

# **SOME CONTRACT ISSUES ARISING FROM ONLINE BUSINESS-CONSUMER AGREEMENTS**

**SAUL SQUIRES**\*

## **I INTRODUCTION**

The evolution of the Internet has transformed the boundaries of business-consumer transactions far beyond the confines of more traditional retail markets and outlets, or even activities like telemarketing. In particular, it has expedited, and continues to do so, the development of mass-market contractual arrangements between remote parties on a global scale. Understandably, then, apparent challenges to the fabric of domestic contract law have arisen, partly by virtue of the outward novelty of online contracting, partly because of the international context in which online transactions take place and which overlays the domestic context, and partly because of the general dependence of electronic commerce on technology.

Yet, notwithstanding these ostensible challenges, the fact that a transaction may take place over the Internet does not of itself change the applicability of contract law principles. This will be so even where the subject matter of such a transaction remains totally within an information system. Furthermore, given the historical strength and flexibility of contract law principles, the apparent novelty of online contracting and the emergence of new technologies is not, or need not be, determinative of whether those principles will apply to an online transaction. Of course, this is not to say that there are no limits to the application of domestic contract law principles to online contracts. The global character of the Internet which arguably supplies the overall context by which to analyse online contracting, acts as a significant constraint on the application of domestically-oriented principles to online transactions involving parties in different legal jurisdictions. Nevertheless, the application of contract law to Internet transactions which take place between parties residing in the same legal jurisdiction is consistent with maintaining a uniform body

---

\* SJD candidate, Deakin University, Melbourne.

of law applicable to contractual transactions between a nation's citizens. Indeed, it can be argued generally that 'the Internet's inevitable local effects can [and should] be monitored by representatives of the local communities affected' in conformity with relevant local laws.<sup>1</sup> It is useful therefore to analyse the nexus between current contract law principles and the new forms of contracting.

With the foregoing in mind, this article analyzes the formation of the main types of contracts used in business-consumer transactions over the Internet. In this connection, the article is divided into four parts. In order to provide a proper context for the analysis of online business-consumer contractual transactions, Part II provides a brief introduction to electronic commerce and information networks, and other types of online contractual transactions. Following on from this introduction, Part III briefly describes the most important types of online business-consumer contractual relations. The central part of this article, Part IV, analyses several issues in contract formation relevant to online business-consumer transactions, the emphasis being on issues relating to offer and acceptance, intention, and the nature or character of electronic communications. The aim of this part is to demonstrate that existing contract law principles are generally applicable to domestic online business-consumer contracts. It is assumed that existing statutory requirements would also apply. Additionally, it is felt that despite the limited focus on business-consumer transactions, the analysis is applicable generally to other types of online transaction and for this reason much of the analysis is expressed in general terms. Part V argues, *inter alia*, that provided an online business-consumer contract conforms with traditional principles of contract formation and with relevant statutory requirements, it will be enforceable in the domestic context. The article concludes, however, that although it is rational to apply traditional contract law principles to domestic online business-consumer contracts, regulators worldwide must attempt to determine adequate and enforceable consumer protection measures if consumer confidence in Internet commerce is to be raised.

## II SOME DEFINITIONS AND TECHNOLOGICAL CONCEPTS

### A *What is Electronic Commerce?*

What constitutes electronic commerce depends on the perspective taken. As a starting point for the legal analysis of electronic commerce, a useful and common definition that broadly conforms to a communications perspective of electronic commerce<sup>2</sup> (and preferred by this writer), views it as any form of commercial trans-

<sup>1</sup> See Steven R Salbu, 'Who Should Govern the Internet?: Monitoring and Supporting a New Frontier' (1998) 11(2) *Harvard Journal of Law & Technology* 429, 477.

<sup>2</sup> Ravi Kalakota and Andrew B Whinston, *Electronic Commerce—A Manager's Guide* (1997) 3. These authors define electronic commerce, as viewed from a communications perspective, as 'the delivery of information, products/services, or payments via telephone lines, computer networks, or any other means' (*ibid*). Electronic commerce is also commonly defined from a business process perspective. Accordingly, electronic commerce is defined as 'the application of technology toward the automation of business

action in which the parties interact electronically via telecommunications networks, with or without partial recourse to physical exchanges or contact.<sup>3</sup> These commercial transactions usually occur between businesses, between business and consumers or between businesses and government.<sup>4</sup> Usually, too, these transactions involve the buying and selling of information, products, and services but it is reasonable to include also transactions relating to the support of these kinds of transactions over telecommunications networks.<sup>5</sup> Of course, commercial transactions are not the only types of business transactions that may take place electronically. Non-commercial 'intra-organisational' business transactions relating to, for example, workgroup communications, financial management processes and human resources management, are also conducted electronically.<sup>6</sup> However, for the purposes of this article, these types of transactions are excluded from the above definition.

## B Categories of Electronic Commerce

Electronic commerce consists of three categories: business-business, business-consumer and business-government.<sup>7</sup> Commonly, the business-business category comprises the use of EDI<sup>8</sup> by companies. Increasingly, it also includes

---

transactions and workflows' (ibid 3), the 'application of advanced information technology to increase the effectiveness of the business relationships between Trading Partners' (Electronic Commerce Innovation Centre, 1999, 'An Introduction to Electronic Commerce', <<http://www.info.cardiff.ac.uk/uwcc/masts/ecic/elecomm.html>>, (accessed June 1999), or 'the enablement of a business vision supported by advanced information technology to improve efficiency and effectiveness within the trading process' (ibid). In short, this perspective emphasises the role of technology in the re-engineering of business processes. From a legal viewpoint, these definitions are not particularly useful although they do emphasise a need to understand the underlying technologies of electronic commerce activities.

<sup>3</sup> Electronic Commerce Commission of the European Union, 'Electronic Commerce-An Introduction', s 2, <<http://www.ispo.cec.be/Ecommerce/intoduc.htm>>, (accessed June 1999); Roger Clarke, 'Electronic Commerce Definitions', <<http://www.anu.edu.au/people/Roger.Clarke/EC/ECDefns.html>>, (accessed June 1999); Steven O Kimbrough and Ronald M Lee 'Introduction to the Special Issue: Formal Aspects of Digital Commerce', (1998-99) 3(2) *International Journal of Electronic Commerce* 3, <<http://www.cba.bgsu.edu/ijec>>, (accessed June 1999); European Board for EDI/Electronic Commerce Standardization, 'Building Blocks for Electronic Commerce—Final Report', Part 2.1, 1997, available at <<http://www.ispo.cec.be/e-commerce/publications.html#0report>>, (accessed June 1999).

<sup>4</sup> The term 'commercial' is used instead of the term 'business'. The latter term is much wider in scope and can be taken to include relations between individuals and government. The import of this preference is that 'electronic commerce' becomes a subset of 'electronic business'. Commonly, the two are used interchangeably; nevertheless, it is useful to make this distinction for the purposes of this article.

<sup>5</sup> Michael Bloch, Yves Pigneur and Arie Segev, 'On the Road of Electronic Commerce—A Business Value Framework, Gaining Competitive Advantage and Some Research Issues', 1996, <<http://www.stern.nyu.edu/~mbloch/docs/roadtoec/ec.htm>>, (accessed June 1999).

<sup>6</sup> These types of business transactions are better analysed under the broader concept of 'Electronic Business'—see Clarke, above n 3; Kalakota and Whinston, above n 2, 19-20, 79-86.

<sup>7</sup> See Electronic Commerce Commission of the European Union, above n 3, s 3; European Board for EDI/Electronic Commerce Standardization, above n 3, parts 1.1-1.2. These organisations also include a consumer-government category of electronic commerce within the concept of electronic commerce. This category includes transactions covering or likely to cover, for example, welfare payments delivery or self-assessed tax returns (as in the e-tax system recently introduced by the Australian Tax Office). Their inclusion within the concept of electronic commerce is not appropriate in the current context: see above n 4.

<sup>8</sup> EDI is the most established and structured form of electronic commerce, and it is used across a diverse variety of industries including banking, transport, retailing, manufacturing construction health care,

electronic trading<sup>9</sup> and electronic services delivery (ESD)<sup>10</sup>. The business-consumer category is constituted primarily by electronic retailing. However, it, too, includes ESD, a common example being phone banking. The relatively undeveloped business-government category covers transactions between companies and government including those relating to public procurement and the payment of corporate taxes.<sup>11</sup> Notably, the forms of electronic commerce mentioned above are neither exhaustive nor mutually exclusive. Indeed, the current convergence of information systems with other forms of communication media like, for example, digital television and telephony, will blur distinctions further and/or create new forms of electronic commerce.

Each of the above categories may be divided further according to whom or what is involved directly in decision-making between transacting parties. Thus, an elec-

---

pharmaceuticals and international trade. EDI takes place in conformity with an umbrella agreement relating to an ongoing specified transaction between organisations, the purpose of the agreement being to delineate 'the standards, forms and protocols' to be followed in the automated exchange of business documents between computer applications within the respective organisations: see Raymond T Nimmer, 'Electronic Commerce: Part 3' (1996) 7(3) *Computers and Law* 31, 36; Richard A Horning, 'The Enforceability of Contracts Negotiated in Cyberspace' (1997) 5(2) *International Journal of Law and Information Technology* 109, 118-120; Roger Clarke, 'Electronic Data Interchange (EDI): An Introduction', <<http://www.anu.edu.au/people/Roger.Clarke/EC/EDIIntro.html>>, (accessed June 1999). The majority of documents consist of 'requests for quotations, purchase orders, purchase change orders, bills of lading, receiving advices, and invoices': Kalakota and Whinston, above n 3, 376. The exchange of documents usually takes place over private or 'value-added networks, but increasingly, the open Internet is also used': Clarke *ibid*. EDI is important because, unlike paper-based systems, it enables the cheap and efficient communication of structured information throughout the corporate and government communities, and the closer integration of physically remote organisations: Kalakota and Whinston, above n 3, 376. For a brief history of EDI see Clarke, *ibid*; see also Kalakota and Whinston, *ibid*, 376-381.

<sup>9</sup> The electronic trading and retailing of physical goods and services and of digital content over the Internet are probably the most publicly well-known forms of electronic commerce. With regard to digital content, the electronic trading and retailing of that content are revolutionary in the sense that the full commercial transaction cycle including delivery can be conducted electronically. By comparison, the electronic trading and retailing of physical goods and services represent 'an evolution of present ways of trading, capitalising on new possibilities offered by technology to improve efficiency in terms of lower costs, effectiveness in terms of widening market potential and better meeting customers needs as well as providing a means for enhanced product and service innovation, notably through customer-supplier interaction.' However, unlike the electronic trade in digital content, certain logistical activities of the commercial transaction cycle, most notably the delivery of physical goods or performance of 'real' services, cannot be completed electronically: see Electronic Commerce Commission of the European Union, above n 2, s 5. See also Clarke, above n 3.

<sup>10</sup> ESD comprises the 'provision of services with the assistance of telecommunications and telecommunications-based tools' and is commonly used in the government and commercial sectors. Common examples include banking and financial services, commodities trading, travel services, entertainment reservation services and the provision of distance education. See Clarke, above n 3. Additionally, ESD includes the up and downstream support and/or value-adding services that accompany electronic trading and retailing. These services comprise, *inter alia*, the 'advertising and promotion of products and services, the facilitation of contacts between traders, the provision of market intelligence, pre- and post-sales support ... procurement and support for shared business processes': see Electronic Commerce Commission of the European Union, above n 2, s 5.

<sup>11</sup> Electronic Commerce Commission of the European Union, above n 2, s 3; European Board for EDI/Electronic Commerce Standardization, above n 3, parts 1.1-1.2. In Australia, relevant information can be found at <<http://www.atg.gov.au>>, <<http://www.vgpb.vic.gov.au>>, <<http://www.ctc.gov.au>> and <<http://www.transigo.net.au>>.

tronic transaction may be based on (a mixture of) human-human, human-computer or computer-computer interactions.<sup>12</sup> Commonly, human-human contact occurs via telephones, facsimile and e-mail. Here, there is direct human involvement in decision-making processes—technology only enables these processes. E-mail communications in business-consumer transactions are discussed further at Part III.A below. By comparison, transactions involving human-computer or computer-computer contact involve the active use of computers, or more accurately, computer programmes, in decision-making processes, and consequently, any human involvement in decision-making is indirect. Probably the most important example of human-computer contact is the so-called clickwrap contract which is also described at Part III. With respect to computer-computer contacts, the most important example is EDI. A more uncommon example of this type of contact is the situation involving non-EDI programmed business-consumer transactions where a buyer's software programme searches the WWW and subsequently, in accordance with any parameters set by the buyer, interacts and perhaps contracts automatically with the vendor's programme.<sup>13</sup>

## **C Introduction to Information Networks and Web Sites**

### **1 Types of information network**

Electronic commerce may be conducted via open information networks like the Internet or via private intranets; in both cases, the now ubiquitous World Wide Web (WWW or Web) architecture or set of protocols and formats has become the de facto standard for executing transactions over both the Internet and intranets.<sup>14</sup> Intranets consist of proprietary networks which, although fenced in by protective firewalls,<sup>15</sup> enable businesses to utilise the Web architecture in order to create 'more

<sup>12</sup> Raymond T Nimmer, 'Electronic Contracts: Part 1' (1996) 7(1) *Computers and Law* 36, 37.

<sup>13</sup> Ibid. See also S D Levi and R Sporn, 'Can Programs Bind Humans To Contracts', <<http://www.ljx.com/internet/0113shrink.html>>, (accessed June 1999).

<sup>14</sup> Kalakota and Whinston, above n 2, 63, 65. As discussed in Kalakota and Whinston, the basic Web architecture, which is continually being extended by new languages and multimedia applications, consists of three parts: hypertext markup language (HTML), the format for Web pages, which provides both formatting and hyperlinking; hypertext transfer protocol (HTTP) which is the protocol for communications between Web servers and browsers; and the common gateway interface (CGI) which is a program that negotiates the movement of data between web servers (computers which host web sites) and outside applications such as databases, other software applications and information content (at 66, 106).

<sup>15</sup> A firewall consists of a security policy which forces connections between an intranet and the open Internet to pass through software and/or hardware filters so that the intranet, and hence proprietary company data are secured from intruders, yet allows authenticated users full access to the Internet and, conversely, access to the intranet: see *ibid.*, 124-6. Conceptually, 'security' relates to 'how readily a particular system or asset can be appropriated or modified to unauthorised use'; 'authentication' deals with how one party obtains adequate assurance about whether a particular item, message or performance was in fact received from or sent to the intended party: see Nimmer, above n 12, 38. Security is often based on cryptographic technology, the latter's main applications being authentication or verification of parties and encryption of sensitive materials: see Kalakota and Whinston, *ibid.* 138-146; Nathaniel S Borenstein et al, 'Perils and Pitfalls of Practical Internet Commerce: The Lessons of First Virtual's First Year', in Ravi Kalakota and Andrew B Whinston (eds), *Readings in Electronic Commerce* (1997) 190;

“open” integrated systems where marketing, distribution, manufacturing, and financial management functions all communicate with each other to achieve a common objective.<sup>16</sup> By comparison, the Internet is a global network, or more accurately, a ‘network of networks’ linking information systems and computers worldwide.<sup>17</sup> This super-network is neither owned by any of the telecommunications companies which provide the physical structure for Internet communications nor is there any centralised control. Relevantly, the information content accessed by Internet users ‘is located in independently owned, high-capacity computers called “servers”’; these servers are linked to regional telecommunications networks which in turn are linked to so-called ‘backbone’ telecommunications networks.<sup>18</sup>

## 2 *Web sites*

Web sites are computer programmes residing on servers although to a person browsing the Internet, Web sites appear as collections of screens (or multimedia (HTML) pages) which he or she may explore after accessing the Web sites’ ‘home’ pages.<sup>19</sup> They are identified by Uniform Resource Locators (URLs)<sup>20</sup> enabling them to be contacted by client computers using the Web architecture (usually) in order to enable two way communications between, say, a prospective consumer (represented by the client computer) and the Internet supplier (represented by the server).<sup>21</sup> Insofar that Web sites consist of computer programmes, it is not difficult to change Web sites remotely, or to change the physical location of the host server.<sup>22</sup> Additionally, a Web site, which from a business perspective is logically integrated, may physically be dispersed across a range of servers, and by virtue of the possible location of servers in different countries, across a number of jurisdictions; such dispersal creates obvious cross-jurisdictional and enforcement issues (discussed further at Part V) for consumers and vendors alike.<sup>23</sup>

### III ONLINE BUSINESS-CONSUMER CONTRACTS

The most important types of business-consumer interactions occur via e-mail or clickwrap communications, or combinations thereof. These are described and analysed below. Although the description is meant to apply to business-consumer

---

see also Simon A Price, ‘Understanding Contemporary Cryptography and its Wider Impact upon the General Law’ (1999) 13(2) *International Review of Law, Computers & Technology* 95.

<sup>16</sup> Kalakota and Whinston, above n 2, 79, 86, 310.

<sup>17</sup> For a brief history of the development of the Internet, see Kalakota and Whinston, above n 2, 31-2.

<sup>18</sup> *Ibid* 37-8, 40-2.

<sup>19</sup> *Ibid* 64. See also Australian Tax Office, August 1997, ‘Tax and the Internet—Discussion Paper’, paras 3.4.1-3.4.1, <<http://www.ato.org.au/ecp>>, (accessed September 1999).

<sup>20</sup> Essentially, URLs are names or addresses for objects on the WWW: see D W Connelly, ‘An Evaluation of the World Wide Web as a Platform for Electronic Commerce’, in Kalakota and Whinston, above n 2, 58.

<sup>21</sup> Australian Tax Office, above n 19.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*.

transactions, some of these have a broader application. For this reason, the analysis is largely stated in general terms.

### **A Contracts Formed by E-mail Exchange**

E-mail, in the current context, refers to any form of text-based electronic messages. Commonly, contracts formed via e-mail exchange resemble traditional contracts insofar that a 'human decision-maker [usually] reviews the contractual relationship at both ends of the deal' in the following way: A sends an e-mail offer to B proposing a contract and, after reviewing the proposal, B indicates his or her acceptance by e-mail or in some other way.<sup>24</sup> That is, e-mail communications facilitate human-human contacts. However, e-mail messages may also be generated automatically, an infamous example being spam, or unsolicited e-mail, and so in this case, the direct contact is of the human-computer type. Additionally, e-mail communications may be but one form of communication used in the formation of any particular contract. Contracts formed with the aid of e-mail include those which result from the posting of e-mail messages at online classified advertisement sites.<sup>25</sup> One important difference between these contracts and clickwrap agreements is that all or some of the terms and conditions can be negotiated.

### **B Clickwrap Agreements<sup>26</sup>**

Frequently, the purchase of online products<sup>27</sup> is regulated by 'clickwrap' contracts. The subject matter of such contracts are physical goods and software. These agreements consist of standardised electronic forms which are filled in by prospective buyers, and which are usually subject to the vendors' standard terms and conditions. The terms are viewable directly or from 'read me'-type files to which the buyer is (or ought to be) directed. Commonly, buyers assent to the standard terms by mouse-clicking on 'agree' icons thereby indicating their assent to the agreement by affirmative conduct (in which case, the form consists of a standard offer). If buyers do not wish to assent to the standard terms they mouse-click on 'disagree' icons and leave the sites. A clickwrap transaction may also be based on implied terms and the acceptance of these terms may be made by either buyer or vendor, depending on the circumstances.

---

<sup>24</sup> Nimmer, above n 12, 37.

<sup>25</sup> See, for example, <<http://classifieds.yahoo.com>>.

<sup>26</sup> The term 'clickwrap' is derived from the so-called 'shrinkwrap' software license, the analogy being based primarily on the facts that intentional conduct is necessary for contract formation, and that such conduct may be indicated by mouse-clicking: see Stephen J Davidson and Scott J Bergs, 'Open, Click or Download: What Have You Agreed To? The Possibilities Seem Endless' (1999) 16(4) *The Computer Lawyer* 1, 5-6.

<sup>27</sup> For the purposes of this article, and at the risk of oversimplification (for example, copyright issues are not considered), the purchase of products is taken to mean the sale of physical goods, the supply of digitised products (such as software, text or multimedia products) and the supply of services and facilities (such as banking and financial services).

A third example of a clickwrap transaction is the online auction. Here, it is the buyer who makes the offer, for the auctioneer's advertisement that an auction will be held comprises an invitation to treat.<sup>28</sup> The same should hold where the auctioneer makes a request for bids.<sup>29</sup> As to the actual bidding process,<sup>30</sup> a registered buyer will enter the amount of his or her bid in an electronic form. Subsequently, he or she will click a 'review bid' icon, enter a user id and password and then click on a 'place bid' icon to complete bidding. Prior to the auction's close, the bidder will receive a daily email informing him or her whether he or she has been outbid or not. If so another bid can be submitted, and so on. If at the auction's close the bid was the highest, the bidder must e-mail the seller within three business days to claim the item.

A novel aspect of clickwrap transactions is that a buyer does not deal directly with the vendor but rather with the vendor's (or in the case of an auction, the auctioneer's) computer system (and attendant software) which "accepts" the [buyer's] order and "instructs" the inventory program to ship [or deliver] the desired products.<sup>31</sup> In these transactions, the performance of the vendor's side of the bargain by the vendor's computer system and software rise to the notion of electronic agency. Whether or not an agency relationship really exists is not discussed here. But for the purposes of this article, the phrase 'electronic agent' is used as shorthand for 'a computer program ... used by a person to initiate an action, or to respond to electronic messages or performances, on the person's behalf without review or action by an individual at the time of the action or response to the message or performance.'<sup>32</sup>

## IV FORMATION OF ELECTRONIC CONTRACTS

### A *The Nature of a Vendor's Online Presence*

What is the nature of a vendor's mere online presence? Is it an invitation to treat, an offer or some other thing? A useful starting point is the traditional analysis of a display of goods in a shop. Such a display constitutes an invitation to treat to which a buyer makes an offer to pay the advertised price, and the agreement is made on the vendor's acceptance of the consumer's offer at the point of sale.<sup>33</sup> It is possible to apply this analysis to the online sale of products, by analogising virtual spaces and the activities that 'appear' to take place in these spaces to real world spaces and

<sup>28</sup> See *Harris v Nickerson* (1873) 8 LRQB 286.

<sup>29</sup> See *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217, 233-4 (Ormiston J). See also *British Car Auctions Ltd v Wright* [1972] 3 All ER 462.

<sup>30</sup> The following process is based on that used by online auction company eBay.com at <<http://www.ebay.com>>.

<sup>31</sup> Nimmer, above n 12, 37.

<sup>32</sup> See the proposed United States Uniform Computer Information Transactions Act, s 102. See also the proposed United States Uniform Electronic Transactions Act, s 2.

<sup>33</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401; *Fisher v Bell* [1961] 1 QB 394; *Reardon v Morley Ford Pty Ltd* (1980) 49 FLR 401; *Cottee v Franklins Self-Serve Pty Ltd* (1995) Aust Contract Reports 90-060.



activities. Applying the analogy, one can find 'Web shops'<sup>34</sup> situated at online shopping malls which emulate the form of traditional shops. These Web shops may feature virtual shopping baskets or trolleys enabling self-service, virtual cash registers and customer assistance, and allow payment by credit card, shop card or electronic cash. Online shopping malls may be 'multistoried' in a manner analogous to real-world malls,<sup>35</sup> or located in 'virtual cities' alongside other online retailers and service and entertainment providers.<sup>36</sup> It follows that where a vendor 'displays' priced products in a web shop or generally advertises products, the display would ordinarily constitute an invitation to treat. Notwithstanding exceptions, a similar result should follow where a vendor advertises products for sale online in some other way.<sup>37</sup>

However, the traditional analysis with respect to automated processes generally is different to that for shop displays and advertisements. For example, the setting up of a vending machine has been regarded as making a standing offer.<sup>38</sup> By analogy, it follows that where electronic agents are used in clickwrap contracts by online vendors, the latter should also be regarded as making a standard offer, provided that this is the intention of the vendor,<sup>39</sup> although online auctions are a notable exception (here, the buyer makes the offer via a standardised form: see Part III.B). However, the same may not hold for automatically-generated e-mail communications. Moreover, many Web shops which 'display' products in a manner akin to real shops necessarily rely on automated processes, that is, the display itself is consequential to automated processes by virtue of the electronic environment in which transactions take place. So is a Web shop display an invitation to treat or a standard offer?

As in contract formation generally, the crucial question here is whether an online vendor intended to be bound by any or all responses or whether he or she retained a discretion whether or not to be bound. To add complexity, a Web shop may be either interactive or non-interactive. Thus, a non-interactive Web site which merely advertises or 'displays' products and makes no provision for a prospective buyer's automated response, should constitute an invitation to treat unless a contrary inten-

---

<sup>34</sup> Or more accurately, Web sites located on servers: see part II.C.2 above.

<sup>35</sup> For example, see the ShopLink (TM) mall at <<http://www.stgeorge.com.au/shoplink/ground.htm>>. It has three 'virtual' floors of retail outlets (or more accurately, it provides hyperlinks to the outlets' web sites which may or may not be located within the shopping mall site.

<sup>36</sup> See e-Estate, the world's first 'cyber city', which will be located at <<http://e-estate.com>>. e-Estate is divided into 16 precincts which include zones for commercial business and retail trade, and entertainment zones.

<sup>37</sup> For commonly recurring situations, the presumption is that an advertisement is an invitation to treat, some examples being advertisements of goods for sale (*Grainger & Son v Gough* [1896] AC 325; *Partridge v Crittenden* [1968] 2 All ER 421), seller's circulars (*Spencer v Harding* (1870) 5 LRCP 561, and newspaper advertisements (*R v Clarke* (1927) 40 CLR 227).

<sup>38</sup> See *Thornton v Shoe Lane Parking* [1971] 2 QB 163.

<sup>39</sup> Although a case concerned with larceny, *Kennison v Daire* (1985) 160 CLR 129 is instructive on the issue of intention. In that case, the High Court found that although a bank had programmed an automatic bank teller in a way that facilitated the commission of fraud by a person using a cash-card, this did not mean that the bank had consented (or intended to consent) to the withdrawal of money by a person who had no account with the bank. See also the similar case of *R v Evenett* (1987) 24 A Crim R 330.

tion is manifest.<sup>40</sup> However, a more complex set of transactions arises at interactive Web sites, for these not only advertise or display products but enable 'negotiation, conclusion and—in the case of data supply—even performance of a contract completely within computer systems'.<sup>41</sup> Here, an analysis might find combinations comprising, for example, invitations to treat (advertisements or displays), vendors' standard offers, and acceptances (indicated by buyers' conduct); or invitations to treat, buyers' offers (in response to a vendor's non-standard offer) and acceptances (indicated by vendors' conduct). The possibility also exists that a vendor's programmed response to a buyer's offer is in fact a mere acknowledgement of receipt.<sup>42</sup>

Further complexity awaits the analysis of online transactions involving e-mail or those contracts which are concluded totally online or by a combination of electronic and more traditional communications media. For example, where a prospective buyer, having obtained a vendor's e-mail address from a print advertisement, e-mails an order to the vendor, the vendor's reply may, depending on his or her intention, comprise an acceptance, a counteroffer or an acknowledgement of receipt. Clearly, then, the established categories of invitation to treat, offer, acceptances and so on cannot not be applied mechanically, and ultimately, the legal interpretation and effect of an online communication will be determined by the particular purposes and circumstances of a transaction.<sup>43</sup> As Lord Wilberforce noted in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH*,<sup>44</sup> a

[s]ophisticated analysis may be required to decide when the last counter-offer [if any] was made into a contract by acceptance, or at what point a clear consensus was reached and by virtue of what words spoken or of what conduct.<sup>45</sup>

The latter point refers of course to whether the parties 'intended that [a transaction should] have legal consequences and be legally enforceable'.<sup>46</sup>

Despite the potential complexity, a default rule vis-a-vis the nature of an online vendor's presence may be stated: a Web site presence should normally be regarded as an invitation to treat even where electronic agents are used to enable contract formation.<sup>47</sup> Importantly, the rule is premised on the desirability of functional

<sup>40</sup> See Christoph Glatt, 'Comparative Issues in the Formation of Electronic Contracts' (1998) 6(1) *International Journal of Law and Information Technology* 34, 50.

<sup>41</sup> *Ibid.*

<sup>42</sup> See *Corinthian Pharmaceutical Systems Inc v Lederle Laboratories* 724 FSupp 605 (SD Ind, 1989). This case is briefly discussed at part IV.C below.

<sup>43</sup> See *Carlill v Carbolic Smokeball Company Ltd* [1893] 1 QB 256 (advertisement indicated an intention to be bound and, therefore, constituted an offer); *Reardon v Morley Ford Pty Ltd* (1980) 49 FLR 401, 407 (Smithers J) (no absolute rule that shop displays must be invitation to treat). See also *Lefkowitz v Great Minneapolis Surplus Store* 86 NW2d 689 (1957) (Min SC).

<sup>44</sup> [1982] 1 All ER 293 ('*Brinkibon*').

<sup>45</sup> *Ibid* 295. See also *Hyde v Wrench* (1840) 49 ER 132 and *Turner Kempson Pty Limited v Camm* [1922] VLR 498 in relation to the convoluted nature of the sequence of communications.

<sup>46</sup> *Rose and Frank Co v R Compton and Bros Ltd* [1923] 2 KB 261, 282 (Bankes LJ).

<sup>47</sup> See also Glatt, above n 41, 50-1; Heather Rowe, 'E-commerce Policy Developments in the UK and the EU' (1999) 10(2) *Computers and Law* 21, 26; New Zealand Law Commission, *Electronic Commerce Part One: A Guide for the Legal and Business Community*, Report 50 (1998)[66-7], available at <<http://www.lawcom.govt.nz/EComm/R50chap3.htm>> (accessed December 1999). But see Assafa

equivalence between communications media in relation to vendor presence and advertising.<sup>48</sup> To illustrate, a 'consumer can open a magazine [or watch a television programme], see an advert, call the company and place an order. Not too much of a difference seems to be there to a mouseclick on the Internet.'<sup>49</sup>

The underlying policy for the default rule is that although a vendor may intend his or her Web site to be globally accessible, he or she may not wish to contract with parties everywhere in the world. The reasons for this may be (i) to avoid the possibility of breach of contract arising from unfulfilled orders (on account of limited stocks<sup>50</sup>); (ii) because of uncertainty arising from the variable impact of content and copyright laws (especially on the supply of software, information and other data) or of consumer protection laws; or (iii) the difficulties surrounding cross-jurisdictional actions and enforcement. The default rule may, of course, be set aside where the apparent intentions of the contracting parties evince a different interpretation of a transaction.

It is worthwhile commenting briefly on the relative strength of the traditional limited stocks argument in the context of electronic commerce. On its own, this argument is unlikely to be determinative of whether a vendor's online presence is an invitation to treat or not. Prima facie, with respect to physical goods, the argument is reasonable. With respect to digital products, the latter are potentially available in 'an unlimited number of copies', in which case, at least on this point, breach of contract is not relevant, notwithstanding the effect of copyright law may be such that reproduction is restricted and vendors should not, therefore, be held bound to an unlimited number of acceptances.<sup>51</sup> However, even if a vendor's online presence constitutes a standard offer instead of an invitation to treat, the vendor is not necessarily bound to the general public or to unknown persons unlimited in number. Rather the vendor is only bound to those persons who, before the standard offer is withdrawn from the vendor's Web site, accept the offer.<sup>52</sup> This is potentially so irrespective of the subject matter of a contract. In this regard, given the actual and potential inter-connectivity between software programmes regulating an online transaction, it would be possible for the vendor to programme an electronic agent so that it completed contracts only while stocks lasted<sup>53</sup> or with persons in specified jurisdictions and so on. Thus, for these reasons, and by virtue of the Internet's global nature, the primary reasons for the policy behind the default rule are the

---

Endeshaw, 'The Proper Law for Electronic Commerce' (1998) 7(1) *Information and Communications Technology Law* 5, 7 (noting the potential for exceptions to the rule).

<sup>48</sup> See Reinhard Schu, 'The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?' (1997) 5(2) *International Journal of Law and Information Technology* 192, 214.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Esso Petroleum Ltd v Customs and Excise Commissioners* [1976] 1 All ER 117, 126.

<sup>51</sup> See Glatt, above n 41.

<sup>52</sup> Following the similar reasoning in *Carlill v Carbolic Smokeball Company Ltd* [1893] 1 QB 256.

<sup>53</sup> In this case, the vendor should expressly state as much; alternatively, where it was proved that the vendor's electronic agent's actions were limited in conformity with the stock held, a term that the vendor would only sell while stocks lasted could be implied.

commercial and legal uncertainties arising from the variable impact of foreign laws on a vendor's online activities (these uncertainties are not discussed in this article), and the difficulties surrounding cross-jurisdictional actions and enforcement (these difficulties are discussed further below at Part V).

## B Instantaneous Communications

Prima facie, electronic communications should be characterised as instantaneous or 'virtually instantaneous'<sup>54</sup> communications, the obvious analogues being communications by telephone,<sup>55</sup> telex<sup>56</sup> or facsimile.<sup>57</sup> However, it has been argued that a blanket assumption of instantaneity for types of electronic communications like e-mail may be 'too simplistic'.<sup>58</sup>

A common point of agreement as to the instantaneity of electronic communication is the case of direct (and closed) computer links like company intranets or EDI networks which enable instantaneous (and in the case of EDI, automated) communication between parties.<sup>59</sup> By analogy to EDI transactions, this would likely extend to automated communications (like clickwrap transactions) conducted through interactive web sites over open networks like the Internet. In this connection, software controlling the transactions allows contracting parties to determine whether a communication has been received and therefore whether an agreement has been reached.<sup>60</sup>

<sup>54</sup> This is the test applied in *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327, 332 (Denning LJ), 337 (Parker LJ).

<sup>55</sup> *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327; *WA Dewhurst and Co Pty Ltd v Cawrse* [1960] VR 278; *Re Viscount Supply Co Ltd* (1963) 40 DLR (2d) 501; *Brinkibon* [1982] 1 All ER 293.

<sup>56</sup> *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327; *Mendelson-Zeller Co Inc v T & C Providores Pty Ltd* [1981] 1 NSWLR 366; *Brinkibon* [1982] 1 All ER 293. For other Australian cases see *WA Dewhurst and Co Pty Ltd v Cawrse* [1960] VR 278 and *Express Airways v Port Augusta Air Services* [1980] Qd R 543 (sending of telegram acceptance through post office into offeror's telex system not subject to postal rule) although the latter case, decided before *Brinkibon* (the relevant point being that the general rule as to instantaneity cannot be applied mechanically), has been criticised and probably would not be followed in future cases (see *Leach Nominees Pty Ltd v W Wright Pty Ltd* [1986] WAR 244 (acceptance by public telex dictated over phone subject to postal rule)).

<sup>57</sup> *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd* (1988) 5 BPR 11, 106; *Tallangalook Pty Ltd v Duketon Goldfields NL* (Unreported, Supreme Court of Victoria, 13 February 1997). In both cases, the courts proceeded on the assumption that facsimile communications were instantaneous. See also *Rolling v William Investments Ltd* (1989) 17 ACWS (3d) 1035 (Ont CA); *Gunac Hawkes Bay (1986) Ltd v Palmer* [1991] 3 NZLR 297 (instantaneous nature of facsimile communications). According to these cases a contract formed by exchange of facsimiles will be created at the time and place where the communication is received).

<sup>58</sup> Glatt, above n 41, 55; see also Schu, above n 49, 215.

<sup>59</sup> Glatt, above n 41, 55 (arguing against general assumption of instantaneity); Kathryn O'Shea and Kylie Skeahan, 'Acceptance of Offers by E-Mail—How Far Should the Postal Acceptance Rule Extend?' (1997) 13 *Queensland University of Technology Law Journal* 247 (arguing for general assumption of instantaneity).

<sup>60</sup> See Glatt, above n 41, 57. Cf Schu, above n 49, 215 where it is argued that the transmitting of an 'offer either by email or by filling in and posting an order form directly [as in a clickwrap transaction] onto the supplier's web server' is equivalent to 'posting an offer by ordinary mail', the reason being that although

Where disagreement does exist, it relates to e-mail sent over open networks. The basic arguments against the instantaneity of e-mail communication (and consequently, for the application of the postal acceptance rule to e-mail<sup>61</sup>) can be stated as follows. First, although e-mail is usually delivered very quickly, the transmission speed is slower than established forms of instantaneous communications like telephones and potentially subject to third party-related delays caused by technical faults, network bottlenecks or even insufficient processing power of computer systems.<sup>62</sup> Thus, there is no certainty as to when an e-mail communication will arrive.<sup>63</sup> Secondly, e-mail communications over open networks have to be entrusted to third party Internet service providers (ISPs) or network providers whose servers receive and send e-mails via 'mailboxes'. That is, the third parties act in a manner akin to that of a post office providing posting, telegraph and poste restante facilities. Importantly, there is no direct connection between contracting parties comparable to established forms of instantaneous communications.<sup>64</sup> Thirdly, the contracting parties themselves may contribute to delays in contract formation by, for example, incorrectly addressing e-mail or failing to read e-mail in good time.<sup>65</sup> Finally, given that a sender loses control over his or her message once it has been transmitted, the sender (or offeree where the postal acceptance rule is concerned) ought not be liable for any (third party) faults which may occur after transmission. This would be so even though e-mail software often allows a sender to be notified upon an e-mail's receipt or even retrieval by an addressee, the reason being this only works if the addressee's software is capable of, or the relevant mode has been selected for, sending a confirmation receipt.<sup>66</sup>

However, the foregoing should not overcome the presumption of instantaneity of e-mail communication. With respect to the first claim, a trivial answer is that e-mail is usually delivered much more quickly than postal mail. More crucially, though, the same objection can be made about existing forms of instantaneous communications, that is, telephone, facsimile and telex communications are also subject to third party-related delays. Moreover, both telex and facsimile communications are slower than telephone communications in terms of the actual awareness of the contents of a communication and yet the former types are generally considered to be instantaneous. In this connection, one should remember that the test applied in *Entores Ltd v Miles Far East Corp*<sup>67</sup> did not require instantaneity but virtual instantaneity. Exactly

---

there are 'factual changes on that server...the location of the server is fortuitous and the means of communication should not be crucial.'

<sup>61</sup> Also known as the rule in *Adams v Lindsell* ((1818) 1 B & Ald 681; 106 ER 250). Although the rule had its genesis in that case, it was finally accepted in *Household Fire and Carriage Accident Insurance Company (Ltd) v Grant* (1879) 4 Ex D 216. The rule was first applied in Australia in *Tooth v Fleming* (1859) Legge 1152.

<sup>62</sup> See Glatt, above n 41, 55; O'Shea and Skeahan, above n 60, 258-9.

<sup>63</sup> Glatt, above n 41, 55.

<sup>64</sup> *Ibid.*, 55-6. See also Chris Reed, 'EDI—Contractual and Liability Issues' (1990) 6(2) *Computer Law and Practice* 36.

<sup>65</sup> Brian Clarke, 'The E-Mail Acceptance Rule' (June 1997) *Proctor* 13, 13.

<sup>66</sup> Glatt, above n 41, 56.

<sup>67</sup> [1955] 2 QB 327. Adopted in *Brinkibon* [1982] 1 All ER 293.

how wide this criterion is, rightly, an open question (given the continuing development of new technologies) but it is consistent with the historical conservatism of the courts vis-a-vis maintaining the general principle that acceptance occurs at the time and place of receipt. This fact, coupled with the illogicality of construing all e-mail communications as non-instantaneous because some e-mail communications may be subject to third party-related delays, undermines this head of the argument that e-mail communications are best regarded as non-instantaneous and therefore subject to the postal acceptance rule.

Secondly, the apparent resemblance of an e-mail communications system to the postal system does not necessarily mean the postal acceptance rule should apply to the former. Unlike postal systems, e-mail communication systems provided by ISPs are automated so as to enable communications to take place as instantaneously as possible, and thus one could argue that even where e-mail communications are sent over open networks, the postal acceptance rule's application would not, unless otherwise stipulated, be 'within the contemplation of the parties'<sup>68</sup>, any reliance on third parties notwithstanding. In any event, the reliance on third parties should not be a factor counting against an e-mail sent over an open network being classified as instantaneous. Like postal communications, telephone and facsimile communications also rely on third parties (like telecommunications network providers) and occur over open networks, and yet the courts generally hold such communications to be instantaneous. One could argue further that the success of modern business derives, in part, from the provision of communication networks by specialised intermediaries like telecommunications network providers. Additionally, the distinction between telecommunications network providers and ISPs is blurring as evidenced by corporations like Telstra which provide a number of services including telephony, Internet access and e-mail services. It appears mistaken, then, to distinguish e-mails sent over open networks from the more established forms of instantaneous communications simply because they take place through ISPs, even though functional similarities may exist between the latter and post offices.

With respect to the third claim, delays caused by contracting parties themselves (such as failing to read e-mail in good time or incorrectly addressing e-mail) 'are external to the e-mail communication network' and therefore should not be determinative of whether or not e-mail communications are instantaneous.<sup>69</sup> So, with respect to a recipient's failure to read an e-mail, it would seem unreasonable to base the nature of an e-mail (is it instantaneous or not?) on whether or not a recipient was subjectively aware of the e-mail's existence and/or contents. Indeed, given that such a failure is external to the operation of an e-mail communications system, it is arguable the courts could justify a default rule construing 'delivery' as 'constructive delivery' to the e-mail communication system used by a recipient, rather than as actual delivery to a recipient's computer and/or awareness of an e-mail's contents.

---

<sup>68</sup> This being a necessary threshold re the applicability of the postal acceptance rule: see *Henthorn v Fraser* [1892] 2 Ch 27, 33 (Lord Herschell).

<sup>69</sup> O'Shea and Skeahan, above n 60, 258.

One advantage of construing delivery, and hence acceptance, in these terms is that it does not rely on a recipient's subjective awareness of a message's existence and/or contents—that is, it provides a more objective basis for assessing when delivery actually occurred.<sup>70</sup> A similar conclusion should hold for the situation where a sender incorrectly addresses an e-mail; in this situation, too, the postal acceptance rule should be inapplicable in that the sender of such an e-mail is quickly notified of the fact, unlike the sender of incorrectly addressed postal mail.

Fourthly, is it fair to assume, as the final claim does, that because (offeree) senders appear to lose effective control over e-mail communications (acceptances) once they have been sent, (offeror) recipients should bear all the risk after transmission by acceptors? <sup>71</sup> Ironically, the answer lies in the claim itself. Notwithstanding limits to its functionality, software in available e-mail systems enables a sender to determine whether a communication has been successfully sent because a message to that effect will be delivered to the sender by the service provider's information system. E-mail systems may also allow senders to be notified by confirmation receipts upon an e-mail's receipt or retrieval by an addressee, or even to retract an e-mail prior to retrieval.<sup>72</sup> However, the same knowledge will not be available to the party to whom the communication is addressed, that is, he or she will not know if an unsuccessful attempt has been made to send an e-mail communication.<sup>73</sup> Thus, it follows that a sender's knowledge of the transmission status of an e-mail acceptance exceeds that of a postal acceptance. Moreover, given the wide availability of other forms of instantaneous communication to confirm the receipt of an e-mail communication, the growing convergence between different communications mediums (Internet telephony, video conferencing and so on) and the increasing functionality of e-mail systems, it is difficult to see what policy justification exists for the general application of the postal acceptance rule to e-mail. Certainly not business convenience<sup>74</sup> because unlike the post, there is unlikely 'to be a substantial interval between the time when [an e-mail] acceptance is sent and the time it is received'<sup>75</sup>; and the composite need to shift transmission risks to offerors<sup>76</sup> or to provide offerees cer-

---

<sup>70</sup> With respect to electronic communications generally, a default rule similar to this is used in various statutory schemes (like the *Electronic Transactions Act 1999* (Cth)) and proposals (like the draft Uniform Electronic Transactions Act (US)): see part IV.E below.

<sup>71</sup> O'Shea and Skeahan, above n 60, 259.

<sup>72</sup> *Ibid* 260.

<sup>73</sup> A point noted about telexes and telephones in *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327, 332-3 (Denning LJ), 337 (Parker LJ) and by Lord Fraser in relation to telexes in *Brinkibon* [1983] 1 All ER 293, 297.

<sup>74</sup> See *Byrne & Co v Leon Van Tienhoven & Co* (1880) 5 CPD 344; *Household Fire and Carriage Accident Insurance Company (Ltd) v Grant* (1879) 4 Ex D 216, 223-4 (Theiseger LJ).

<sup>75</sup> Words borrowed from Lord Brandon in *Brinkibon* [1983] 1 All ER 293, 301. Referring to the use of telephone or telex communications, Lord Brandon opined at 301 that 'commercial expediency does not have any application when the means of communication employed between the offeror and the offeree is instantaneous in nature...[rather] the general principle relating to the formation of contracts remains applicable.'

<sup>76</sup> See *Dunlop v Higgins* (1848) 1 HL Cas 381; *Harris's Case, Re Imperial Land Co of Marseilles* (1872) 7 LR Ch App 587.

tainty as to whether a contract exists or not (by removing the risk of revocation)<sup>77</sup>, is, if it is not already nonexistent, insubstantial. For these reasons, it is convenient to impose the risks attending e-mail transmissions on senders.

Finally, broader legal, commercial and policy considerations also indicate the presumption of instantaneity should extend to e-mail communications. Firstly, '[t]he success and sheer volume of commercial transactions which are currently conducted over the Internet indicate that contracting parties do not need...the postal acceptance rule to overcome any delays experienced in communicating by e-mail.'<sup>78</sup> The crucial point here is that parties transacting electronically do so on the presumption that their communications are instantaneous by nature. Secondly, insofar that electronic contracting exists in an international context, it is useful to consider the effect, if any, of international conventions like the Vienna Sales Convention and the potential influence of foreign laws, proposed laws and policies on the presumption of instantaneity of electronic communications. The latter point is developed below in Parts IV.D and E. However, it is useful to point out that the broad effect of these conventions, laws and policies is to strengthen the presumption of instantaneity. Perhaps most importantly, though, the courts themselves appear reluctant to extend the application of the postal acceptance rule outside its original sphere, unless it is to be inferred that an offeror contemplated and intended the operation of the rule. Rather, they have generally acted to preserve the primacy of the principle that a contract is not completed until acceptance of the offer is actually communicated to the offeror, and this has meant that modern forms of communications have been characterised as instantaneous.<sup>79</sup> It follows that e-mail communications, too, ought to be characterised generally as (virtually) instantaneous, and by virtue of this the postal acceptance rule should not apply to such communications.

Thus, the original impression stands. Electronic communications should be characterised as instantaneous or 'virtually instantaneous' communications, subject, of course, to Lord Wilberforce's caveat that '[n]o universal rule can cover all...cases; [ultimately] they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by judgement where the risks should lie.'<sup>80</sup> One can add that difficult cases may also be resolved by reference to statutory provisions (if any) outlining default rules on the sending and receiving of electronic communications.<sup>81</sup>

<sup>77</sup> See *Adams v Lindsell* (1818) 1 B & Ald 681, 683; *Harris's Case, Re Imperial Land Co of Marseilles* (1872) 7 LR Ch App 587, 594.

<sup>78</sup> O'Shea and Skeahan, above n 60, 260.

<sup>79</sup> See *Brinkibon* [1983] 1 All ER 293, 296 (Lord Wilberforce), 301 (Lord Brandon); *Nunin Holdings v Tullamarine Estates* [1994] 1 VR 74, 83 (Hedigan J). See also *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93, 112 (Dixon and Fullagar JJ); and the authorities noted at footnotes 55-58.

<sup>80</sup> *Brinkibon* [1982] 1 All ER 293, 296; see also Lord Brandon's opinion at 302. In this connection, a relevant Australian case is *Leach Nominees Pty Ltd v W Wright Pty Ltd* [1986] WAR 244 (acceptance by public telex dictated over phone subject to postal rule).

<sup>81</sup> See, for example, s 14 of the *Electronic Transactions Act 1999* (Cth). See also part IV.E below.



## C Intention

### 1 Intention and Electronic Agents—Case Law

Given the foregoing characterisation of electronic communications, the primary issue regarding the use of instantaneous communications in contract formation is the intention of the parties to be bound by such communications. A contract will be constituted by 'the simple case of instantaneous communication between principals', provided that such communications '[appear] to be within the mutual intention of the parties that contractual exchanges should take place in this way.'<sup>82</sup> But what of those transactions that are dependent on electronic agents? If one accepts that the physical involvement of a machine or computer system has no legal consequences<sup>83</sup> because machines and computer systems do not make truly autonomous decisions but operate according to 'prior human intention',<sup>84</sup> then the simple case above should also apply to the latter type of transaction, provided that a party's intention to contract is expressed by clear conduct. In this connection, the use of an electronic agent will have clearly been consented to by the party who, relying on the agent, also programmed it to act on his or her behalf. However, with respect to a party (such as a consumer) who utilises (perhaps unknowingly) but who does not programme the same agent, any consent as to the use of the agent on contract formation will obviously need to be implied. This need not be controversial provided that the contractual terms are readily accessible and not objectionable.

Some examples of appropriate conduct arising in response to communications generated by electronic agents can be found in recent case law. For example, in *Hotmail Corporation v Van Money Pie Inc*,<sup>85</sup> the United States District Court found that once a party mouse-clicks on an 'I agree' icon denoting acceptance of the other party's terms, a valid and enforceable contract is concluded.<sup>86</sup> Similar approval of mouse-clicking to signify agreement was also given in *ProCD, Inc v Matthew Zeidenberg and Silken Mountain Web Services*.<sup>87</sup> In Australia, there have not been any comparable cases. However, the National Advisory Council on Consumer Affairs has recommended that '[o]nline consumers ... be required [by vendors] to "click" through a process which specifically requires the consumer to confirm their

<sup>82</sup> *Brinkibon* [1982] 1 All ER 293, 296.

<sup>83</sup> Unless, of course, legal consequences are intended.

<sup>84</sup> Glatt, above n 41, 45. See generally also Tom Allen and Robin Widdison, 'Can Computers Make Contracts' (1996) 9(1) *Harvard Journal of Law & Technology* 25 (contrasting arguments for viewing computers as legal persons and as mere machines, and tending to favour the latter, technological advances notwithstanding). The assertion here is, of course, debatable, and so it is arguable that with the increasing complexity of computer systems and advances in artificial intelligence, the question of the legal personality, if any, of electronic agents will remain a live issue.

<sup>85</sup> 47 United States Patent Quarterly 2d 1020 (ND Cal, 1998).

<sup>86</sup> In other words, this method of acceptance establishes a connection between an offer and a subsequent acceptance: *R v Clarke* (1927) 40 CLR 27.

<sup>87</sup> 86 F3d 1447 (7<sup>th</sup> Cir, 1996).

intent to purchase.<sup>88</sup> 'Principle No. 5' of the Council's report affirmed that mouse-clicking can signify a 'meaningful consent' to an online contract's standard terms and conditions.<sup>89</sup>

The foregoing discussion emphasises the need for the intentional conduct of offer-ees to be clearly expressed. In this connection, it is useful to consider the consequences of poorly communicated intentions arising from automated transactions, as was the situation in the United States case of *Corinthian Pharmaceutical Systems Inc v Lederle Laboratories*.<sup>90</sup> This case involved the plaintiff buyer's placement of an order through an automated telephone system and the subsequent allocation of a 'tracking number' by the defendant's computer system.<sup>91</sup> The order was found to constitute an offer. Notably the transaction was derived from human-computer interactions; there was no human-human interaction in the transaction. The court held that the defendant did not intend the issuance of the tracking number to constitute an acceptance but rather an acknowledgement of the plaintiff's order which had been found to constitute an offer.<sup>92</sup> Therefore, no contract was concluded. Whatever the merits of this case, it is clear that the onus for ensuring the clear expression of intentional conduct is on the party who retains programming control over an automated system, irrespective of whether that party is the offeror or the offeree.

## 2 *Intention, Electronic Communications and Electronic Agents—Regulatory Regimes Worldwide*

Although there is, or should be, little doubt, at least in common law countries, as to the contractual efficacy of electronic communications generally and those generated by electronic agents, the issue is being, and has been, addressed in a number of regulatory proposals and regimes worldwide. It is useful to compare these proposals and regimes so as to better inform common law analyses of intention in relation to online contracts.

The pre-eminent regulatory proposal is the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Electronic Commerce 1996 (Model Law). The main purpose of the Model Law is to encourage the international harmonisation of the legal status of electronic communications, and to provide a suitable legal environment for electronic commerce.<sup>93</sup> With respect to contract formation, Article 11 of the Model Law stipulates that unless a contrary intention is expressed by contracting parties, a valid and enforceable contract may be formed

<sup>88</sup> National Advisory Council on Consumer Affairs, 'Consumer Protection in Electronic Commerce—Principles and Key Issues' at s 5, <<http://www.dist.gov.au/consumer/electcomm/html>>, (accessed September 1998).

<sup>89</sup> *Ibid.*

<sup>90</sup> 724 FSupp 605 (SD Ind, 1989).

<sup>91</sup> *Ibid* 607, 610.

<sup>92</sup> *Ibid* 609, 610.

<sup>93</sup> Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), Part A, available at <<http://www.uncitral.org/en-index.htm>>.

using electronic communications. The intention of parties to use electronic agents in contract formation is not addressed directly. However, implied recognition of such intention is found in deeming provisions which state, *inter alia*, electronic communications that originate from information systems are to be those of the persons in whose authority the processes were programmed.<sup>94</sup>

In a similar vein to UNCITRAL, the European Parliament has proposed a 'Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market' (the draft Directive) which, *inter alia*, validates the use of electronic communications in contract formation.<sup>95</sup> That contracting parties may intentionally use electronic agents as in clickwrap agreements is clear, although this is not expressly stated.<sup>96</sup> Nevertheless, parties who use electronic agents or other automated contracting processes must ensure that other contracting parties, particularly consumers, intend to be bound by contracts formed with the aid of such processes.<sup>97</sup> The draft Directive will apply in the United Kingdom, a fact which may explain the omission of contract formation issues in the draft Electronic Communications Bill 1999 (UK).<sup>98</sup>

In the United States, two regulatory proposals are noteworthy. The first, and most similar to the Model Law, is the proposed Uniform Electronic Transactions Act (the draft UETA (US))<sup>99</sup> which applies, *inter alia*, to contractual transactions where parties intend to contract via 'electronic means.'<sup>100</sup> Whether parties intend to contract using electronic means is 'determined from the context and surrounding circumstances, including the parties' conduct.'<sup>101</sup> These general provisions clearly include the intended use of automated processes in contract formation, and this is confirmed by more specific provisions.<sup>102</sup> Similar provisions exist in the proposed United States Uniform Computer Information Transactions Act (the draft UCITA (US)).<sup>103</sup> Thus, in line with traditional doctrinal considerations a contract may be formed in any manner intended to show agreement, irrespective of the degree of direct human involvement.<sup>104</sup> With respect to the latter point, the draft UCITA (US) expressly recognises that contract formation may arise via interactions between

---

<sup>94</sup> Model Law, art 13(2).

<sup>95</sup> Amended proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market, art 9(1)-(2) (draft as at 6/5/99), available at <<http://www2.echo.lu/legal/en/ecommerc/ecommerc.html>>, (accessed December 1999).

<sup>96</sup> *Ibid* art 11.

<sup>97</sup> *Ibid* arts 10-11.

<sup>98</sup> See Explanatory Notes to the draft Electronic Communications Bill 1999, available at <[http://www.dti.gov.uk/cii/elec/ecbil\\_3.html](http://www.dti.gov.uk/cii/elec/ecbil_3.html)>.

<sup>99</sup> Final draft, 23-30 July 1999 available at <[http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm)>. The draft UETA's main purpose is to legitimise the use of electronic communications generally and to settle legal questions as to writing and record-keeping: see s 3.

<sup>100</sup> Draft UETA (US), s 5

<sup>101</sup> *Ibid*.

<sup>102</sup> *Ibid* s 14.

<sup>103</sup> The proposed UCITA (US) (final draft, 23-30 July 1999, available at <[http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm)>) replaces the proposed Article 2B of the Uniform Commercial Code. The draft UCITA will regulate transactions involving digital goods (software, information and so on) and the rights therein, although a number of exclusions exist: see s 103.

<sup>104</sup> *Ibid* s 202(a).

information systems (expressed as 'electronic agents') or between humans and information systems.<sup>105</sup> That intention is paramount is made clear in a provision providing that where parties

so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one or more terms are left open or to be agreed on, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms.<sup>106</sup>

By comparison, Australia's *Electronic Transactions Act 1999* (Cth) (ETA), which is loosely based on the Model Law, does not address directly contract formation and issues of intention and automated processes and so on.<sup>107</sup> Rather, the ETA stipulates in generic terms that for the purposes of a law of the Commonwealth<sup>108</sup> a transaction will not be invalid merely because it was conducted using electronic communication.<sup>109</sup> In other words, the validity of the transaction will be determined in accordance with other existing legal requirements.<sup>110</sup> Given the 'light touch' nature of the Act (reflected in the principles of media and technology neutrality)<sup>111</sup> this limited response is unsurprising. One could argue also that given the robustness and flexibility of the common law as to contract formation, to have made express provisions about the prima facie validity of contracts formed using electronic communications would have been to state the obvious.

## D *Time and Place of Receipt of Electronic Acceptances*

It follows from the cases adverted to above (in Part IV.B) in relation to instantaneous communications that, as in contract formation generally, a contract formed online will be made when and where the acceptance is received by the offeror. However, whether an acceptance becomes effective occurs upon mere receipt by a recipient's facsimile or telex machine or upon actual communication to the recipient

<sup>105</sup> Ibid s 206.

<sup>106</sup> Ibid s 202(b).

<sup>107</sup> Inter alia, the ETA aims to provide a basic regulatory framework for the use of electronic communications (s 3) and equality between electronic and paper transactions and records (s 8).

<sup>108</sup> That is, those laws set out in Schedule 1 of the *Electronic Transactions Regulations 2000*.

<sup>109</sup> See ETA, s 8(1). However, it is clear that contractual transactions are covered by the Act: see s 3. See also Electronic Commerce Expert Group, 'Electronic Commerce: Building the Legal Framework' Report to the Attorney-General, Recommendations, 1998, 1, 4 (Executive Summary), [4.2.3-4.2.15], [4.5.60-4.5.62], available at <<http://www.law.gov.au/ecommerce>>. This Report has been the major Australian response to the legal challenges of electronic commerce, and forms the (intellectual) basis for the ETA.

<sup>110</sup> Revised Explanatory Memorandum *Electronic Transactions Bill 1999* (Cth), Notes on Clauses, cl 8, available at <<http://www.law.gov.au/ecommerce>>.

<sup>111</sup> The Act is based on two principles: 'functional equivalence' (also known as media neutrality) and technology neutrality. The term functional equivalence means that transactions conducted using paper documents and transactions conducted using electronic communications should be treated equally by the law...Technology neutrality means that the law should not discriminate between different forms of technology—for example, by specifying technical requirements for the use of electronic communications that are based upon an understanding of the operation of a particular form of electronic communication technology: see *ibid* at General Outline. See also Electronic Commerce Expert Group, above n 110, at Overview (Executive Summary), [4.5.3-4.5.12].

seems to be undecided and/or depend on the circumstances of each case. Nevertheless, one can identify those situations where it would seem reasonable that a recipient need not be subjectively aware of an electronic acceptance's contents in order for it to be effective. One situation would be where an offeror is in control, whether actual or constructive, of the information system receiving the communication.<sup>112</sup> Another situation would be where a party uses electronic agents to complete transactions, the reason being that such use necessarily implies that actual notice of an electronic communication is not required.

Where a problem may lie, however, will be in the case where a third party rather than the offeror is in control of the information system receiving the acceptance. Here, if a consistent approach is to be taken, one would need to deem a rule stipulating that an electronic communication will be effective even though the intended recipient is not subjectively aware of its contents. There is nothing inherently onerous or unreasonable about doing this, even in business-consumer transactions. The primary reason is that the offeror, although not in command of the information system used to receive an offeree's acceptance, will usually be able to access freely the third party's information system and e-mail facilities through his or her computer, the latter being in a place within the control of the offeror. An obvious objection is that the offeror may not own a computer and therefore must rely on another party's (say, an Internet cafe's) computer in order to access a relevant information system. However, this should not detract from the imposition of a default rule that an electronic communication will be effective upon receipt in an information system readily accessible by the person to whom the communication is addressed—the recipient's subjective awareness is not necessary to ensure a communication's effectiveness unless the circumstances of a particular case (the situation alluded to in the objection may be such a case) indicate otherwise.

The analysis of the time and place of receipt of online communications must also take into account the general irrelevance of (i) the physical location of an information system (with respect to the place of receipt) and (ii) the identity of the information system used in contract formation, especially where open networks are used in contract formation (with respect to the time of receipt). In relation to the physical location of an information system, one must consider the fact that a contracting party may not have a readily identifiable place of business (which conforms with relevant legal requirements), or that a business may have more than one place of business. The first possibility provides the threshold case for demonstrating the irrelevance of the physical location of an information system, namely that of the

---

<sup>112</sup> See Lord Fraser's remark in *Brinkibon* at 297 that it is unnecessary to predicate the effectiveness of electronic messages on the immediate review by human parties: 'once the message has been received by the offeror's telex machine, it is not unreasonable to treat it as delivered to the principal offeror, because it is his responsibility to arrange for prompt handling of messages within his own office.' Lord Wilberforce, however, left the issue open (at 296). See also *The Pendrecht* [1980] 2 Lloyd's Rep 56 where at 66 Parker J thought that for the purposes of the *Limitation Act 1939*, a telex notice was considered to have been delivered at a registered place of business even though delivery was outside of normal business hours.

vendor who provides electronic services such as providing access, upon payment, to information. Here, the physical location of the vendor's electronic service, or to put it another way, the place where the service is rendered, is likely to be difficult to ascertain. Should it be the physical location of the server hosting the vendor's service, the location of the person accessing the service, or the place from which the vendor runs and organises the service?<sup>113</sup> In relation to the first two possibilities, location is

absolutely fortuitous and can even change, for instance if the supplier switches to a new server or uses several servers with the same contents [proxy servers] or if the user accesses the data from different locations [including different countries].<sup>114</sup>

Arguably, then, 'the place where the services are rendered is in fact the place from where the supplier controls and organises the service.'<sup>115</sup> That place may or may not at be the same physical location as the service provided. For example, the locations will not be the same where a vendor 'hires space on a website, which is technically maintained by a third party, and [the vendor] only provides the information to that party, which ultimately makes it available on the net.'<sup>116</sup> Thus, the only reasonable way to locate the place an electronic service is rendered is to deem it to be the place from where the vendor organises his or her service, whether that place is the sole place of business, main place of business (where more than one place of business exists) or place of residence (where no place of business exists).

As to the formal identification of information systems for the purpose of communication, generally this should not be determinative of the time of receipt (notwithstanding that contracting parties may indicate otherwise). In this connection, several points can be made. Generally speaking, other forms of instantaneous communications like telephony, telex or facsimile do not depend on contracting parties identifying the communications system or systems actually used so as to determine the time of receipt. Additionally, at least with respect to the latter two forms, the time of receipt is recorded on the relevant machine, and a similar process occurs in electronic communications where software records the time of receipt. The question as to whether an information system needs to be identified also seems to be based on concerns relating to the effectiveness of communications which have not come to the subjective attention of recipients. This question was answered negatively above in relation to the issue of whether a recipient needs to be subjectively aware of a communication's contents. If any doubt does or is perceived to exist, then, in the absence of relevant authority, a simple legislative provision expressing as much would suffice. For example, the draft UCITA (US) stipulates that '[r]eceipt of an electronic message is effective when received even if no individual is [subjectively]

---

<sup>113</sup> See Schu, above n 49, 217.

<sup>114</sup> *Ibid* (citations omitted).

<sup>115</sup> *Ibid* 218.

<sup>116</sup> *Ibid*.

aware of its receipt.<sup>117</sup> Lastly, given open networks like the Internet are built, *inter alia*, on the principle of redundancy of information systems for the purpose of communication,<sup>118</sup> an argument exists that the principle also indicates the general irrelevance of identifying particular information systems for the purpose of electronic communications and thus for determining time of receipt.

## E *Time and Place of Receipt—Regulatory Regimes*

Although no relevant case law exists with respect to the general irrelevance of the physical location of an information system (with respect to the place of receipt) and of identifying which information system is used in contract formation, especially where open networks are used in contract formation (with respect to the time of receipt), the regulatory regimes discussed earlier with respect to intention have attempted to address these matters although with no particular uniformity of approach. Nevertheless, it is useful to compare the regimes so as to better understand common law analyses of the time and place of receipt of electronic communications in online contracts.

### 1 *Place of receipt*

Although the Model Law does not purport to regulate the formation of contracts (in deference to sovereign interests<sup>119</sup>), it does address the general issue of the time and place of receipt of electronic communications.<sup>120</sup> With respect to the place of receipt, the Model Law recognises that an information system used to convey communications may not be located at an addressee's place of business. That is, the physical location of an information system is irrelevant in determining place of receipt.<sup>121</sup> Thus, the place of receipt 'is deemed...[to be] the place where the addressee has its place of business'<sup>122</sup> which accords with the general rule of contract formation. Similar, albeit wider, provisions are found in the ETA<sup>123</sup> and draft UETA (US),<sup>124</sup> although only the latter formally recognises the irrelevance of the physical location of an information system.<sup>125</sup> Thus, unless a contrary intention is expressed, the communication is deemed to be received at the recipient's place of business, main

<sup>117</sup> Section 215. The purpose of this provision is to remove any doubt as to the *prima facie* effectivity of transactions involving electronic agents.

<sup>118</sup> The decentralised nature of the Internet (initially a consequence of its military origins) ensures that it is protected from being disabled should a link be disrupted: see Maureen A O'Rourke, 'Fencing Cyberspace: Drawing Borders in a Virtual World' (1998) 82 *Minnesota Law Review* 609, 617.

<sup>119</sup> See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) [76].

<sup>120</sup> With regard to contract formation, data messages could include offers, acceptances and revocations of offers.

<sup>121</sup> Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, above n 120, [100, 105-7].

<sup>122</sup> Model Law, art 15(4).

<sup>123</sup> Section 14(5).

<sup>124</sup> Section 15(c).

<sup>125</sup> However, to the extent that the ETA is based on the recommendations of the Attorney-General's Expert Group on Electronic Commerce, the irrelevance of the physical location of information systems can be imported impliedly into that Act: see Electronic Commerce Expert Group, above n 110.

place of business (if there is more than one place of business) or place of residence (if there is no identifiable place of business).<sup>126</sup>

## 2 *Time of Receipt*

The regulatory regimes analysed below (the UCITA Bill (US) and the European Parliament's draft Directive being exceptions) address the issue of time of dispatch<sup>127</sup> as well as the issue of time of receipt of electronic communications. The following analysis assumes that the relevant times are contemporaneous, in accordance with the presumption of instantaneity. However, the fact that these times may not be the same is addressed briefly at the end of this section.

### (a) *UNCITRAL's Model Law*

With respect to the time of receipt, the Model Law stipulates that it may be either the time at which a communication is received by an addressee's information system (whether designated by contract or not), or where an information system is designated but the message is sent to another information system of the addressee, the time at which a communication is retrieved from the latter information system.<sup>128</sup> The first part of these provisions clearly comports with the presumption of instantaneity of electronic communications insofar that it recognises that it is not necessary to require the importation of a requirement that a communication come to a recipient's subjective attention before it is treated as effective.<sup>129</sup> However, the second part differs insofar that it requires that an intended recipient be subjectively aware of the existence of a message. In this connection, the protection of recipient parties where senders fail to communicate via designated information systems as per contract is clearly intended. The first part also makes it clear that generally the question of identifying which information system is used by contracting parties is not to be determinative of the time a communication is received.

### (b) *The United States UETA and UCITA Bills*

A similar (albeit simpler) approach to that in the Model Law is followed in the draft UETA (US). Thus, the time of receipt is, unless otherwise agreed, the time a communication enters an information system (whether designated or otherwise<sup>130</sup>) that a recipient uses for receiving electronic communications 'of the type sent' and from which the recipient is able to retrieve the communication, provided that the latter 'is in a form capable of being processed by that system.'<sup>131</sup> Importantly, electronic communications are deemed to have been received even if no individual is subjectively aware of its receipt.<sup>132</sup> Here, the instantaneity of electronic communications is

<sup>126</sup> Draft UETA (US), s 15(d).

<sup>127</sup> Model Law, art 15(1); UETA, ss 14(1)-(2); draft UETA, s 15(a).

<sup>128</sup> Article 15(2)(a)-(b).

<sup>129</sup> See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, above n 120, [101].

<sup>130</sup> The words 'uses or has designated' in s 15(b) of the draft UETA (US) suggest this interpretation.

<sup>131</sup> Draft UETA (US), s 15(b).

<sup>132</sup> *Ibid* s 15(e).



clearly presumed. Unlike earlier drafts, there is no fall back provision where the time of receipt will, in the alternative, be the time a communication comes to the attention of the recipient,<sup>133</sup> and doubtless, this is left to the parties to decide. The draft UCITA (US) does not address the general issue of the time (or place) of receipt of an electronic communication.<sup>134</sup> However, with respect to the temporal aspect of contract formation, the draft UCITA (US) stipulates that a contract will be formed upon receipt of an electronic acceptance or, if an electronic 'response consists of beginning performance, full performance, or giving access to information, when the performance is received or the access is enabled and necessary access materials are received.'<sup>135</sup> Obviously, the latter alternative takes account of the use of electronic agents in electronic performance.

(c) *Australia's ETA*

The approach to the time of receipt in the ETA differs in some aspects from both the Model Law and the draft UETA (US). Like the latter two schemes, s 14(3) of the ETA stipulates that where an information system has been designated for receiving electronic communications, then, unless otherwise agreed, the time of receipt is the time when an electronic communication enters that information system. However, unlike the Model Law and the draft UETA (US), s 14(4) does not extend this approach to the time of receipt to non-designated systems. Rather, with respect to the latter the time of receipt is the time a communication's existence comes to the attention of the recipient, unless contracting parties agree otherwise. Like the Model Law, s 14(4) introduces a subjective test with respect to the receipt of communications over non-designated information systems although the test in s 14(4) is much wider in scope in that it applies to all communications sent over non-designated information systems. Interestingly, the Expert Group on Electronic Commerce did, in fact, recommend that the simpler approach of the draft UETA (US), rather than that of the Model Law, be followed.<sup>136</sup> However, a clear difference between the relevant draft UETA (US) provision and s 14 of the ETA is that the latter, unlike the former (assuming that the analysis at (b) above is correct), differentiates between communications that take place over designated networks and those that do not. Unfortunately, this differential approach seems mistaken.

The different treatment of designated and non-designated information systems in s 14 sits uncomfortably with the presumption of instantaneity of electronic communications and with the general irrelevance of identifying an information system for the purposes of determining the time of receipt. With respect to designated systems, the

---

<sup>133</sup> In previous versions (for example, s 402 of the UETA (25 Nov 1997 draft), a fallback provision was proposed.

<sup>134</sup> The provisions of the draft UETA (US) do not apply to the draft UCITA (US): see draft UETA (US), s 3.

<sup>135</sup> Draft UCITA (US), s 203.

<sup>136</sup> Expert Group on Electronic Commerce, above n 110, [4.5.86-4.5.87], Recommendation 14 (Ch 4). The Expert Group actually recommended that s 402 of the UETA (25 Nov 1997 draft) be followed. Section 15 of the current draft UETA (US) is similarly worded although as previously noted, a fallback provision is no longer included.

presumption of instantaneity clearly holds insofar that there is no requirement that a recipient be subjectively aware of a communication's existence or contents in order for the communication to be effective. Where designated information systems are used, typically in EDI transactions, instantaneity of communications will arise by virtue of the designation (in an umbrella or similar agreement) of which information systems will be used by contracting parties. Conceivably, e-mail and clickwrap communications that take place over closed networks could also come within the provision, provided that it is assumed that such communications take place in accordance with the prior agreement of relevant parties.<sup>137</sup>

However, where non-designated information systems are used, as is commonly the case where communications take place over open networks like the Internet, the default rule is that an electronic communication will not be effective unless the recipient is subjectively aware of its existence (though not its contents).<sup>138</sup> The most likely type of communication coming within the provision is e-mail although it also applies to clickwrap communications that take place over open networks, notwithstanding that the use of electronic agents necessarily indicates that a recipient's subjective awareness of the existence of a communication is irrelevant as to its effectiveness. The provision leaves open the possibility that contracting parties may agree to set aside the default rule, in which case the presumption of instantaneity of electronic communications would apply. It is not stated whether such agreement can be implied, but the combined effect of the relevant subsections seems to require the express agreement of the parties.<sup>139</sup> If this is so, then the provisions are unnecessarily restrictive if regard is had to current commercial practices which arguably imply the presumption of instantaneity into most if not all open network (Internet) transactions (whether contractual or not), and in some discord with other regulatory proposals such as the Model Law and the draft UETA (US).<sup>140</sup> Indeed, the provision seems overly prescriptive by virtue of the arguments for the presumption of instantaneity of electronic communications and the general irrelevance of identifying information systems for the purpose of determining a communication's time of receipt (notwithstanding the contra-intentions of contracting parties). It is arguable,

---

<sup>137</sup> That such an agreement is required, is indicated by the view of the Expert Group on Electronic Commerce that 'the mere indication of an electronic mail...address on a letterhead or other document should not be regarded as express designation of one or more information systems': Expert Group on Electronic Commerce, above n 110, [2.5.3].

<sup>138</sup> ETA, s 14(4). With respect to s 14(4), an 'addressee who actually knows, or should reasonably know in the circumstances, of the existence of the communication should be considered to have received the communication. For example, an addressee who is aware that the communication is in their electronic mail 'box' but who refuses to read it should be considered to have received the communication.'

<sup>139</sup> ETA, ss 14(3)-(4).

<sup>140</sup> It is interesting to consider whether an information system used for communications over open networks could be considered to be a designated information system. Arguably clickwrap transactions (given their automated nature) could fall within s 14(3), notwithstanding that the reference to designated information systems only seems to apply to closed information networks. In this connection, the designation of an information system used for receiving clickwrap communications could be imputed to the parties which is reasonable given that electronic agents used for such communications are likely to be based at identifiable information systems. However, the argument is contra-indicated by the differential nature of s 14.

too, that the fact s 14 can be interpreted as providing differential treatment based on the type of network used runs counter to the principle of technology neutrality which underlies the Act, provided that it is assumed (quite reasonably) that what type of network (open or closed?) is used to communicate is, inter alia, a technological question. Lastly, if s 14(4) is in fact intended to mirror the Model Law's safeguarding of recipient interests where a sender fails to communicate by designated information systems then it should have been drafted in a similar and narrower fashion. It remains to be seen how effective s 14 will be (having regard to the purpose of the ETA), but in its current form it appears defective.

(d) *The European Parliament's Draft Directive*

Generally, the draft Directive does not regulate the time (or place) of receipt of electronic communications. However, where contracts are formed using electronic agents, as in clickwrap contracts, a contract is not formed at the time of acceptance but rather when an offeree (or 'recipient of the service') receives from the offeror (or 'service provider') an electronic acknowledgement of receipt of the offeree's acceptance.<sup>141</sup> The time of receipt of an acknowledgement is deemed to be the time the offeree is able to access it.<sup>142</sup> In other words, contract formation is contingent on the offeree's subjective awareness of a communication's existence. Judging by the draft Directive's other provisions, it is reasonable to assume policy considerations relating to consumer protection underlie the above requirement. However, from a common law position as to contract formation, such a requirement seems unnecessarily broad and prescriptive, notwithstanding that online consumer protection is a live issue.

(e) *The Vienna Sales Convention*

It is useful to consider the Vienna Sales Convention (applied throughout Australia by virtue of the various Sale of Goods (Vienna Convention Acts) as it may affect Australian contracting parties. There is no scope under the Convention for the operation of the postal acceptance rule, unless the parties agree otherwise or there is a usage or custom to that effect. Both offers and acceptances are effected when they reach the intended recipient. Article 24 of the Convention provides that an offer, acceptance or 'any other indication of intention' reaches an addressee when it is made orally to him or her or delivered by any other means to him or her personally, to the addressee's place of business or mailing address or place of residence, as the case may be. Thus, it appears that the time of receipt of an electronic communication to which the Convention applied would be the time it entered the information system (whether designated or otherwise) used by the addressee to receive electronic communications, but not the time of actual retrieval.<sup>143</sup> If this interpretation is correct, then the Convention's approach to offer and acceptance would be consistent

---

<sup>141</sup> Amended proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, art 11.

<sup>142</sup> Ibid.

<sup>143</sup> See New Zealand Law Commission, above n 48, [72-4].

with both the Model Law and the UETA Bill (US), and with the common law analysis of contract formation using instantaneous communications.

(f) *Mailbox Rules and Time of Dispatch*

The Model Law, the draft UETA (US) and the ETA countenance the possible application of the postal rule (or at least a 'mailbox' rule where the Model Law is concerned), particularly in cases where contractual transactions take place over open networks. Thus, they stipulate that where an electronic communication enters a single information system or alternatively, it enters successively two or more information systems outside the sender's control, then, unless otherwise agreed, the time of dispatch is the time when the electronic communication enters the first information system.<sup>144</sup> Given the foregoing analysis of instantaneous communications at Part IV.B with respect to contract formation,<sup>145</sup> these provisions should be regarded as merely providing default rules about the time and place of sending of electronic communications to clarify (if necessary) the intent of parties contracting, or purporting to contract, with the postal acceptance rule in mind.

## V ENFORCING INTERNET CONTRACTS

As yet, there appear to be no reported cases addressing directly the issue of whether online agreements are enforceable, although a de facto approval of them can be discerned.<sup>146</sup> Some legal commentary has questioned whether clickwrap agreements are enforceable, and by association, whether terms and conditions can be incorporated via mouse-clicking.<sup>147</sup> Strangely, such commentary, influenced by the apparent novelty of online agreements, has ignored or at most given only an implicit acknowledgement to traditional contract doctrines. Yet, from a common law viewpoint, this novelty is largely superficial. At a general level, a number of legal issues in cyberspace are or will be indistinguishable from legal issues in real space in the sense that the legal elements remain the same although the context and content may differ. This sameness extends to contract law.<sup>148</sup> Thus, there is a general freedom for

<sup>144</sup> ETA, ss 14(1)-(2); UETA (US), s 15(a); Model Law, art 15(1).

<sup>145</sup> Though obviously not other areas of law.

<sup>146</sup> A number of cases have determined that being a party to an online contract can be a factor in determining a court's jurisdiction over that party: see, for example, *CompuServe v Patterson* 89 F3d 1257 (6<sup>th</sup> Cir, 1996); *Zippo Manufacturing v Zippo Dot Com* 952 FSupp 1119 (WD Pa, 1997); *Hotmail Corporation v Van Money Pie Inc* C98-20064 (ND Cal, 1998), WL 388389. Also, *ProCD, Inc v Matthew Zeidenberg and Silken Mountain Web Services* 86 F3d 1447 (7<sup>th</sup> Cir, 1996) suggests that online agreements would be enforceable.

<sup>147</sup> For example, see Elizabeth S Perdue, 'Challenges of On-Line Contracts With a Point and Click', (1997) 2(9) *The Internet Newsletter*, <[http://www.ljx.com/internet/97\\_12\\_click.html](http://www.ljx.com/internet/97_12_click.html)>, (accessed September 1998); R D Harroch, 'Online, Draftmanship Is Still Pivotal', 1998, <<http://www.ljx.com/internet/0202webks.html>>, (accessed September 1998); K Stuckey, 'Shrinkwrap/Point and Click Agreements', <<http://www.ljx.com/internet/excerpt.html>>, (accessed September 1998).

<sup>148</sup> See Salbu, above n 1, 449-50; and generally Allen and Widdison, above n 85.

parties to order their contractual affairs as they see fit,<sup>149</sup> notwithstanding statutory and judicial intervention. As the above cases indicate, this freedom extends to the technological means by which contracts may be formed. Contractual relations may be formed orally, by written agreement, by conduct or by a combination of these means, although Statutes of Fraud-like provisions do apply in some jurisdictions.<sup>150</sup> This lack of formality encompasses the various Sale of Goods regimes in Australia.<sup>151</sup> Provided that the preconditions pertaining to agreement, consideration<sup>152</sup> and intention to create legal relations are met, the words, writing or conduct need not take any particular form to be binding. It follows that where an online business-consumer agreement has met these preconditions, it is likely that the question of whether it is enforceable will depend on whether its terms are untenable on grounds applicable to contracts generally such as unconscionable or misleading and deceptive conduct<sup>153</sup> or because they exclude statutorily-implied consumer protection terms,<sup>154</sup> what industry-best practice is with respect to the manner by which terms are incorporated,<sup>155</sup> and whether contracting parties reside in the same jurisdiction or in different jurisdictions.

The latter is perhaps the most important limiting factor, and is worthy of further comment. Given that domestic courts possess jurisdiction or competence under their own rules, a plaintiff-consumer in an action concerning an online agreement may have to consider the issue of cross-jurisdictional enforcement.<sup>156</sup> Where online business-consumer contracts are formed between parties residing in the same jurisdiction, the issue is unlikely to arise. But where an online contract is formed between parties residing in different (national) jurisdictions, the likelihood of a domestic court being able to enforce the terms of that contract against a non-

---

<sup>149</sup> As noted, for example, by Brennan, J in *Baltic Shipping Co v Dillon* (1993) 111 ALR 289, 307; and by Lord Diplock in *Photo Production Ltd v Securicor Transport* [1980] AC 827, 848.

<sup>150</sup> See *Sale of Goods Act 1972* (NT), s 9; *Sale of Goods Act 1895* (Tas), s 9; *Sale of Goods Act 1895* (WA), s 4. Note that written evidence is not the only means by which these provisions are satisfied. The alternatives are: acceptance of the goods, the giving of something in earnest to bind the contract or part payment of the goods. In other words, the passing of consideration is important.

<sup>151</sup> For example, *Sale of Goods Act 1923* (NSW), s 8; *Goods Act 1958* (Vic), s 8.

<sup>152</sup> In the case of clickwrap contracts where payments are made by credit card, the passage of consideration is unlikely to at issue. More generally, the 'need to prove the existence of consideration is essentially unaffected by the advent of electronic communication technology, since the latter represents a revolution in how contracts are formed, rather than the substance of contracts...[Hence], the law relating to consideration does not require any reform in order to respond to the challenges posed by electronic commerce.' New Zealand Law Commission, above n 48, [76].

<sup>153</sup> As in s 52 of the *Trade Practices Act 1974* (Cth). See also statutes like the *Contracts Review Act 1980* (NSW) which applies where a court finds a contract or a provision of a contract to have been unconscionable, harsh or oppressive in the circumstances relating to the contract at the time it was made.

<sup>154</sup> Like those in Part V, Division II of the *Trade Practices Act 1974* (Cth).

<sup>155</sup> What best practice actually is has yet to be determined. Nevertheless, the enforceability of click wrap agreements, for example, may rest, inter alia, on whether prior notice of a vendor's terms was given and whether a consumer could exit the contract process at any time and whether a consumer had to perform an affirmative act indicating assent to the vendor's terms: see F M Buono and J A Friedman, 'Maximizing the Enforceability of Click-Wrap Agreements' (1999) 4(3) *Journal of Technology Law & Policy*, available at <<http://journal.law.ufl.edu/~techlaw/4-3/friedman.html>>. Obviously, these matters may go to the question of whether an online agreement was unconscionable or not under statute.

<sup>156</sup> And also the inherent limitations on service *ex juris*.

resident vendor will be greatly reduced, particularly if he or she does not possess assets within the court's jurisdiction. So, for example, the efficacy of consumer protection provisions like s 68 (read with s 68A) of the *Trade Practices Act 1974* (Cth) (TPA) is likely to be greatly reduced in cross-border transactions.<sup>157</sup> This suggests that any judgment against an offshore vendor 'will only be effective if [he or she] voluntarily agrees to satisfy it or if it is enforceable in [another jurisdiction] where the defendant has assets.'<sup>158</sup>

This outcome is compounded by the potential difficulty of determining an offending vendor's identity and physical location in the first place for, as discussed earlier at Part II.C, a vendor's physical location can be different to that of the information system which carries the vendor's Web site. In this connection, when a consumer accesses a Web site,

the only information which will definitely be provided about the supplier is the Uniform Resource Locator (URL) which identifies the supplier's home page on the Internet...[Unfortunately, the URL does not] indicate categorically what country [or jurisdiction] the supplier is in.<sup>159</sup>

One may be able to identify the vendor's service provider and consequently the vendor through any contractual arrangements between the parties, but as the facts of *People v Lipsitz*<sup>160</sup> indicate, a vendor can easily change service providers if they are subjected to consumer complaints.<sup>161</sup> Thus, set along side considerations of choice of law, governing law, cost and convenience and the fact that most online business-consumer transactions do not involve large amounts of money,<sup>162</sup> the real potential for an unsatisfied judgment (assuming the vendor could be identified) involving cross-border parties is likely to mean that litigation by consumers will be impractical.

<sup>157</sup> Essentially, s 68 renders void contracts that exclude, restrict or modify terms implied under the Act. Under the Act, implied terms include terms relating to the supply of goods (s 70) and to the merchantable quality and reasonable fitness of goods (s 71). Section 68A limits liability under s 68.

<sup>158</sup> Michael Pryles, Jeff Waincymer and Martin Davies, *International Trade Law* (1996) 533.

<sup>159</sup> Federal Bureau of Consumer Affairs, 'Untangling the Web-Electronic Commerce and the Consumer', 1998, chap 5, available at <<http://www.dist.gov.au/consumer/publicat/untangle/introd.html>>, (accessed September 1998). Note further that '[a]n Internet site apparently located in Australia could be a proxy forwarding messages to a different jurisdiction'. See also Australian Competition and Consumer Commission, 'The Global Enforcement Challenge: Enforcement of Consumer Protection Laws in a Global Marketplace', 1997, Discussion Paper at 15-16, available at <<http://www.accc.gov.au>>, (accessed September 1998).

<sup>160</sup> NY Slip Op 97, 495 (NY Sup Ct, June 23 1997).

<sup>161</sup> Other methods of disguising identity are outlined in Australian Competition and Consumer Commission, above n 162, 15-16.

<sup>162</sup> See National Advisory Council on Consumer Affairs, above n 89, Section 1-Protection; Australian Competition and Consumer Commission, above n 162, xii, 29-31; New Zealand Ministry of Consumers Affairs, 'Electronic Commerce and the New Zealand Consumer: Issues, and Strategies for the Future-Discussion Paper', 1997, 14-15, available at <<http://www.moc.gov.au/mca/P7.html>>, (accessed September 1998).

## VI CONCLUSION

A solution or set of solutions to the problems associated with cross border online business-consumer transaction is likely to be intractable, at least in the near future. Currently, there are no reasonable international standards of consumer protection (comparable, say, to the provisions of the TPA), and there is considerable industry resistance to the implementation of any such standards.<sup>163</sup> Additionally, there is little empirical evidence of what problems are being experienced by consumers buying online.<sup>164</sup> This suggests that although it is rational and logical to apply traditional contract principles and statutory protections to domestic online business-consumer transactions, the jurisdictional challenges posed by Internet commerce mean that domestic regulators worldwide must attempt to determine adequate and enforceable consumer protection measures. To do otherwise will stifle consumer confidence in Internet commerce; it may also mean sinking into a mire of regulatory parochialism, an outcome which is completely at odds with the ethos of Internet commerce generally.

---

<sup>163</sup> This is not to say that such standards are not being considered. Currently, consumer protection guidelines (the Guidelines for Consumer Protection in the Context of Electronic Commerce) are being considered by the Consumer Policy Committee of the OECD (currently, the only governmental trans-national body considering the development of self-regulatory consumer protection guidelines that could provide a framework for global cross-border electronic commerce): see Consumers International, 'Cyber Rules for Consumer Protection Urgently Needed Says International Federation', 1999, Press Release, <<http://www.consumersinternational.org/news/pressreleases/electronic060999.html>>, (accessed September 1999).

<sup>164</sup> A recent landmark Consumers International survey (funded by the European Union) revealed some serious obstacles to achieving consumer-friendly online shopping. In the survey, consumer organisations from 11 countries ordered more than 150 items from web-sites of established traders in 17 different countries and subsequently returned most of them. Inter alia, the study found that: 10% of products ordered never arrived, 44% of items arrived without receipts, 73% of traders failed to give crucial contract terms, over 25% of traders gave no address or telephone number, and 24% of traders were unclear about the total cost of the item that was ordered. More generally, the survey found, inter alia, that the quality of information provided by traders in relation to, for example, delivery charges, order progress, and policies on privacy, returns and redress were often inadequate, and the reliability of service in terms of, for example, delivery or refunds, was often unacceptable. See Consumers International, above n 166; Consumers International, 'Consumers' Shopping—An International Comparative Study of Electronic Commerce', 1999, <<http://www.consumersinternational.org/campaigns/electronic/e-comm.html>>, (September 1999).

