Issue 6, Winter 2000/2001

E-COMMERCE.CO.UK – LOCAL RULES IN A GLOBAL NET

ONLINE BUSINESS TRANSACTIONS AND THE APPLICABILITY OF TRADITIONAL ENGLISH CONTRACT LAW RULES

by

Jens Werner *

A. Introduction

The introduction of the World Wide Web (WWW) has brought along a new range of possibilities for commercial transactions. Companies have realized that potential customers cannot be reached at the business premises only anymore, but also at home via the Internet.

Thus, electronic contracting has become a big issue in the commercial world which raises various legal issues.

B. Two methods of electronic contracting

There are two ways of electronic contracting: the e-mail contracts and the web-click contracts.

E-mail is the digital equivalent of a letter.[1] The (virtual) sender types it out, inserts an address and sends it to the recipient, exactly the same process he would have done with a conventional physical letter. Via different mail servers the message reaches the recipient's inbox, the digital equivalent of his letterbox.

The web-click contract is the second method. It can be explained best as the digital equivalent of a purchase in a supermarket. The operator (supplier) places a webvertisement (advertisement) on his web page (shop), offering products for a special price. The customer then has to tick a box in order to select a product (pick it up from the shelf).[2] In order to submit the order (take the goods to the cash register) the customer has to click a button saying "Buy", "I accept" or something similar.

* London School of Economics (mail@jens-t-werner.de).

1 Murray, p.2

2 The equivalence can be seen by the fact that online shops use to some extent the same words like conventional shops (e.g. YAHOO.com ⇒ cart; BOL.co.uk ⇒ trolley; AMAZON.de ⇒Einkaufswagen)

C. Legal requirements as to form

Although for the majority of contracts the form used does not matter, sometimes the law requires a particular form to make the contract enforceable.

For example, a lease for more than three years (ss.52, 54 (2) Law of Property Act) or a unilateral gratuitous promise can only be enforced if they are made by a deed. Formerly, a deed consisted of a written document which was signed by both parties, sealed and then delivered to the person who wanted to acquire property.[3]

The Law of Property (Miscellaneous Provisions) Act 1989 has abolished some of the old rules, most notably the requirement of a seal. S.1 (2), (3) requires now that the document must bear the word "deed" or an indication that it is intended to be a deed, and that it must be signed in the presence of witnesses and delivered.

However, with regard to online contracts only the requirement of a signature can be seen as somewhat problematic. "Signature" could be extended to "digital signature" which encompasses the scanned digital image of a person's signature as well as the advanced form which requires the use of encryption.[4] Even so, there is no blanket recognition of electronic signatures, as s.8 of the Electronic Communications Act 2000 shows. S.8 (2) (c) provides that secondary legislation may be made that facilitates the use of electronic communication for purposes concerning a person's signature or the requirement of a deed.

Nevertheless, the importance of "electronic deeds" is relatively low because just a few contracts are required to be by deed.

However, some must be in writing. For example, bills of exchange,[5] bills of sale[6] and contracts for the sale or other disposition of an interest in land[7] must be in writing.

Concerning electronic contracting the question arises whether a digital document can fulfil the requirement to be in writing.

The government has stated that "at present, a requirement for a document to be "in writing" cannot be met using electronic means.[8]

The English courts have held that the database of a computer is a document for the purpose of High Court rules, in so far as "it contains information capable of being retrieved and

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3 Collins, p.53

4 Lloyd, p.586

5 Bills of Exchange Act 1882, s.3 (1)

6 Bills of Sale Act 1878 (Amendment) Act 1882

7 Law of Property (Miscellaneous Provisions) Act 1989, s.2

8 Trade & Industry Committee, 7th report (19th May 1999), http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmtrdind/187/18702.htm

converted into readable form and whether stored in the computer or recorded in backup files".[9] Though, this may not satisfy the requirement of being "in writing". "Writing" is defined in the Interpretation Act 1978 as "including typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form.[10]

However, digital documents are not visible. Underlying the representatives of words on the screen, there is a series of digital numbers (of zeros and ones), the Binary Code, as well as compiled software instructions, the Object Code, which cannot be understood and read by the human eye. Furthermore, a series of electrical impulses cannot be declared as sufficient for the required degree of visibility and permanency under the Interpretation Act.[11]

One author argues that this should be more generously interpreted since electronic communication becomes more common.[12] He refers to Vaisey, J's statement in J.H. Tucker & Co Ltd v Board of Trade[13] that the interpretation has to be in the ordinary sense in which the business uses it. In 1995, this would have only meant materialised documents, whereas nowadays digital documents could also be included.

Nevertheless, with the enactment of the Electronic Communications Act 2000, this is not a problem anymore. In this Act, the government has taken a "functional approach" which takes into account the purposes and functions of the traditional paper-based requirements and analyses whether a digital document can fulfil the same requirements.[14]

One could think of different functions of paper-based documents: to provide that a document would remain unaltered over time, to allow for the reproduction of a document so that each party possesses a reliable copy, to keep a record, to provide clarity and certainty between the parties and clarity for public authorities and courts.

In respect of all these functions an electronic document can offer the same level of security as paper-based documents, sometimes even a higher one.[15]

This principle which states equivalence between electronic and conventional documents is further strengthened by the UNCITRAL Model Law on Electronic Commerce. The United Nations (UN) realized that the growth of electronic communication means and its impact on

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9 Vinelott, J. in Derby & Co v Weldon (1991) 1 W.L.R. 653

10 Schedule 1 of the Interpretation Act 1978

11 Murray, p.3; Livermore et al., JILT

12 Faber, p.232f.

13 Tucker (J.H.) Ltd. V Board of Trade (1995) 1 W.L.R. 665

14 UNCITRAL Model Law on e-commerce, http://www.uncitral.org/english/texts/electcom/ml-ec.htm , paras.15-18; Murray et al., p.128

15 UNCITRAL Model Law on e-commerce, http://www.uncitral.org/english/texts/electcom/ml-ec.htm , paras.15-18

international trade transactions could be hindered by different national "legal obstacles to the use of such messages, or by uncertainty as to their legal effect or validity".[16]

Art.5 states that an electronic document should not be discriminated against just because it is in electronic format. This means that there should be no difference between electronic and paper-based documents whatsoever. However, art.5 does not give a blanket equivalence that any given data message should have the same effect as a conventional one; it merely states that the electronic form cannot be the sole reason for a denial of legal effectiveness.

In art.6, the model law then creates specific equality for electronic documents which have to fulfil the requirement of being "in writing". Art.6 does not focus on notions such as "durability" (too harsh criteria) or "intelligibility" (too subjective criteria) but mere on the basic (objective) notion that the information can be reproduced and read.[17] It covers both human use and computer processing so that the problem concerning the Object Code which can only be understood by computers does not arise anymore.

As a result, it can be said that digital documents can fulfil the requirements of being "in writing".

D. Formation of a contract

I. Offers and invitations to treat

To form a contract, English law requires a meeting of the minds of the two contracting parties. This *consensus ad idem* is generally achieved by a clear and unambiguous offer and a corresponding acceptance.

An offer could be defined as a statement of willingness to contract on specific terms, made with the intention that if accepted, these terms should be binding upon the parties.[18]

However, a genuine offer has to be distinguished from an invitation to treat, i.e. the willingness to enter into negotiations, to accept offers. Advertisements in newspapers are generally invitations to treat. In Partridge v Crittendon[19] an advertisement in a periodical "offering birds for sale" was held to be an invitation to treat, because if it were held as an offer, the advertiser might find himself contractually obliged to sell more goods than he in fact owned.

The display of goods for sale in shops constitutes another type of an invitation to treat,[20] because the contrary would deprive the shopkeeper of his freedom to decide whether or not to contract with a particular customer.[21]

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16 UNCITRAL, Guide to Enactment, para.2

17 UNCITRAL, Guide to Enactment, para.50

18 McKendrick, p.32; Collins, p.150

19 Partridge v Crittendon (1968) 1 W.L.R. 1204

20 Pharmaceutical Society of GB v Boots Cash Chemists (1953) 1 QB 401

The question is now whether a webvertisement is an offer or an invitation to treat. Although webvertisements show similarities to both situations mentioned above, they are closer to shop displays and thus constitute invitations to treat.[22] Interactive websites provide the possibility to examine the product, to sample the product (software products) and to buy it immediately in the virtual shop without leaving it. Furthermore, the two reasons mentioned above for assuming an invitation to treat apply for webvertisements as well.

Examples where this distinction between invitations to treat and offers was crucial occurred frequently over the last years. For example, e-tailer Argos offered by mistake a Sony TV for £ 3.00 instead of £ 299.99.[23] People who spotted the bargain placed numerous orders for TVs which would constitute an acceptance (and thus conclude a contract) if the webvertisement of Argos could be regarded as a genuine offer. Like most e-tailers, Argos sends out confirmation mails automatically and immediately after the order has been placed. At least at this stage, a contract is formed because the confirmation would constitute the acceptance.

The reaction of most e-tailers to mistakes like this was to put a clause in their terms and conditions that they reserve the right to withdrawal if they priced items wrongly and the consumer acted in bad faith.[24] Bad faith is difficult to prove, but it can be assumed in cases where the item is significantly underpriced so that every reasonable observer would notice the error. Double discounts (DELL Computers)[25] or half-price products (CDW)[26] are unlikely to be subsumed under bad faith, whereas in cases where the "labelled price" is around one per cent of the market value (Argos,[27] Amazon,[28] WStore[29]) and the customer ordered more than a normal household would need, bad faith is not difficult to prove.

II. Moment of formation

Another issue that arises in contract law is the moment when the contract is actually made. Generally, acceptance becomes effective when it is communicated to the offeror.[30] However, there is an important exception to this rule, i.e. when the acceptance is communicated by

21 McKendrick, p.34

22 Reed, p.176; Murray, p.5

23 L. Sherriff, http://www.theregister.co.uk/content/archive/6632.html

24 See for example: http://www.egghead.com/helpinfo/helpdesk/prodavail.htm , "Cancellations"

25 L. Harrison, http://www.theregister.co.uk/content/6/14540.html

26 L. Harrison, http://www.theregister.co.uk/content/archive/14731.html

27 L. Sherriff, http://www.theregister.co.uk/content/archive/6632.html

28 T. Richardson, http://www.theregister.co.uk/content/archive/10553.html

29 T. Richardson, http://www.theregister.co.uk/content/archive/9153.html

30 Murray, p.6; Lloyd, p.563; Dickie, p.332; Bainbridge, p.267

post. The postal rule states that acceptance becomes effective when sent rather than received (Adams v Lindsell).[31]

It applies only where it is reasonable to expect communication via this medium (Byrne v van Tienhoven[32]). This requirement would by fulfilled by an e-mail or a click-wrap acceptance, merely because of art.11 (1) of the EU directive on electronic commerce[33] which states that the service provider has to acknowledge the receipt by electronic means.

There are numerous explanations for the development of the postal rule.[34] Some argue that the rule applies when there is a trusted third party involved in the communication[35] while others emphasize the non-instantaneous method of communication.[36]

III. E-mails and the postal rule

Applying these explanations to e-mail communication, the result is that the postal rule does not cover contracts via e-mail. On the first hand, the service provider is not a third party, it is more similar to network providers like BT or DEUTSCHE TELEKOM which, for example, cannot be sued if the telephone line goes dead during a telephone conversation. On the other hand, e-mail is almost instantaneous.

Although some argue that e-mails are more similar to the postal system because they are forwarded a number of times in the network before they are forwarded to the recipient[37], it must be acknowledged that in terms of speed of transmission, e-mail generally equates fax, telex and telephone,[38] which are all not covered by the postal rule.[39]

Consequently, the legal rules relating to fax and telex are pertinent. In Entores v Miles Far East Corp.[40], the House of Lords held that a telex send from the Netherlands that accepted a contractual offer became effective at the time it was received by the recipient in England. This

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31 McKendrick, p.47; Dickie, p.332; Adams v Lindsell (1818) 1 B & Ald. 681

32 Byrne v van Tienhoven (1880) 5 CPD 344

33 Directive 2000/31/EC, OJ L 178 p.1, 17 Jul 2000

34 Evans, p.553f.

35 Thesiger, LJ, in: Household Fire Insurance v Grant (1879) 4 Ex.D. 216, 233; in the US: M'Culloch v Eagle Insurance Co. (1882) 18 Mass (1 Pick.) 278

36 Dickie, p.332; Lloyd, p.565

37 Murray, p.8

38 Lloyd, p.565; Dickie, p.332

39 This is also the position of the Vienna Convention on Contracts for the International Sale of Goods, Art.18 (2) and the American Bar Association's Model Agreement on Electronic Data Interchange (s.2.1)

40 Entores Ltd v Miles Far East Corp. (1955) 2 QB 327

decision was later confirmed in Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft.[41]

However, to some extent e-mails differ from telex and fax, as it can be stored on a host computer which is external to the offeror.[42] The question that arises is whether e-mails become effective when they are received by the electronic host computer of the offeror or when they arrive at the offeror's place of business.

Applying the doctrine of agency[43] the host computer could be the agent of the principal (offeror) so that the acceptance would become effective at the moment it arrives at the host computer. However, in Henthorn v Fraser[44] it was held that the communication of acceptance to the agent only becomes effective when the agent has authority to accept it and not only authority to forward it. Obviously, the latter case applies to electronic host computers.

Consequently, e-mails should become effective when they reach the offeror's place of business within office hours. This approach minimises uncertainty because it "obliges" to check e-mails regularly. It was applied by the Crown Court in R v Pontybridd Juvenile Magistrate Court[45] in which it was held that an electronic message became effective when it arrived on a Friday (during business hours) although it was not read until the following Monday.

IV. Click-wrap contracts and the postal rule

The applicability of the postal rule depends, as stated above, on whether there is a trusted third party involved or whether the communication is instantaneous. A trusted third party is not involved in click-wrap acceptances[46], but they are instantaneous. This can be attributed to a technical device, a self-checking mechanism called checksum.[47] This mechanism allows the receiving computer to check if the information sent are complete or if there is something missing. So the server knows immediately if there was a breakdown in communications just like an individual would recognize during a telephone conversation.

So the postal rule does not apply.

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41 Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft (1983) 2 AC 36

42 Dickie, p.333

43 Treitel, p.651f.

44 Henthorn v Fraser (1892) 2 Ch 27 at 33

45 R v Pontybridd Juvenile Magistrate Court (1999), 28th July 1988

46 For argumentation, see above

47 For plain explanation, see Murray, p.9-10

V. Conclusion – postal rule and electronic contracting

Because e-mail and click-wrap acceptances are instantaneous, the postal rule does not apply in any case. Consequently, the general rule that a contract is made when the acceptance is received by the offeror prevails in electronic contracting.

E. Jurisdiction and Choice of law

I. Jurisdiction

In determining the court which has jurisdiction to hear cross-border contractual disputes one has to determine where the contract was made and whether it is a consumer or a non-consumer contract. In Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft the House of Lords stated that the acceptance became effective when it was received in Vienna, not when transmitted from London and that the contract was thus subject to Austrian and not to English law. Nevertheless, Lord Wilberforce stressed that this did not constitute a universal rule because cases like this must be resolved also with regard to the parties' intention, to business practice and to risk allocation.

However, uncertainty in this was minimised by the introduction of the Brussels Convention on Jurisdiction in 1968. In terms of business transactions, the defendant's domicile is the most important factor. Except in cases where the on-line contract contains a contrary jurisdiction, companies can only be sued in the courts of their state (art.2). Art.13 and 14 provide that consumers can only be sued in their domicile but can choose to sue either there or in the seller's domicile.[48]

II. Choice of law

The choice of law is somewhat more complicated than that of jurisdiction. In this field the Rome Convention on the law applicable to contractual obligations of 1980[49] is the main instrument in the European Union. It distinguishes between contracts with and those without an express choice of law clause.

For business transactions, art.1 states that the parties are free to choose the law applicable. This choice can be made expressly or be implied from the circumstances (art.3 (1)) so that many web-site operators include law choices in their terms and conditions.

In consumer contracts the approach is more restrictive. Art.5 (2) expresses that if the contract was preceded by an advertisement (website) the consumer can rely upon their (national) mandatory consumer protection laws. This would mean that e-tailers would find themselves unknowingly bound by foreign law. To circumvent that an e-tailer could ask potential consumers to indicate their country of residence which gives him the possibility to reject unwanted

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48 Dickie, Internet and E-commerce Law, p.84

49 OJ 1980 L266

transactions. This is covered by art.5 (2) though when related to consumers within the EU this would constitute and infringement of competition law.

However, there are also situations where there is no expressed or implied choice of law.

In business transactions, the law of the country with the closest connection to the contract shall be applicable (art.4). Art.4 (2) contains a presumption referring to the habitual residence of the person who "effects the characteristic performance". Consequently, the law of the country where the supplier has his principal place of business will usually be applied in business transactions.

In consumer contracts, however, art.5 (3) states that the applicable law is that of the consumer's place of residence.

F. Conclusion

With the ongoing growth of e-business and online contracting, legal rules concerning electronic contracting have and will get more and more attention. This work tried to examine the most important legal rules, namely formalities in contracts, the point of formation of online contracts, the role of the postal rule, the appropriate jurisdiction and the choice of law and their applicability to the cyberworld.

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