is now relevant to determine how and when acceptances are made. The general rule is that an acceptance must be communicated to the person making the offer. The Electronic Commerce Directive also obliges offerees to acknowledge the receipt of an offer ‘without undue delay and by electronic means’¹⁶. An acknowledgement of receipt may well also be the acceptance of the offer. Fortunately the two may be dealt with separately. Otherwise this would then bind the supplier into accepting the offer ‘without undue delay and by electronic means’. The supplier is entitled first to acknowledge receipt of the offer, and then to accept the offer. If a supplier does not acknowledge receipt of the order, they may be sued for damages for breach of statutory duty¹⁷.

Suppliers should take care over the language used in any acknowledgement. They should ensure that it does not act as an acceptance and so, inadvertently, form a contract earlier than intended.

Any person making any offer may waive the general rule that acceptance must be communicated and can instead permit acceptance by conduct. This general rule is examined in the light of e-commerce transaction.

XI. Communication of Acceptance

The acknowledged rule is that acceptance of an offer must be communicated to the offeror¹⁸. This must not be confused with the Electronic Commerce Directive’s rule that acknowledgement of a consumer’s offer must also be communicated. In addition, as the court of Appeal has stated in *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao*¹⁹, ‘We have all been brought up to believe it to be axiomatic that acceptance of an offer cannot be inferred from silence, save in the most exceptional circumstances...’

The question is, what are the ‘most exceptional circumstances’ when it is appropriate for an acceptance to be silent? These exceptional circumstances stem from the reasons for the rule: to protect both offeror and offeree.

The rule protects the offeror from being bound by a contract without knowing that the offer is accepted. An exception to this may be, therefore, where the offeror expressly waives the requirement of communication. For example, an offer to sell goods may be made by sending goods to an offeree who can accept the offer by using them²⁰. Here there is not mere silence or inactivity; there is conduct indicating acceptance.

Conversely before the Electronic Commerce Directive, offerees were also protected by this rule. If they did not wish to accept an offer, it was not felt undesirable that offerors could put them to the trouble of communicating a refusal²¹. Indeed, authority from an established precedent, *Felthouse v Bindley*²², indicates that the offeror can waive communication of acceptance by the ‘custom and practice’ of the area of commerce²³.

Acceptance by conduct

The website can accept an offer, ‘on behalf’ of its owner, by certain conduct. For example, a viewer can click a button on a web page to send a request for some software and the software may then begin to download to the viewer’s computer. This positive action can be viewed as an acceptance of the offer made by the viewer without the owner (or offeree) having expressly assented to the offer itself²⁴. But, our courts commonly apply an ‘objective’ test to interpret the actions of the offeree. Conduct will therefore be regarded only as acceptance if the reasonable person would be induced into believing that the offeree has unequivocally accepted the offer.

Completing an order by downloading a file to the consumer is likely to be construed as acceptance by the reasonable person²⁵. Owners must therefore carefully construct their websites. The owner must ensure that the website is able to validate the terms of the offer from the viewer: Generally this is achieved by the website

¹⁶ Electronic Commerce Directive, art 11(1), first; Electronic Commerce Regulations, reg 11(1) (a).

¹⁷ Regulation 13.

¹⁸ [1974] 1 WLR 155 at 157.

¹⁹ [1985] 1 WLR 925 at 927.

²⁰ Electronic Commerce Regulations, reg 11(2) (b).

²¹ Clive Gringras, *The Laws of the Internet*, 2nd ed, 2003, Butterworths LexisNexis. P 29.

²² (1862) 11 CBNS 869.

²³ See *Jonathan Wren & Co Ltd v Microdee plc* (5 July 1999, unreported) Technology and Construction Court, See Clive Gringas P 29.

²⁴ See *Brogden v Metropolitan Rly*(1877) 2 App Cas 666.

²⁵ See *Northern Foods plc v Focal Foods Ltd*[2001] EWCA Civ 1262.

having a contract page that the viewer is encouraged to submit, or offer, by clicking a link or button. On receiving this notification the website will automatically start the downloading of digital material to the viewer. But the automation of this acknowledgement of receipt and acceptance places a burden on the site owner: he must ensure that the terms of the offer submitted are the terms of the offer expected.

Consumer Acceptance

Acceptance by conduct

It has been explained that conduct can constitute acceptance²⁶. ‘In the scenario where a website makes an offer, it will be the conduct of the consumer, or viewer, which the courts will examine to check for acceptance. It is in the interests of the website to ensure that the conduct by the consumer is therefore as unequivocal and unambiguous as possible²⁷.

Conduct is regarded as acceptance, and, for services, acknowledgement of receipt of the order, only if the reasonable person would be induced into believing the offeree has accepted. ‘This objective’ test can create difficulties for the operator and designer of a web page. Many digital consumers using the World Wide Web for commerce view it like a shop, only a ‘virtual’ one. They may therefore be surprised, and not aware, that to acquire a product they must not only provide payment but also then consent to a licence. The more usual tangible purchases involve simply paying in exchange for receiving the product. On that basis it is difficult to fathom how a court could objectively construe as acceptance the clicking of a button that denotes downloading the product rather than accepting the licence. Under the Scottish law, a case concerning ‘shrink wrapped’ computer software showed the court’s readiness to construct two contracts out of the supply of computer software transaction: *Beta Computers (Europe) v Abode System Europe*²⁸. The first contact is the retail sale of the physical box of software containing the product is one between the retailer and the consumer. The second is purported by the software publisher to be between the retailer and consumer did not break the ‘shrink-wrapping’ and so was decreed not to have a contract with the software publisher. Bearing in mind this case, owners of websites should not shy from explaining that clicking a button will bind that person to obligations regarding the material that they will acquire. This provides the background for the final issue pertaining to the acceptance by the conduct of a consumer- ignorance of offer.

XII. Ignorance of Offer- Lack of Intention

It can be appreciated that, even with provision of the intention required by the Electronic Commerce Directive, consumers could click on a button labelled ‘download’ without envisaging that they may be entering an explicit, rather than implied, contract: consider the eagerness to acquire some new software or material and consider the typical ignorance that the acquisition is subject to an explicit licence. It is also to press the wrong button. In such a situation, Electronic Commerce Directive or not, the courts may be reluctant to bind unwitting offerees simply because they have performed an action: *Specht v Netscape Communications Corp and America Online Inc*²⁹ that purportedly indicates acceptance. A further reason that the courts may not hold consumers bound by their action is that, in not knowing of the offer, the consumers have no intention to be legally bound by their actions.

XIII. Timing of Acceptance

Because an offer may normally be revoked at any point until acceptance, it is obviously vital to appreciate when acceptance is deemed to have taken place over the Internet. Unlike for offers, the Electronic Commerce Directive and Regulations do not specify when acceptance is deemed to be received.

One person may make an offer which is acknowledged as being received and is accepted immediately by the other person. But if that offer is withdrawn before the acceptance is received by them there may be a conflict. The possible legal outcomes are that the contract was made when the acceptance was sent; or when, and if, it arrives at the recipient. ‘As no English law cases have covered this point in relation to email or website acceptances and the Electronic Commerce Directive is silent on the issue, it is necessary to extrapolate from the law relating to acceptance by post, telephone and telex³⁰.

²⁶ See p 13.

²⁷ Clive Gringras, p 31.

²⁸ 1996 SLT 604.

²⁹ US District Court of Southern District of New York, 3 July 2001.

³⁰ C Gringras, p 33.

Acceptance by post, telephone and telex

Where acceptances are sent by post there is a generally applicable rule that the English courts have used to determine the deemed time of acceptance: *Adams v Lindsell*³¹. Acceptance takes place when that letter is posted. Where acceptances are made by an instantaneous form of communication, such as telephone or telex, another rule has been generally applied: *Entores Ltd v Miles Far East Corp*³² and *Brinkibon Ltd v Stahag Stahl Und Stahlwarenhandelgesellschaft mbH*³³. Acceptance deemed to take place when the acceptance is communicated to the offeror.

As C. Gringras³⁴ pointed out, it is a moot point whether these rules should be mechanically applied, or whether they are, as is more likely, a starting point to assess what is fair between the parties. Certainly the courts have stated that the posting rules should not be applied where it would lead to 'manifest inconvenience or absurdity': *Holwell Securities Ltd v Hughes*³⁵. And there is occasions where this would be the case: it would be absurd for an acceptance to be deemed accepted at the time of posting if it is delayed in the post because the offeree wrongly addressed it.

Acceptance by e-mail

As mentioned earlier, email is not quite like the post and it is certainly not like the instantaneously communication by the telephone. 'It is sometimes slower than the post, and the arrival of the acceptance by email is far more reliant on the recipient than the sender. It is not like a fax or telephone for two reasons. First, there is no direct line of communication between sender and receiver. Instead, the email is broken into chunks and sent as a collection of packets, each with an 'address' for the recipient. The arrival of an email is therefore far more fragmented than a telephone call. The second, and central, difference between the two is that with a telephone call it is possible to check that the intended recipient has heard the acceptance. With email this is near to impossible but is often quite necessary. Emails are sent using protocols, precise languages, which allow one computer to pass on information accurately to another. However, sometimes these protocols are used incorrectly and an email may arrive entirely garbled or missing a few important characters such as the zero and pound signs. This problem must be combined with the issue that an email requires its recipient to collect it, rather like collecting mail from a pigeon-hole. It is therefore difficult, unlike a phone call, to check that the offeror has received the acceptance and to check that it is unequivocal'³⁶.

Reasonableness of email acceptance

Like the posting rules, the first issue to consider in relation to an acceptance is whether it is reasonable to use email to accept. A rule of thumb applied in postal cases has been that if an offer is made by post, it is reasonable to accept by post. This, at first blush, appears applicable to email; it may not be. Some email users are permanently connected to their Internet Service Provider: as soon as an email arrives for them, they are notified and can immediately view the message. What is more common, however, is that a user's email arrives to a server which the user must contact by modem to access any messages: the connection is not permanent. These users are rarely notified that an email is ready for them. They must simply log-on on the off-chance that an email is ready for them. For these remote email users, a period of days may elapse before they check for any email. It may therefore be less reasonable that an important acceptance is emailed to one of these remote users, than for an offer to be sent from one of these users.

XIV. Accepted but Not Received

Emails can be delayed in their transmission, sometimes through no fault of the offeree. On 13 April 1998, software flaws crippled an AT & T data network for about 24 hours. This affected millions of consumers who tried to send, and hoped to receive, emails during the period³⁷. Less often an email will not be received at all. There are three possible reasons for this. First, the sender sends the acceptance to an incorrect email address: it is extremely unlikely that a court will grant such carelessness with the benefit of the doubt; the email will not be an acceptance. A second reason that the email may not be received is owing to a fault at some point in the transmission process. As another example, on 17 July 1997 hundreds of thousands of email messages sent to known addresses simply 'bounced back' as though the addresses did not exist. The cause of this was an

³¹ (1818) 1 B & Ald 681.

³² [1955] 2 QB 327

³³ [1983] 2 AC 34.

³⁴ See C. Gringras p 33.

³⁵ [1974] 1 WLR 155 at 161.

³⁶ See C. Gringras, p 34

³⁷ USA Today, 23 April 1998, see C. Gringras p 35.

employee of Network Solutions Inc (who at the time maintained the ‘master’ address list) who was working the night shift and failed to react to an alarm³⁸. Like a loss in the Royal Mail, a court must weigh the fairness to the offeree against the unfairness to the offeror, who may have already contracted with another party. Even so, it is still likely that the contract will have been formed at the time of sending the email: *Household, Fire and Carriage Accident Insurance Co Ltd v Grant*³⁹. The third and most common reason that an email acceptance will not be received is that its recipient does not retrieve it. This person sees who the message is from and deletes it without reading it. In both of these situations, the email would constitute acceptance; an offeror’s recklessness will not prevent the formation of a contract.

It follows from the above that an email acceptance sent, but not yet received, cannot be ‘beaten’ by a later sent revocation of the offer. This rule is well established under rules of postal acceptance and there seems little justification to adjust it for acceptances over the Internet: *Re London and Northern Bank*⁴⁰

XV. Inaccurate Transmission

It has been mentioned that an email may arrive missing, or including, certain characters and it may even be entirely illegible. ‘The legal significance of a flawed email is that its sender may never know. In this way email differs to a large extent from a telephone acceptance and to a smaller extent to a fax acceptance. During a telephone call one can check that an acceptance has been heard; fax machine will report an error if a fax cannot be sent with sufficient quality, or there is no paper at the offeree to know before it is too late. For this reason, it would be both inconvenient and absurd for any other rule to apply other than making the offeror bound by a garbled email. The offeror, having not specified an alternative method of acceptance, is not at liberty to presume it is a counter-offer.

This rule is not purely based on technical realities and policy; it is also based on evidential matters. As with fax, the sender retains a copy of that which is sent. On the other hand, it is often possible, using digital translators, to unscramble the received email to establish whether it was an equivocal acceptance⁴¹.

XVI. Acceptances over the World Wide Web

Unlike email communications, on the World Wide Web the client and the server are in simultaneous communication for most purposes. The communication between the two has the quality of a telephone conversation between computers rather than humans. Either party will be immediately aware if the other party ‘goes offline’. This is because when one party sends digital data to the other these data are sent together with a checksum which allows the receiving computer to check that the correct information has been received. A checksum is almost the equivalent of someone ‘Okay?’ after asking a question over the telephone; it is a way of checking that the silence is due to acquiescence rather than absence.

If the client loses contact with the server, the server will ‘know’ of this situation within seconds, as its checksums and ‘received data’ will not arrive; if the ‘server not responding’. In law this ‘knowledge’ of non-transmission makes a crucial difference. In *Entores Ltd v Miles Far East Corp*n Lord Denning LJ’s considered for the first time when an acceptance sent by telex should be considered as making a contract⁴². It is instructive to follow closely Denning LJ’s reasoning in this case: this will demonstrate that a website acceptance greatly differs to an email acceptance and should be treated like a telephone, or telex, acceptance.

First, Denning LJ considered the hypothetical case where one person, in the earshot of another, shouts an offer to the other person⁴³. The person hears the offer and replies but his reply is drowned by noise from an aircraft flying overhead. Denning LJ was clear that there is no contract at the moment of the reply. The accepting person must wait until the noise has gone and repeat the acceptance so the other can hear it. Next, Lord Denning took the case of a contract attempted to be made over the telephone. An offer is made but in the middle of the reply of acceptance the line goes ‘dead’. Denning LJ was again clear that there is no contract at this point because the acceptor will know that the conversation has abruptly been broken off. Finally, Lord Denning considered use of telex to form a contract. Again, if the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. If the line does not go dead, but, say, the ink dries up, the clerk at

³⁸ See C.Gringras p 35.

³⁹ (1879) 4 Ex D 216.

⁴⁰ [1900] 1 ch 220.

⁴¹ See C. Gringras, p 36.

⁴² [1955] 2 QB 327. Applied by the House of Lords in *Brinkibon Ltd*.

⁴³ [1955] 2 QB 327 at 332.

the receiving end will send back a message ‘not receiving’. In all Denning’s examples the person sending the acceptance knows that it has not been received nor has reason to know it.

Parallels with acceptance over a website are now obvious: if a communication of acceptance is sent from or to a website, it will become immediately obvious if a problem has occurred which blocks the communication. Like a telephone acceptance, a server will always ‘know’ whether a message has been received by its intended recipient; it is waiting for received data to signify that the message has been received. And like a telex acceptance, if a client sends a message to the server but there is some problem preventing transmission, the client will receive, not unlike the telex clerk’s message, a ‘server not responding’ message. It is therefore submitted that communications over the World Wide Web differ from those by email. The contract is complete when the acceptance is received by the offeror.

XVII. Consideration

As an oversimplification, perhaps, it can be stated that the English law of contract distinguishes breakable promises from enforceable contracts. **Consideration** given in return for a **promise is the main ingredient** that returns promises into contracts. Consideration has been variously defined as ‘something of value in the eye of the law’: *Thomas v Thomas*⁴⁴; [d]etriment to the promisee⁴⁵; ‘the price for which the promise is bought’.

English law has always recognised that mutual promises may be adequate consideration for each other, thus forming a contract. If a builder promises to repair a roof and the unfortunate home owner promises to pay on completion of the repair, a binding contract is formed. No services have been provided yet and no money has been given. Similarly, promises to pay over the Internet are enough to form the consideration to create a contract.

XVIII. Web- Wrap Consideration

‘It is now common that to enter a website one must click a link labelled, ‘I Agree to the terms above’. These terms are generally divided into two sections: the top section expresses the intellectual property rights that the site owner licenses to viewers; the bottom section attempts to exclude liability for any damage cause by the site.

If a web-wrap contract is properly constructed it seems likely that there is consideration to form a binding contract with the viewer. What the developer of the website must attempt to create is a set of mutual promises that will form the consideration for the contract. One method of achieving this is to actually prevent a viewer who does not click the ‘I Agree’ link icon from entering the site itself. Promising the viewer access to the site if the ‘I Agree’ link is selected then forms one of the promises to bind the contract. The other promise must come from the viewer. This, of course, is to promise to abide by the terms of licence. This prevention can then be classed as a promise to allow the viewer into the website if he agrees to the terms on the screen⁴⁶.

XIX. Intention

The fourth and final ingredient to create a binding contract is an intention to create legal relations. The reason that this is a factor in resolving a contractual issue over the Internet is that often only one human is involved. When a person makes an agreement with a website, the site accepts or rejects the communication by the person according to a computer program being run at the time. A human does not sit on the server side of the website. This raises the issue of how the contract can be formed without this direct intention.

XX. Programmed Intention

In *Thornton v Shoe Lane Parking*⁴⁷ Mr Thornton accepted a contract by driving a car into a car park. In that case, Lord Denning stated that the automatic reaction of the car park turning a light from red to green and thrusting a ticket was enough to create a contract⁴⁸. All the ingredients were present. It is of no legal consequence that the contract was physically completed by a machine. The court looks objectively to whether a contract can be said to have been made: has the user been induced reasonably to believe that a contract was being made or offered? In comparison, it is of no legal consequence that a computer program completes the

⁴⁴ (1842) 2 QB 851 at 859.

⁴⁵, Holdsworth W, History of English Law, Vol 8, at p 11, see C. Gringras p 40

⁴⁶ See C. Gringras, p 41.

⁴⁷ [1971] 2 QB 163.

⁴⁸ [1971] 2 QB 163 at 169.

contract over the Internet; many contracts are ‘made’ with machines. That a computer program is being relied upon, however, can be of commercial significant to its owner.

Usually web-wrap contracts and automated email contracts use an express agreement. If, as a result of a bug in the contracting program, the viewer’s offer is accepted in error, the court will presume that there was the requisite intention. The offeror has the heavy burden to prove that there was no intention to have a legal consequence: *Edwards v Skyways Ltd*⁴⁹. The subjective opinion of, say, the owner of the website is of little consequence to the court: *Smith v Hughes*⁵⁰ unless the viewer knew of the lack of intention.

5.21: Performance: Payment

‘Online payments from consumer to merchant and from merchant to merchant can occur in many forms, including credit cards, electronic checks, digital cash and electronic funds transfers. The use of credits to make online payments is already common, and various types of credit card payment systems have developed. The first “early” method-transmission of credit card information by the buyer to seller over an “un-secure” server-became less frequent when modern Web browsers became equipped to handle transmission of encrypted information over secure servers. The security risks associated with transmission of credit card information over the Internet are obvious. Buyer is concerned about the integrity of an online vendor who may have no physical place of business. Similarly, seller is concerned that buyer is really an authorised user of the credit card. Both parties are concerned with non-refutability that is neither party will deny engaging in the transaction’⁵¹.

Due to such security risks, two more reliable forms of credit card payment systems have evolved, each relying on variations of the digital signature technology discussed above. Secure credit card payment relies on public-key cryptography to encode sensitive data such as credit card numbers. The payment transmission is then digitally signed to insure its authenticity. The other payment system, registry credit card payment, combines digital signature technology with the concept of a “trusted third party” to facilitate the online payment process. Under this approach, a group of sellers affiliates with a third party who is responsible for servicing credit card payments. Buyers then register their credit card information with the trusted third party and receive an identification number for making purchases. In the light of certain inherent limitations associated with credit card use, such as the lack of anonymity, payment limits, and the impracticality of using credit cards for low-value transactions, and payment limits, credit cards may not be the preferred payment method for certain transactions, including very small or very large transactions.

As a result, electronic checks and digital cash have developed as alternate methods of effectuating electronic payments, particularly with respect to small-scale consumer-related and merchant-to-merchant transactions. Electronic checks function much the same way as their real world counterparts: the check authorises the transfer of account balances from the account against which the check is drawn to the account to which it is deposited. The key difference is that the check and all information included on it would exist in an electronic format and could be transmitted electronically via e-mail or other network protocols to initiate payment. Also, like paper checks, electronic checks do not guarantee that the account contains sufficient funds; if the account contains insufficient funds, the electronic check, like its real world counterpart will bounce.

Digital cash is the ideal method of electronic payment for low-value transactions. The nominal associated transaction costs make digital cash well suited for such transactions. Banks usually issue digital cash, digitally signed with the issuing bank’s private key and represented by an electronic token of some sort that can be downloaded from a user’s bank account and stored on a “smart card” or in a cyber wallet. One of the key advantages to digital cash is that it can be anonymous, meaning that –like paper money-consumers can spend it in a generally untraceable manner. Digital cash also facilitates non-merchant commerce since none of the parties to the transaction needs to register with a credit card issuer.

However, J.C. Dodd, pointed out that, ‘none of the payment systems described above seems particular well suited for large- scale trading partner type transactions. Each has its own limitations: credit cards may have spending limits, electronic checks do not provide a guarantee of payment, and digital cash is better suited for small transactions. Perhaps the most practical methods of online payment for trading partners are “financial EDI,” a combination of electronic funds transfers (“EFTs”) and EDI. Two essential components comprise financial EDI: (1) a payment of funds electronically destined for the seller’s bank, and (2) an electronic

⁴⁹ [1964] 1 WLR 349 at 355.

⁵⁰ (1871) LR 6 QB 597.

⁵¹ See ThomasJ. Smedinghoff, Online law(1996), CLRTJ, JC.Dodd, Summer(1998).

remittance of information associated with the payment electronically destined for processing with seller's accounts receivable information. The buyer can transmit remittance information electronically by combining it with a payment order so that the information transfers through the funds transfer system to seller's bank; or the buyer can transmit remittance information separately, either directly from buyer to seller, or from buyer through a third-party intermediary to seller.⁵² However, many EDI transactions do not follow the foregoing paradigm. Rather, EDI transactions between established trading partners commonly consummate in the same manner as non-electronic transactions between regular trading partners: the seller provides the product or service on credit sends invoices on a regular basis, and the buyer pays by check or wire transfer. The financial EDI paradigm can be useful, though, in situation in which the parties to the transaction have had few prior commercial dealings⁵³.

Finally, 'there is the Society for Worldwide Inter-bank Financial Telecommunications ("S.W.I.F.T."), a messaging system operated by a consortium of over 1700 banks in more than 80 countries. S.W.I.F.T. is a communications system that facilitates the communication of payment orders and other messages among its members. It is important to note the key difference between S.W.I.F.T. and the other funds transfer system discussed above.'⁵⁴

⁵² J.C.Dodd and James A. Hernandez, CLRTJ –Summer 1998, p 27.

⁵³ Digital Cash and Cyberspace Financial Transactions, Chris Reed, at 1 (Cyberspace Law: A U.S. and European Perspective, University of Houston Law Center, June 16,1997), See CLRTJ, J.C.Dodd(Summer 1998).

⁵⁴ Contracting in Cyberspace, J.C.Dodd, JLRTJ –Summer 1998, P 28-29.