



Research Article

NATURE OF ELECTRONIC COMMUNICATION EFFECTIVENESS OF THE INCORPORATION OF TERMS AND THE VALIDITY OF ELECTRONIC SIGNATURES IN THE LIGHT OF UK AND EU LAW

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ABSTRACT

In the first part, this article analyzes which kind of rules should be applied to electronic communications. It compares advantages and disadvantages of postal and acceptance rules. Then introduces the most appropriate rule for electronic communication. In the second part, the effectiveness incorporation of terms of electronic contracts will be analyzed in the light of UK and EU law. The definition of “durable medium” and UK’s position will be compared with the current legislation of EU. At the end, it discusses the validity of electronic signature in the light of EU and UK law.

KEYWORDS

Electronic commerce, postal rule, acceptance rule, incorporation of terms, “durable medium”, confirmation of acceptance, digital content contracts, electronic signature.

INTRODUCTION

Communication is the key point of development on commerce. For many centuries, people communicated each other through the postal letters and made agreement on written forms, which were clearly visible to parties. Today, commerce is being formed online

with the help of internet. So, the way of the traditional communication has been changed to modern electronic one. Countries have been trying to adopt the rules of online commerce to their legislations. This essay will discuss the characteristics of online



transactions through examining the similarities with traditional commerce and give explanation in the light of EU and UK law. In the first paragraph it compares the benefits and drawbacks between the postal and acceptance rules and tries to identify the most appropriate rule to electronic communications. Then, it gives broad definition to incorporation of terms and shows which kind of requirements have been created to protect the rights of consumers. Finally, it analyzes the validity and effectiveness of electronic signatures by comparing different types of signatures. The main argument in this essay will be effectiveness of the contract through the age of internet.

In electronic communication it is essential to find when the contract is deemed to be formed. There are two rules have been discussed by the scholars as well as judges to identify the effectiveness of the contract. The first one is traditional postal rule, the second one is modern acceptance rule. Both of them have been argued to apply to the electron communications although they have some advantages and disadvantages. These rules have different approaches in determining the effectiveness of contract and identifying the certain legal system to solve the dispute.¹

1. Should postal rule be applied to electronic communications?

The main advantage of the postal rule is giving confidence to offeree because in this rule contract takes effect when the acceptance is posted in the post office. This rule has been applied by English courts over

a period of centuries where the postal mails were in common rather than e-mails. If the acceptance rule applied to the postal communications there would be some uncertainties to acknowledge by the offeree to know whether his acceptance reached and accepted by the offeror. So, it would take long time to make contract via letters and that would not promote business efficacy. To make business more effective, it would be nice to give some certainties to offeree by posting letter via post office, which meant contract was formed.² In the case of *Adams v Lindsell*³ it clearly addressed that the contract takes effect as soon as acceptance is posted by offeree. This rule has been applied to all the postal communications since that case held. The second advantage of postal rule is the protection of the acceptance from revocation by the offeror because as soon as the acceptance is posted, the offeror can no longer revoke the contract.⁴ For instance, in the case of *Byrne v. Van Tien Hoven*,⁵ it was held that a withdrawn offer was inoperative even if it was posted before the offer was accepted by offeree because offeree was not unaware of revocation at the time of posting acceptance. However, there would be no contract, if the revocation is reached to offeree before the acceptance is posted. However, postal rule has some drawbacks which make uncertainty to offeror being unaware that whether the offer accepted or not and there may be some amendments by offeree to the contract which does not reach to the offeror due to the loss of the letter.⁶ For example, in the case of *Household Fire and Carriage Accident Insurance Co. v.*

¹ J. Lloyd, *Information and technology law* (6th edn, Oxford University press, 2011) 456

² F. Wang 'E-confidence: offer and acceptance in online contracting', (2008) *International Review of Law, Computers and Technology*, 22 (3): 271–8.

³ *Adams v Lindsell* [1818] 106 E.R. 250

⁴ N. Andrews, *Contract law* (Cambridge University press, 2011) 52

⁵ *Byrne v. Van Tien Hoven* [1880] 5 C.P.D. 344

⁶ F. Wang, *Law of electronic commercial transactions contemporary issues in the UE, US and China* (2nd edn, 2014) 60



Grant⁷, it is clearly seen that, once acceptance is posted, contract is deemed to be formed, even if it does not reach the offeror. On the other hand, there is one question that if the offeree will send the acceptance to an irrelevant address or the address will not be properly stamped, whether the contract still takes effect and whether the postal rule should be applied in this situation. It is argued that, although the offeror takes much risk to himself to be lost of the letter accidentally, it is not fair to put additional risk of carelessness or negligence of the offeree's fault.⁸ So the postal rule should not apply in this situation.

Having analyzed the advantages and disadvantages of the postal rule, it is clearly understandable that there are some similarities between postal and electronic mails. It is seen, in both of them there is no control to change the acceptor's decision after posting mail because it will be transmitted to the next stage.⁹ Secondly, there may be some delays to reach the address of the offeror. That is why some scholars have argued that, e-mails should be treated as postal mail and the same rule should be applied to them. Although they have some similarities, e-mails are considered instantaneous communication which provides much safety and certainty for the offeree to deliver a letter. Thus, the main point of the postal rule loses its efficiency by giving the confidence to the offeree because of the fast delivery system.

2. Should acceptance rule be applied to electronic communication?

⁷ Household Fire and Carriage Accident Insurance Co v. Grant [1879] 4 Ex D 216

⁸ N. Andrews, Contract law (Cambridge University press, 2011) 52

⁹ F. Wang 'E-confidence: offer and acceptance in online contracting', (2008) International Review of Law, Computers and Technology, 22 (3): 271-8

By comparing with the postal rule, the acceptance rule has a more flexible approach in applying to electronic communications because it provides much confidence to both parties who make an agreement through instantaneous communication. In this rule, the contract is deemed to be formed when the acceptance is received by the offeror. However, there are different arguments in this area regarding the effectiveness of the contract. Firstly, does the contract take effect as soon as acceptance is received by the offeror or should there be some reasonable time? Secondly, should all types of electronic communication be treated at the same level? If not, what are the differences between them? By answering these questions in this essay, we can clearly understand the advantages and disadvantages of the acceptance rule.

2.1. When contract takes effect?

There are different arguments that have been discussed about the effectiveness of the contract when the agreement is made through electronic communications. At the first stage, in the case of *Entores v. Miles Far East Corporation*¹⁰, it was proved that the place of acceptance received is important to determine the effectiveness of the contract through electronic communications. However, there is another problem with the time of the acceptance rule because sometimes acceptance may be sent to the offeror out of the working hours¹¹ or emails may be opened once or twice a day which prevent the acceptor from acknowledging the acceptance. In these situations, it is crucial to find the time of the formation of the contract.

¹⁰ *Entores v. Miles Far East Corporation* [1955] 2 QB 327; [1955] 2 All ER 493

¹¹ *Mondial Shipping and Chartering BV v Astarte Shipping Ltd* [1995] Com LC 1011



That's why, there are many reasonable questions have been discussed to find the real time of effectiveness of contract. Should contract takes effect by the time of receiving the acceptance or there should pass some reasonable time until, the offeror takes acknowledgement of it? Some scholars argued that, acceptance takes effect as soon as it reaches the offeror inbox and available to read regardless of the acceptor's business hours.¹² As authors view, although, email is different from telex or other electronic communications, acceptance takes effect when it reaches to the inbox of offeror in his normal working hours by letting him reasonable time to be aware of it.

2.2. The differences of the acceptance rule between email and web sites.

As a result of the impact on the technology many people are tend to consume products via internet. Thus, online markets are getting popular around the world. Making agreement through websites is a little bit different from other electronic communications. For instance, as mentioned above when the acceptance is received by email, contract takes effect without any notice by offeror while on web agreement this rule does not apply, because offeror should give the acknowledgement of recipient of acceptance by giving of direct response on the website or by a subsequent email.¹³ According to the EC Directive on Electronic Commerce a consumer should put order by pushing "I agree" button, the service provider should provide acknowledgement of the receipt of the recipient's order without undue delay.¹⁴ However, in Directive the meaning of the order is not explained. Does it mean consumer's offer or acceptance? If it is

the offer then acceptance should be requested by seller as confirmation of offer. If it is acceptance, then acknowledgement of recipient should be requested by seller. As authors view, advertisement on the website is invitation to treat for consumers, when consumers tend to buy some certain products, they should collect those products to the basket then it will change to offer. This offer should be accessible to consumer by allowing him to identify and correct input errors prior to the placing of the order.¹⁵ By agreeing the terms and conditions, consumer should click the button by sending the offer to the service provider. At the final stage the acknowledgement of recipient should be sent by seller as a confirmation of acceptance. However, in practice some online suppliers put different rules in the terms and conditions of their contract, which are not suitable to the articles of EC Directive on Electronic Commerce. For instance, in the conditions of Amazon's contract, the confirmation email is divided in two parts. In the first stage, when consumers make an order to buy the products, they will receive the confirmation email, as an acknowledgement of receiving the offer by the company, but it does not confirm the acceptance of the offer. In the next stage, they will send the dispatch confirmation email which confirms the acceptance but it may be send after passing some days. As a result, by making such amendments to the contract the acceptance rule loses its effectiveness and the rights of consumers will become vulnerable.

3. The effectiveness incorporation of terms in the light of UK and EU law.

¹² D. Nolan, 'Offer and Acceptance in the Electronic Age' (Oxford, 2010)

¹³ R. Stone and J. Devenney, The modern law of contract (11th edn, 2015) 71

¹⁴ EC Directive on Electronic Commerce, 2000, Article 11.

¹⁵ UK Electronic Commerce (EC Directive) Regulations 2002, Regulation 11.



Traditionally, terms and conditions should be available to consumers when they sign the contract on paper. However, through the online transactions it is a bit challengeable to make available the conditions before concluding contract because sometimes the link on the website may not be opened or the conditions will be amended by the seller without giving notice to consumer. Therefore, it is important to make some regulations in order to get the conditions accessible and obtainable before, during and after the contract has been made. This would enable the contracting parties to give informed consent to the terms and have terms recorded for later reference.¹⁶ For instance, according to the EU law contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.¹⁷ However, this Directive does not explain the availability of how to provide the terms of contract and the consequences of failure to do this. But it gives some explanations to the Member states to put sanctions in order to enforce the effectiveness of contract. Furthermore, it gives some certainty to parties to identify and correct input errors, prior to placing order.¹⁸ If the service provider fails to do this, it entitles to parties to stop the contract even if they have made the order.¹⁹

3.1. The definition of “Durable medium” and UK Position

Unlike, UE Directive, UK’s Consumer Contract Regulations provides the definition of “durable medium” which means an email or any other

communication that allows information to be addressed personally, enables to the recipient to store the information in the future reference and provides unchanged reproduction of stored information.²⁰ This regulation provides the strict rule for terms of contract which protects consumer from different difficulties to access to the information. If consumer does not know how to access to the terms of contract, which is not made available to consumer, then this contract does not be valid. For instance, making information which only accessible via hyperlink on the website does not constitute “durable medium” and contract should not be valid.²¹ Moreover, this regulation requires to provide some information about the characteristics of goods and notice of the right to cancel contract by providing cancelation form.²² That is why, many online sellers, like Amazon, send two emails to their consumers. The first one is “Order confirmation email” which is the acknowledgment of recipient of order but not acceptance which gives to consumers reasonable time to identify errors and make changes to it. The second one is “Dispatch confirmation email” which provides the cancelation form. However, any term of contract is not provided in the confirmation email, which strictly contrast the rules of the Regulations because according to Regulations seller should provide all the information to the confirmation of contract unless he has already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract.²³

¹⁶ F. Wang, ‘The Incorporation of Terms into Commercial Contracts: A Reassessment in the Digital Age’, (2015) J.B.L. 2, 87-119

¹⁷ EC Directive on Electronic Commerce, 2000, art.10(3)

¹⁸ EC Directive on Electronic Commerce, 2000, art.11(2)

¹⁹ UK Electronic Commerce (EC Directive) Regulations, 2002, reg.15

²⁰ UK Consumer Contract Regulations, 2013, reg.5

²¹ Content Services Ltd v Bundesarbeitskammer [2012] 3 C.M.L.R. 34

²² UK Consumer Contract Regulations, 2013 reg.13 (1)

²³ UK Consumer Contract Regulations, 2013 reg.16 (2)

3.2. Pre-contractual information for digital content contracts.

Commonly, the terms and conditions of digital products will not be available to consumer until setup process starts. In another word the consumer will only get acquainted with terms after money has been paid. However, The Regulations provides that any information which has been given before the conclusion of contract should be treated as the terms of contract and should be enforceable same as any other description of the digital content.²⁴ This regulation puts an end to some concerns about the validation of “shrinkwrap” agreements because it was arguable to enforce this kind of contracts which did not provide the terms before the conclusion of contract. Now it is seen that, pre-contractual information is treated as terms of contract.

3.3. The fairness test.

One of the main concerns of terms is that weather it takes right balance between parties because sometimes there would be a “significant imbalance” to the price or quality of goods. That is why there should be assessed the fairness and reasonableness of contract. UK Consumer Rights Act introduces the fairness test for the unfair term of contract which is contrary to the requirement of good faith, causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.²⁵ However, if the terms are transparent and prominent it should be excluded from the fairness test.²⁶

4. The effectiveness of validity of electronic signature in the light of EU and UK law.

Confidence and trust are one of the most major factors on electronic transactions because lack of trust may reduce the business activities through the online commerce. That is why many amendments have been done to increase the validity of electronic signature in the EU and UK law. The eIDAS Regulation provides broad definition of electronic signature which means data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign²⁷. This definition includes any types of electronic signature either simple typewritten or sophisticated cryptographic one. Furthermore, this Regulation provides three types of electronic signature which are divided in simple, advanced and qualified electronic signatures. One of the important amendments in this Regulation is that electronic signatures can only be used by individuals not corporate entities. Now legal persons can use advanced and qualified signatures which provide unique identification and verification to users and protect from different attacks. Another important amendment is providing for the electronic signatures having equivalent legal effect of a handwritten signature.²⁸

In the UK eIDAS Regulation has been implemented into two laws which provide the validity of electronic signature in any legal proceedings.²⁹ These rules allow using of electronic signature in any form which is

²⁴ UK Consumer Contract Regulations 2013 reg.13 (6)

²⁵ UK Consumer Rights Act 2015 sec.62

²⁶ UK Consumer Rights Act 2015 sec.64 (2)

²⁷ Regulation (EU) On electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, 2014, art.3 (10)

²⁸ Regulation (EU) On electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, 2014, art. 25. (1)

²⁹ The Electronic Identification and Trust Services for Electronic Transactions Regulation 2016 (2016 No.696) and The Electronic Communications Act 2000



incorporated into or logically associated with any electronic communication or electronic data.³⁰

4.1. Examining the validity of electronic signature which is incorporated in the email.

By analyzing the laws of EU and UK there are two main questions will arise which are associated with email. The first question that, is typed a name into an electronic document considered valid electronic signature? The second one is whether, the name in an email address is deemed electronic signature.

Email is one of the main communication ways to make contract electronically. When parties put their names or even their initials on the end or at the beginning of the text, it is deemed that electronic signature has been signed by themselves or their behalves. For instance, in the case of *Golden Ocean Group Limited v. Salgaocar Mining Industries PVT Ltd*³¹ judge held that the name of the beginning of text “Paul/Peter” was meant Peter addressed the message to Paul and his name was considered as electronic signature. However, sometimes parties forget to put their name in the text when they are sending email to second party like the situation of scenario. The major concern is whether, the name of the email address would take effect as electronic signature or not. Usually people put their name in the email address for being distinguished from others. However, it is not always fairly because senders may hide their real identification to mislead the parties. In the case of *J Pereira Fernandes SA v. Mehta*³² judge held that, the email amounted to memorandum for the purposes of the Statute of Frauds Act³³ however, the name of sender’s address

did not constitute as a signature. As author’s view, if the email address is known to acceptor because of previous conversations and shows clearly the identity of the sender, then this electronic document should be dimmed as electronically signed. Regarding the scenario, which not signing a name at the end of the email message makes the electronic document invalid according to the case of *J Pereira Fernandes SA v. Mehta*³⁴ but as author’s view, that acceptance should be considered as signed document because A knew B’s email address in advance and A himself sent offer to B so then B accepted the offer with attaching signed terms and conditions. The name on the email address as a signature logically associated with a particular electronic communication.³⁵

To conclude, acceptance rule should be applied to electronic communications because, it provides much confidence to both parties. Although all types of electronic communications are not the same, they are much more instantaneous comparing with postal mails. Time of receipt plays important role in the effectiveness of the contract through electronic communication. However, this could be different regarding with types of communication. For instance, when parties make agreement through the email, contract is deemed to be formed when the acceptance reaches the offeror’s inbox in some reasonable time while in click-wrap agreement the acknowledgement of acceptance should be given by direct response on the website or by a subsequent email. Regarding with effectiveness of incorporation terms and conditions, the definition of “durable medium” provides broad explanation which allows parties to access information before, during and after contract has been formed. By

³⁰ Electronic Communications Act 2000 sec. 7 (2)

³¹ *Golden Ocean Group Limited v. Salgaocar Mining Industries PVT Ltd* [2011] EWHC 56 (Comm)

³² *J Pereira Fernandes SA v. Mehta* [2006] 1 WLR 1543

³³ Statute of Frauds Act 1677 s.4

³⁴ *J Pereira Fernandes SA v. Mehta* [2006] EWHC 813 (Ch)

³⁵ Electronic Communications Act 2000 sec. 7 (1)

analyzing the requirements, it is understandable that hyperlink does not constitute the way of providing the information because, it can be easily amended by provider and does not allow to party to store the information for the future. Although shrink-wrap agreements do not allow to parties to get acquainted with terms in advance, there is a clear explanation for providing pre-contractual information which is considered part of the contract. If there is a significant imbalance between parties to the terms, in this situation contract is not be considered to be formed. Finally, according to the validity of electronic signature the eIDAS Regulation provides broad definition which allows all kind of data to be attached in electronic document is considered valid electronic signature. However, there are some concerns whether the name of the email address is considered as electronic signature. In spite of the case of J Pereira Fernandes SA v. Mehta, in some circumstance the name of email should be considered as valid signature.

BIBLIOGRAPHY

Table of Cases

Adams v Lindsell [1818] 106 E.R. 250

Household Fire and Carriage Accident Insurance Co v. Grant [1879] 4 Ex D 216

Entores v. Miles Far East Corporation [1955] 2 QB 327; [1955]2 All ER 493

Mondial Shipping and Chartering BV v Astarte Shipping Ltd [1995] C.L.C. 1011 Content Services Ltd v Bundesarbeitskammer [2012] 3 C.M.L.R. 34

Golden Ocean Group Limited v. Salgaocar Mining Industries PVT Ltd [2011] EWHC 56 (Comm)

J Pereira Fernandes SA v. Mehta [2006] 1 WLR 1543

Primary Legislation - Statutes (UK)

Statute of Frauds Act 1677

Electronic Communications Act 2000

The Electronic Identification and Trust Services for Electronic Transactions Regulation 2016 (2016 No.696) and The Electronic Communications Act 2000

UK Consumer Rights Act 2015

Secondary Legislation (UK)

Electronic Commerce (EC Directive) Regulations 2002

Consumer Contract Regulations, 2013

The Electronic Identification and Trust Services for Electronic Transactions Regulation 2016

Table of Legislation (EU)

EC Directive on Electronic Commerce, 2000

Regulation (EU) On electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, 2014

Books

J. Lloyd, Information and technology law (6th edn, Oxford University press, 2011)

N. Andrews, Contract law (Cambridge University press,2011)

F. Wang, Law of electronic commercial transactions contemporary issues in the UE, US and Chine (2nd edn, 2014) 60

D. Nolan, 'Offer and Acceptance in the Electronic Age' (Oxford, 2010)



R. Stone and J. Devenney, The modern law of contract
(11th edn, 2015) 71

Journal Articles

F. Wang 'E-confidence: offer and acceptance in online contracting', (2008) International Review of Law, Computers and Technology, 22 (3): 271–8.

F. Wang, 'The Incorporation of Terms into Commercial Contracts: A Reassessment in the Digital Age', (2015) J.B.L. 2, 87-119

