

# Formation of contract via internet under english law essay sample



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## 1. Introduction. Internet and electronic commerce

The Internet is a complex web of computer networks. It allows a person in one place in the world to communicate using his or her computer with another person located in another place in the world. The ability costs no more than the price of a basic computer, a small fee, if any, to the company that provides access to the Internet.

Electronic commerce(e-commerce)includes the buying, selling, marketing, and servicing of products or services over the Internet. The rapid increase of electronic commerce reflects the fact that electronic commerce has a number of advantages over paper-based commerce: in particular, speed and reducing the cost of doing business. On the other hand, e-commerce means the conduct of business commercial communications and management through electronic methods.

E-commerce in its early meaning was not in fact connected with the formation of contract via the Internet and meant the facilitation of commercial transactions electronically, with the help of Electronic Data Interchange EDI and other technologies, to send orders and invoices electronically.

The true e-commerce or, more precisely, “ web commerce” or “ Internet commerce” the purchase of goods and services over the World Wide Web via secure servers (note HTTPS, a special server protocol which encrypts confidential ordering data for customer protection) with e-shopping carts and with electronic pay services, like credit card payment authorisations.

E-commerce has existed for many years, in fact since the late 1970s, but electronic contracts were associated with a high degree of uncertainty. The interest of lawyers in e-commerce increased in the late 1990s – 2000s. A number of international and national laws, like the Electronic Signatures in Global and International Commerce Act 2000 in the US, made electronic contracts and electronic signatures as legal and enforceable as traditional paper contracts signed in ink. Its proponents promise the world where commerce has much greater speed and lower cost of transactions in comparison with the conventional commerce. However, consumer groups worry that the law doesn't adequately protect against online fraud and may create disadvantages and penalties for consumers who prefer printed agreements.

## 2. Electronic contract

Electronic contracts have provided a new mechanism to form a legal relationship via the Internet. The pressure grows to apply a cogent legal scheme to govern the maturing Internet technology. As Feigin[1] has noted, courts have been struggling to formulate a comprehensive view of the Internet that will guide them towards the proper application of existing legal doctrines. Today's jurisprudence begins to perceive the Internet as a massive interconnection of individually owned plots of land (web sites, electronic mail boxes, individual and corporate accounts, banners etc.), each containing the intellectual property of their respective owner. They therefore apply existing property law doctrines, both statutory and common law, to manage and protect these varied property interests.

However, in adopting this view, courts are wrong in ignoring communication as the basis and essential goal of the Internet. The Internet is based on a norm of consent, not one of strong property rights. Manifestations of this consent occur both implicitly and expressly, Feigin stresses, as the lowest-level Internet protocols are built to operate via cooperation.

Compliance with them should therefore imply consent to certain behaviours that would be prohibited under a purely property-based scheme. Higher-level protocols, such as those utilized in most web interactions, involve exchanges that should be considered express consent: the formation of a legally binding contract. Stating that the Internet is a communications network, we can properly identify the ways in which Internet property owners voluntarily circumscribe their property rights. We can apply the correct legal doctrines only by understanding the technology they govern[2].

On the other hand, the electronic contract or Internet contract can respond not only to the parties but to changing conditions of some kind and then inform the parties of these new events or conditions. The electronic contract, in other words, connects the parties to each other and, if desired, to other people and to other sources of information in ways that are difficult to imagine with paper.

Time, like space, seems to be out of place or even absent in the Internet environment. Consequently, different jurisdictions and different laws have challenged some contract issues. Therefore, with the advent of the Web as the new commercial medium, traders and buyers alike should be aware of

some basic principles of contract formation and how they apply to web transactions.

Mostly, the approved rules of paper contract continue to hold up in a purely Internet exchange between parties to an agreement. The law does, however, draw the line at certain kinds of transactions which must be fulfilled. It is important before considering the particularities of the online world, to take a step back and examine contractual formation via Internet which is the background against which the relevant rules to the online world were established.

As the UK Law Commission stated in December 2001, the rapid rate of change, which electronic commerce is bringing about means that any legal obstacles to electronic commerce in the UK should be addressed as soon as possible if the UK is to enjoy the full benefits offered by electronic commerce and if UK businesses are to play a major role in the global electronic commerce markets[3].

Today all developed countries try to create a 'uniform commercial code' for business over the Internet. The purpose of this is to design a uniform legal structure for electronic commercial bargains world-wide. Steps in this direction have been taken by: the UNCITRAL (United Nations Commission on International Trade Law)[4] Model Law on International Contracting, the CISG Convention[5], the UNIDROIT (the International Institute for the Unification of Private Law) Principles of International Commercial Contracts[6], and English Law. The CISG stands for (the United Nations Convention on) Contracts for

the International Sale of Goods, the uniform international sales law of countries that account for two-thirds of all world trade.

The UNIDROIT – International Institute for the Unification of Private Law – is today an autonomous international organization active in the harmonization of private international law. In 2004, the Governing Council of UNIDROIT adopted the new edition of the UNIDROIT Principles of International Commercial Contracts. As compared to the previous edition issued a decade ago, in 1994, UNIDROIT Principles 2004 contains an expanded Preamble, five new chapters and new provisions on Inconsistent Behaviour and on Release by Agreement. It is important to note that wherever appropriate the Principles were adapted to meet the specific needs of the increasingly important practise of electronic contracting.

All that has developed a basis for legislation for international contracts in electronic commerce, that applies to any kind of information in the form of data message used in the context of commercial activities. This work will consider rules and standards for electronic contract performance, define what constitutes valid electronic writing and the acceptability of electronic signatures for legal and commercial purposes under the above mentioned laws.

It will also discuss the main forms of contracts via Internet and define problems that arise in the formation of electronic contract today. The fundamentals of the formation of electronic contract –offer, acceptance, and consideration – come under attack in both the initial agreement and in modification. Ultimately, the “ take-it-or-leave-it” nature of electronic

contracts, where the agreement is accepted as unread or by acquiescence, poses the greatest challenge to predictability and certainty in sales[7].

### 3. Formation of contract over Internet

#### 4. 1 Major electronic media and electronic contracting concerns

##### 5. 1. 1 Overcoming legal obstacles: contemplation and inclusion of use of electronic commerce

The exchange of legally significant information relating to contracting in the form of non-paper messages may be hindered by certain legal obstacles to the use of such information. Also, its legal effect and validity are not always clear. Legislation in a number of countries imposes or implies restrictions on the use of modern means of communications, for example by prescribing the use of “ written”, “ signed” or “ original” documents. While several nations adopted provisions to deal with certain aspects of e-commerce, there is no legislation dealing with e-commerce as a whole.

Therefore the UNICITRAL Model Law is intended “ to facilitate the use of modern means of communications and storage of information, with or without the use of the Internet. It is based on the establishment of a functional equivalent for paper-based concepts such as “ writing”, “ signature” and “ original”. By providing standards by which the legal value of electronic messages can be assessed, the Model Law should play a significant role in enhancing the use of paperless communication.”

Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of data message.[8] Further to electronic contracting, Article 11 “ *Formation and validity of contracts* ” states that “ in

the context of contract information, unless otherwise agreed by the parties, an offer and acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of contract, that contract shall not be denied validity or enforceability on the sole ground a data message was used for that purpose.”[9]

As far as private international law is concerned in this context, the specific needs of electronic contracting were taken into consideration in adapting the UNIDROIT Principles 2004. In comparison with the UNIDROIT Principles 1994, in Articles 1. 2 ( “ *No form required* ” ) and 2. 18 ( now 2. 1. 18, “ *Modification in a particular form* ” ) the word “ writing ” has been replaced by the sufficiently broader term “ a particular form ”, this covers electronic media actions and expressions in electronic communications.

Also, in Article 2. 8(1) ( now 2. 1. 8, “ *Acceptance within a fixed period of time* ” ) the specific reference to letters and telegrams was deleted to cover all means of communications, and a general rule of when the period of acceptance starts to run was adopted, which would be suitable for electronic messages. In Chapters 1 and 2 a number of comments and illustrations were amended in order to refer specifically to the formation of electronic contracts: Comment 1 to Article 1. 2, Comments 1 and 4 and Illustrations 1 and 2 to Article 1. 9 ( now 1. 10 ), Comment 3 and Illustration 1 to Article 2. 1 ( now 2. 1. 1 ), Comment and Illustration 2 to Article 2. 7 ( now 2. 1. 7 ) and Comment to Article 2. 8 ( now 2. 1. 8 ) [10].

In the Article 2 “ Definitions ” of UNIDROIT Model Law on Electronic Commerce [11] “ Data message ” means information generated, sent,



received or stored by electronic, optical or similar other means including, but not limited to Electronic Data Interchange (EDI), electronic mail, telegram, telex or telecopy. Let us consider briefly challenges to the formation of electronic contract in connection with four major electronic media: e-mail, Electronic Data Interchange (EDI), the Internet, and software sales.

### 3. 1. 2 E-mail

Electronic mail (E-mail, e-mail) is an electronic message sent from one person to another using the Internet. This is a convenient method of time-delayed direct communication through which offer, acceptance, and consideration are fulfilled. Though *an e-mail* may be a singular message, it also *possesses the ability to form contracts*. Consequently, e-mail is viewed as both a formal and informal communications medium. As jurisprudence finds telegrams with typed signatures, letterhead and/or logos to provide the “signature” necessary for a binding contract; sending an e-mail, with or without a signature line, including a name and pertinent contact information, may symbolise assent to contract formation.

If a court concludes that the sender “intended to acknowledge contents of documents,” then he or she will be bound by the terms. In contrast, “receipt” in an electronic environment does not require that the recipient know of, open, or read the message. All it requires is that the

electronic message be available for processing by the recipient’s information system. To illustrate the power of electronic signatures via e-mail, Hill cites US President Bill Clinton, remarking on the United States enactment of E-SIGN (The Electronic Signatures in Global and National Commerce Act): “If

this [e-mail] had existed 224 years ago, the Founding Fathers wouldn't have had to come all the way to Philadelphia on July 4th for the Declaration of Independence. They could have e-mailed their ' John Hancock's' in.”[12]

### 3. 1. 3 Electronic Data Interchange (EDI)

Electronic Data Interchange (EDI) means the electronic transfer of information from computer to another computer using an agreed standard to structure the information.[13]. EDI is the computer-to-computer transmission of information used by *frequently* contracting commercial parties to send and receive standard forms in a store and forward message system.

The UNCITRAL Model Law doesn't settle the question if the definition of EDI necessarily implies that EDI messages are communicated electronically or if that definition would also cover exceptional or incidental cases when data structured as an EDI message would be exchanged by means that do not involve telecommunication systems. But not depending on the fact if the digital data transferred by a courier or other non-telecommunication method are covered by the definition of “ EDI”, they are covered by the above definition of “ data message”.[14]

EDI is probably the method of formation of electronic contract, in which the use of an electronic media as a contracting agent is the most evident. The parties involved in EDI standardise the terms and formats of the transaction.

Transactions – as a rule, quotes or price lists, purchase orders, sent automatically in reply to the former, and invoices – are transmitted and received regularly, between electronic agents, not involving human

intervention, usually via a phone line or other telecommunication medium (now also through a mobile phone network, satellite and other means of communication or their combination). EDI reduces the time and complexity associated with sending, processing and receiving large volumes of information, prevents typing, keystroke and mouse-click errors. Another benefit of EDI is that it saves transaction costs for all parties involved.

As opposed to the formation of electronic contract in other major electronic media, in EDI all the main stages of contracting – contract offer, acceptance, and assent – take place *automatically*.

EDI's output is in a specific technical format. Messages are coded in generally acceptable national or international forms and transmitted through a store and forward system. Since parties must agree on the standards and forms before they engage in the lengthy and expensive process of establishing direct communication, contract assent is evidenced by nature of the connections.

Transaction efficiency through rapid electronic contracting has gained EDI's instantaneous communication methods international approval with the development of EDIFACT (EDI for Administration, Commerce and Transport), an international EDI standard.[15] EDI is based on standards initially established in 1970s, which are managed and administered by the Uniform Code Council, Inc. (UCC). These standards set the format and data content of business transactions.

#### 3. 1. 4. The Internet

The Internet is a massive collection of networks cooperating to connect millions of computers globally to pass information to each other. The Internet is used for a variety of purposes, including communication, file sharing, information posting, and the purchase and sale of goods and services. Internet-based sales are quickly becoming commonplace transactions. Internet sales are divided into three categories: business-to-business (“ B2B”), business-to-consumer (“ B2C”), and peer-to-peer (“ P2P”).

An increasing number of online companies operate in the area of B2C, selling hundreds of thousands of products such as books, CDs and DVDs, cosmetics and home appliances. Customers choose products from a web site, place them in a virtual shopping basket and provide credit card information to complete the purchase. When a customer clicks the “ Place Your Order” button, he or she contractually agrees to the purchase. The goods are mailed to the customer’s designated address.

There is no physical signature and no paper changes hands, which is the major concern for identification and authentication. B2B commerce functions similarly with publicly available or privately protected special websites prepared for valued customers, including direct billing and other inventory management efficiencies. Similar to EDI, purchasing terms are generally agreed upon beforehand. Here, however, users manually interact with the website to select and purchase goods. [16]

### 3. 1. 5 Software Sales

Electronic contracting also takes place in software sales. Software is sold in four ways: 1) direct sale of a packaged or customized product, 2) license

agreement, 3) subscription or database transaction, or 4) online sales, which results in the shipment of a software product or automatic download. Two forms of electronic contracts dominate: “click-wrap” and “shrink-wrap” agreements. Software sellers determine the contracting method. Click-wrap agreements, also known as “browser-wrap” agreements, allow a buyer to manifest assent to the terms of a contract by clicking on an acceptance button that appears while the buyer obtains or installs the product.

A buyer cannot start using the software until he or she has clicked on the button accepting the terms and conditions of the agreement. Click-wrap agreements require buyer action in order to begin usage but do not guarantee cognizance of the agreement terms. Buyers can assent to the contract without even reading it in order to use the product. Buyers cannot negotiate and must, therefore, accept the terms as-is. Most courts find these agreements enforceable. The problem is that a click-wrap agreement may be accepted without the user actually reading or understanding contract terms when manifesting assent.

Shrink-wrap agreements are usually applied when selling off-the-shelf software. The text of agreement is usually imprinted on the software box, CD-ROM case. The license begins when the purchaser reads its terms and tears open the cellophane wrapping or shrink-wrap that surrounds the package. The buyer is supposed to return the software package to the retailer if he or she elects not to abide by the agreement. The problem is with buyers actually receiving notice of the sale, consciously agreeing to the sale, and conditioning the sale on acceptance of the license. The biggest challenge in the quest to balance ease of sale with legal protection for both

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the buyer and seller is obtaining unequivocal assent to the terms and conditions of purchase software.

Without acceptable rules and guidelines, commercial parties may be hesitant to embrace new technology, fearing unenforceable or invalid contracts.

These tensions currently face the primary convention on contracts for the international sale of goods—the CISG—which did not include electronic communications methods because they were not contemplated at the time of drafting. Keeping electronic contract methods in mind, this article will now explore how the CISG, particularly Article 13, embraces the information age and paperless contracts.[17]

### 3. 1 The offer

#### 4. 1. 1 Under English Law

One day Eastman Kodak placed by mistake a photo camera for sale on its UK web site for GBP100 instead of GBP329. Customers ordered thousands of such lower price cameras before Kodak could correct the error, which stripped the company of \$2M. After announcing about this mistake and stating that it would not honour the orders, Kodak faced a lawsuit. Though the company tried to argue that the orders were simply bids to accept its offer for sale, the company overlooked the crucial fact that its web site formed electronic contracts by means of accepting and confirming the orders. Kodak quickly filled all the lower price orders.

Mistakes of computer data entry, which occur in sales transactions, can often be reduced through party interaction. But when mistakes originate from online transactions, the effect is magnified by the speed at which information

is communicated to and acted upon by customers. In today's electronic landscape, parties can instantly agree to, confirm, and communicate assent with just a few keystrokes or mouse clicks.

The biometric identification technology, being developed intensively, can supplement the law covering electronic contracting and its practical fulfilment.

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