Comparative Issues in the Formation of Electronic Contracts

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1 Introduction

Ministers consider the emergence of Global Information Networks a highly positive development. This is an issue of crucial importance for Europe’s future and an opportunity for all, businesses small and large, citizens and public administrations.2

Three years after the White House announced an ‘Information Revolution’3 the Internet boom has undoubtedly reached Europe. European ministers have suddenly discovered their interest in the topic and the European Commission has published a ‘European Initiative in Electronic Commerce’4. It is, indeed, hardly possible to escape daily news about the ‘Infobahn’ in the media.

With a computer and modem anyone can access a network, currently used by about 30 million5 worldwide. Creating one’s own Web page is also fairly easy,6 ensuring that information of any kind can be disseminated

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2 From the declaration issued by the Ministerial Conference on Global Information Networks, Bonn 6–8 July 1997 (http://www2.echo.lu/bonn/final.html).
5 D.Venables quoting Forrester Research (http://www.venables.co.uk/legal/usage.htm).
amongst the Internet community. Given the above commercial interests are growing\(^7\) and more and more contracts will be concluded via Internet.

But how will our legal systems deal with the new techniques of data transmission? Can, for instance, computers conclude contracts? When and where has an electronic acceptance reached the offeror? This paper examines how the basic principles of contract formation can be applied in an electronic environment. The focus is not on the Internet alone but includes all situations where contract information is electronically exchanged.

National borders are frequently and easily crossed by electronic communications; and similar problems are likely to occur in all legal systems. Thus, a comparative approach to the topic has been chosen, looking at the situations in Germany and Scotland.

2 The Technology

2.1 Internet

2.1.1 From Cold War to Electronic Shopping

The history of the Internet reaches back to 1969.\(^8\) Reports about the weakness of central information networks had worried the Pentagon since the mid-sixties. The Advanced Research Project Agency (ARPA), a United States Defense Department organization, provided a solution to the problem that turned out to be the starting point of the Internet. The basic idea was to split data into tiny packets which could take different routes to their destination. Such a ‘packet-switched’ network was thought to survive even a nuclear attack.

Originally designed to enable communication between university researchers and military suppliers, ARPAnet connected most major American Universities by the 1980s. From 1988 on, the defence aspect gradually lost importance, and the Internet (meanwhile re-named NSFnet) was connected to foreign countries.

With growing economic interest in the 1990s, a further network was established in the US and NSFnet was transferred to a private company.

Today, the commercialization of the Internet, initially seen as unacceptable,\(^9\) is overshadowing academic and research uses. By the year 2000, the


advertising market is expected to reach $4.8 billion worldwide. The UK currently has around three million users, and electronic shopping is becoming reality.

2.1.2 Transmitting Information

In order to address the problems of contracting via electronic networks it is necessary to be aware of how information is exchanged between computers.

The Internet is a world-wide collection of computer networks which are able to communicate using a standard set of software (so called TCP/IP protocols). Its main infrastructure consists of three elements:

**Routers** Computers that connect the different networks together. They are specially designed to receive and send 'packets' of data.

**Hosts/Servers** Computers that store data like software, text, graphics, etc. All information available in the Internet is held here. Thus, hosts (also called servers) provide 'mailboxes' for electronic mailing as well as storing homepages.

**Pipes** Telecommunications connections which link routers and hosts together.

Routers and hosts are owned by various government and private organizations, pipes typically by telecommunications companies.

Getting connected with the Internet normally requires an *access or service provider*. This may be an academic institution like a university, a governmental body, or a private company, each of which might constitute a small network itself. Access providers often also offer hosts (for instance to receive e-mail).

Thus, the common method of access for a private user is through a telephone connection from a home-pc (using a modem) to a private service provider (e.g. Compuserve). The service provider himself might be connected to a local area network or a metropolitan/regional network. From there, connections exist to a wide area network (the so called 'backbone'), which, in turn, provides world-wide Internet access.

Take an example: the sending of an e-mail from the home-pc to the addressee. The text, represented by ones and zeros, is broken into pieces by a computer program, the Transmission Control Protocol (TCP). According to the e-mail address given by the user these 'packets' of data are 'labeled' by another program, the Internet Protocol (IP). This enables the routers which receive the 'packets' to send each of them on the fastest way to the address where they are restored to text.

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10 D.Venables quoting Forrester Research (http://www.venables.co.uk/legal/usage.htm).
11 Supermarkets begin to offer on-line ordering; see e.g. 'Tesco Direct’s Gift Collection' (https://shop.tesco.co.uk); for an overview of trade activities see: Trade UK website (http://www.tradeuk.com).
12 See for the following Ed Krol: *The Whole Internet*, ch. 3.
13 Such as the University of Edinburgh’s Local Area Network.
Like the postal service, the Internet is a ‘packet switched network’. If there is no connection between two local users, the router chooses an alternative route which may be different for each ‘data packet’. Thus, an e-mail within Edinburgh may be sent via America.

2.2 Electronic Data Interchange (EDI)\textsuperscript{14}
EDI is the ‘transfer of structured data, by agreed message standards, from one computer system to another, by electronic means’.\textsuperscript{15} As the definition indicates there is no difference in the method of transmitting data via EDI or over the Internet. EDI messages can be transferred on-line using a direct link with one or more trading partners. Because this is rather expensive\textsuperscript{16} most EDI users communicate via networks\textsuperscript{17} operated by a Value Added and Data Services (VADS) supplier.

EDI transactions typically are conducted by parties with a continuing business relationship. Prior to the advent of the Internet companies started to use EDI to structure their commercial transactions more efficiently (for example, for ‘just in time’ stocking systems).

2.3 Other Forms of Communication
Videotex\textsuperscript{18} is another interactive communications system which has to be mentioned here. Developed in the 1970s it was first commercially used during the 1980s in the US. Subscribers are connected over telephone line to the mainframe computer of a videotex system operator.\textsuperscript{19} It stores information, provides electronic mailboxes and connections to other subscribers. Videotex users can retrieve texts and graphics for display on their television set or personal computer. Due to the growing significance of global networks, however, Videotex as a distinguishable system is disappearing. Online ordering from mail order catalogues, for example, can now be done on the World Wide Web.

Communication techniques are changing rapidly and new systems are likely to be developed. PC-based internet phones, for instance, are currently tested.\textsuperscript{20}

\textsuperscript{16} National Economic Development Council, EDI or DIE? A guide to introducing EDI between companies; National Economic Development Office 1992, p 1.
\textsuperscript{17} C. Reed, Computer Law; London: Blackstone 1996, p 298.
\textsuperscript{18} For the following see J. Aumente, New Electronic Pathways; Newbury Park: Sage Publications 1987.
\textsuperscript{19} For example British Telecom or the German Deutsche Telekom (here, the system was called ‘Bildschirmtext’ (BTX), now ‘T–Online’).
\textsuperscript{20} See The Scotsman Interactive, 23 July 1997, p 8.
3 Contract Formation

3.1 General Rules

As in most legal systems, the formation of a contract in Germany and Scotland requires the agreement of at least two parties. Thus, a contract is concluded when mutual assent is expressed by means of a prior offer and a subsequent acceptance.21

3.1.1 Germany

3.1.1.1 The Concept of Legal Transaction22

In section 3 of its General Part, the German Civil Code (BGB) deals with ‘legal transactions’ (Rechtsgeschäfte). The term describes one of the basic concepts of German private law. It comprises all those acts and settlements which have legal effect as a result of the actors’ intention. The contract, a significant example of a legal transaction, is concluded because the parties so intend. Its terms depend merely upon their will.23 Thus, legal transactions are the most important expression of private autonomy.

A legal transaction must have at least one ‘declaration of intention’ (Willenserklärung §§ 116–144 BGB) as it can be found, for instance, in a unilateral promise or a testamentary settlement. For the conclusion of a contract at least two declarations of intention (offer and acceptance) are required. A declaration of intention can be made explicitly or may be implied from conduct.24

Legal transactions have to be distinguished from ‘acts in fact’ (Realakte), the finding of a thing, for instance, and unlawful acts, such as delicts. The crucial difference is that these acts entail legal consequences independent from the actor’s intention.

3.1.1.2 Offer

An offer can be defined as the declaration of the offeror’s intention to be bound by a contract with specified contents should the offeree accept.25

23 As long as they do not contravene statutory prohibitions (§ 134 BGB) or good morals (§ 138 BGB) and are therefore rendered void.
24 Palandt before § 116 no 6.
25 Larenz p 448.
Thus, an offer must contain the essential components (*essentialia negotii*) of the envisaged contract. If the terms of the offer are indefinite these components at least must be clearly ascertainable so that the offeree is able to accept by simply saying ‘yes’. Essentialia negotii in a contract for sale, for example, are usually the object sold and its price.

An offer must be distinguished from a mere invitation to treat (*invitatio ad offerendum*), which lacks any intention to be bound. Advertisements in newspapers, shop window displays, etc. typically only provide information and do not constitute offers in the legal sense.27

In order to become effective as an offer, the offeror’s declaration of intent has to be communicated to the addressee. German Law distinguishes between declarations made *inter praesentes* and those made *inter absentes*.

An offer made in the presence of the offeree (*inter praesentes*) which is written or otherwise embodied becomes effective when it is received by the other party. An example is when a letter containing an offer is handed over to the offeree. It suffices that the offer comes into the offeree’s sphere of influence: actual knowledge of it is not required.28 If the offer is spoken (including offers made by telephone: § 147 s I 2 BGB) or implied (and therefore not embodied), it becomes effective only when it is de facto noticed by its addressee.29

For offers *inter absentes* § 130 s I BGB provides that ‘[a] declaration of will which is to be made as against another becomes, if it is made in his absence, effective at the point in time at which it reaches him’. The offer is ‘made’ when the offeror has put it on its way so that he can expect further carriage, for example by handing it in to the post office.30 It ‘reaches’ the addressee where it comes into his sphere of influence, that is the place where, under normal circumstances, he will notice it.31 It is effective from that point of time when the offeree can reasonably be expected to become aware of it.32 Again, actual knowledge of the offer is not necessary.

In both situations communication requires that the offeror’s declaration of will has come into circulation in accordance with the intention of the declarant and the declarant could count upon and has counted upon it reaching the right recipient, even if by indirect means.33 An offer which is communicated against the will of the offeror is not binding and cannot be validly accepted.34
According to § 130 s 1 2 BGB a declaration of will does not become effective if a revocation reaches the offeree first or, at least, at the same time. An effective offer, however, cannot be withdrawn unless the offeror has excluded its binding effect (§ 145 BGB). Has he done so, his declaration will normally not constitute an offer but merely an invitation to negotiate. The offer lapses if it is refused or not accepted in time (§§ 146–149 BGB).

3.1.1.3 Acceptance
An acceptance is the declaration of the offeree’s intention to be bound by the terms stated in the offer without any reservation.

If the offeror has not fixed a period for acceptance (§ 148 BGB), an offer *inter praesentenses* or made by telephone can only be accepted immediately (§ 147 s 1 BGB). Offers *inter absentes* have to be accepted before the point in time at which the offeror might expect the arrival of the answer in usual circumstances (§ 147 s II BGB). According to § 150 BGB, a delayed acceptance or an ‘acceptance’ containing changes or additions counts as a new offer (counter offer).

Normally the acceptance has to be communicated to the offeror to become effective. § 151 BGB states exceptions to this rule, such as where communication is not to be expected according to business customs. The means of communication used for the offer should also be chosen for acceptance. At least the way of acceptance should be just as quick.

The BGB provides no special rules for the way in which an acceptance should be communicated. Thus, the general rules for any declaration of intention apply. For example, an acceptance *inter absentes* is analogous to an offer in that it becomes effective when it reaches the sphere controlled by the offeror. Consequently, the contract is concluded when and where the acceptance is received.

Like an offer, an acceptance can be withdrawn under § 130 s 1 2 BGB by a message that reaches the offeror at least simultaneously.

3.1.2 Scotland
3.1.2.1 Introduction
While it does not employ a highly abstract concept such as the system of
legal transaction, Scots law comes to a similar notion of contract as German law. Thus, the parties’ intention to create a binding legal relationship is emphasized in defining the nature of contract. Voluntary obligations (promise and contract) are differentiated from the obedential obligations of delict and unjust enrichment. While the latter arise by force of law, the former are based on the idea of free will which is closely linked with the principle of freedom of contract.

3.1.2.2 Offer

An offer is a statement of terms which the offeror proposes to the offeree as the basis of an agreement expressing his willingness to be bound if the offeree accepts.

As in Germany, the essential contract terms must be stated in the offer, which can be express or implied. If the declarant’s intention to be bound is lacking, his proposal merely indicates a bargaining position, inviting the person to whom the statement is made to make an offer himself.

In order to have legal effect, an offer must be communicated to the offeree and the offeror must intend it to be so, it is, therefore, not sufficient that the addressee incidently becomes aware of it.

With regard to the question what amounts to communication, Scots law differentiates between instantaneous and non-instantaneous means of communication. To the former category belong inter alia face-to-face or telephone conversations; the latter comprises, for example, letter and telegram.

If the parties are in an instantaneous communication, an offer is appropriately communicated only when the addressee is notified of it. If other means, such as letter or telegram are used, it has to be put on its way towards the addressee (dispatch), where it has to be received.

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48 McBryde no 4–01.
49 Woolman p 18.
50 Black no 620.
51 McBryde 5–28; Woolman p 24.
52 Gloag pp 16f.
53 Burr v Commissioners of Bur'ness (1896) 24 R 148.
54 Black no 629.
whether mere receipt is sufficient. From *Thomson v James* it follows that receipt is sufficient for the revocation of an offer because then ‘...it should in due course have become known to [the offeree]’. This was confirmed for other contractual notices in two cases where the receipt of a telex message was deemed to be sufficient to indicate the ship owners’ will to withdraw their vessels from the charterers. It is clear that an offer cannot become effective upon posting because at that time the offeree could not even know that it had been made. To demand actual knowledge would, on the other hand, leave the offeror in uncertainty about the effectiveness of his offer. Therefore, ‘Scottish courts would and should hold...that communication is effectually made by the delivery of the message...irrespective of whether [the offeree] then becomes aware of its contents’.

In contrast to German law, an offer does not become binding upon receipt; rather it may be withdrawn at any time before acceptance, if not declared to be irrevocable or open for a definite period of time.

3.1.2.3 Acceptance

‘An offer accepted is a contract’. Stair’s classic definition in fact contains all there is to say about acceptance. It simply means that the offeree agrees to what the offeror suggested. Thus, he has to express (explicitly or, through conduct, impliedly) his final unqualified assent to the terms of the offer and his willingness to bind himself to a contract with the offeror.

Where no time-limit for acceptance is stated, the offer is open for a time reasonable in the circumstances, which has to be judged by the ‘standard of the reasonable observer’. A factor to be taken into account is, inter alia, the method of communication. In instant communication, the reasonable offeror will expect a quicker acceptance than otherwise. The shopkeeper’s offer to his customer over the counter, for instance, may require almost immediate acceptance. A late acceptance which the offeror is entitled to reject, is in effect a new offer.

No contract is formed until the acceptance is communicated to the offe-
ror.\textsuperscript{70} If no particular mode of communication is prescribed in the offer, any competent manner can be chosen by the offeree. Normally, acceptance should be communicated in the same way as the offer.\textsuperscript{71}

Communication requires that the acceptance is notified.\textsuperscript{72} Thus, the general rule is that the contract is concluded at the place where and the time when the offeree becomes aware of the offeree’s notification to him.\textsuperscript{73} Acceptance will not normally be implied from silence. Exceptions may result from a custom of trade or previous dealings between the parties.\textsuperscript{74}

The general rule, however, does not apply to \textit{non-instantaneous} means of communication. If acceptance is communicated by letter or telegram the contract is formed when and where the acceptance is posted (‘postal rule’).\textsuperscript{75} Posted in this respect means that a letter, for instance, has been put into the pillar-box\textsuperscript{76} or handed over to an authorized post-office employee: with that, the offeree ‘has done everything he was bound to do’.\textsuperscript{77} As a possible consequence of the postal rule, which differs considerably from the German approach focussing on receipt,\textsuperscript{78} a contract can be concluded even where the acceptance never reaches the offeror.\textsuperscript{80}

If instantaneously communicated, an acceptance cannot be revoked after it has been noticed by the offeror.\textsuperscript{81} From the postal rule it seems to follow that—in the case of non-instantaneous communication—acceptance is irrevocable after it has been posted. It is, however, not entirely clear whether this step is taken by Scottish law.\textsuperscript{82}

3.2 \textbf{Electronic Contracts}

3.2.1 \textit{Means of Forming Electronic Contracts}

On the Internet two main ways of contracting are likely to be used.\textsuperscript{83} Offer and acceptance may be exchanged by e-mail.\textsuperscript{84} After receipt, the messages typically are stored by host computers in ‘mailboxes’ where the addressee can collect them.

\textsuperscript{70} Woolman p 28; Black no 641; Walker no 7.55; McBryde no 5–97.
\textsuperscript{71} Woolman pp 28f; Walker no 7.56.
\textsuperscript{72} Carlill v Carbolic Smoke Ball Co. [1893] 1 QB 256 (262).
\textsuperscript{73} Brinkibon Ltd v Stahag Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34 (41).
\textsuperscript{74} Black no 640.
\textsuperscript{75} Woolman p 29; Black no 644.
\textsuperscript{76} Entores Ld v Miles Far East Corporation [1955] 2 QB 327 (332).
\textsuperscript{77} Walker no 7.65.
\textsuperscript{78} Dunlop v Higgins (1848) 6 Bell’s App 195.
\textsuperscript{79} See above 3.1.1.3, 3.1.1.2.
\textsuperscript{80} Household Fire Insurance Co v Grant (1879) 4 ExD 216; it has, however, been doubted that Scottish courts would accept this consequence: Black no 644.
\textsuperscript{81} Walker no 7.69.
\textsuperscript{82} McBryde no 5–109; Gloag p 38.
\textsuperscript{84} Above 2.2.
More important for commercial use is the ‘world wide web’, a network of computers storing files which contain text, graphics, sounds, and animation.85 A user may retrieve these ‘Web pages’ and send his own messages via e-mail. Often, he can also respond using an electronic form displayed on the screen. Communication will then be online.

When starting to use EDI trading partners will often conclude ‘master agreements’ regulating their relations generally. The transactions will then be carried out by computers programmed to automatically accept orders and control delivery.86 Nevertheless, it has been suggested that contracting via EDI and Internet are to some extent comparable.87

Messages may be exchanged directly (e.g. EDI) or via one or more service providers (e.g. EDI, Internet, Videotex). The parties may be communicating online (e.g. direct EDI, interactive web sites) or using electronic mailboxes with an element of ‘store and forward’88 (e.g. network EDI, e-mail via Internet).

3.2.2 Typical Subject Matters

Generally, computer-based contracting can deal with any subject matter. Its main difference to conventional legal transactions follows from the electronic medium: Electronic contracts can be negotiated, concluded and performed completely within computer systems.

There are likely to be three broad categories of subject matters:89

Sale of physical goods The contract is, for example, concluded via Internet. While payment can simply be made by typing a credit card number in an electronic form, the seller performs in the ‘old fashioned’ way of physical delivery.

Supply of digitised products Data, such as software, text, or multimedia products can be ‘delivered’ on-line from computer to computer.

Supply of services and facilities Electronic banking is already practiced today. Why not have a consultation with one’s solicitor over the Internet instead of spending time and money by physically going there? Videoconferencing could provide an alternative. Of course the exchange of confidential information will require increases in reliability and security of transmission. In the UK, however, about 260 solicitors already have their own homepage.90 Thus, legal advice via Internet appears not completely unrealistic.

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85 Reed p 13.
86 E.S.Perdue, Creating Contracts Online in: T.J.Smedinghoff (Ed.), Online Law, the SPA’s legal guide to doing business on the Internet; Redding, Mass.: Addison-Wesley 1996, p 80.
87 See Smith no 8.1.1 for further information.
88 Reed p 300.
89 Smith no 8.1.3.
90 http://www.venables.co.uk/legal/firms.htm (September 1997).
3.2.3 General Problems

3.2.3.1 Human Intention

Contracts are based on the decisions and actions of individuals. We have seen that in Germany as well as in Scotland a contract will only come into being if the parties intend to create a legal relationship.\(^{91}\) According to German law, this intention must comprise three elements: the will to act at all, the consciousness of making a legally binding declaration, and, finally, the will to engage in this particular transaction.\(^{92}\) Offeror and acceptor must express their willingness to be bound explicitly or it must be implicit in their actions. Furthermore, in both systems offer and acceptance are validly communicated only if the parties so intend.\(^{93}\)

Where computers make choices and respond to messages without human involvement, the viability of this humanistic principle could be threatened.\(^{94}\)

In an electronic environment e-mail may be sent or answered by computers. Interactive websites enable users to transmit information directly by filling in an electronic form. The response will be generated by software. Where EDI is used, contract processes are likely to be fully automated: computers exchange offer and acceptance without any human participation. This raises the question of whether such interactions create valid contracts. Can it be said that they express the parties’ intention?\(^{95}\)

The problem is not entirely new. Courts have dealt with the lack of direct intention in cases where automatic machines were involved in contract formation. In these transactions machines are reacting automatically to the customer’s conduct, such as the insert of a card into the autoteller,\(^{95}\) or the positioning of a car at the entrance of a car park.\(^{96}\) The machines cannot express intention and there is no real communication between offeror and acceptor. As Lord Denning put it in *Thornton v Shoe Lane Parking*: ‘he [the customer] may protest to the machine, even swear at it. But it will remain unmoved’.\(^{97}\) Nevertheless, the courts had little difficulty in translating these situations into offer and acceptance. The physical involvement of a machine had no legal consequences because it was held to be only the result of prior human intention. Thus, automated declarations of offer and acceptance are valid.\(^{98}\)

\(^{91}\) D. Medicus, Bürgerliches Recht; Munich: C. Heymanns Verlag 1996, no 122; Black no 656; Woolman pp 37ff.
\(^{92}\) Palandt before § 116 no 1.
\(^{93}\) BGH NJW 1979, 2032; Gloag pp 16f.
\(^{95}\) BGH NJW 1988, 981.
\(^{96}\) *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163.
\(^{97}\) [1971] 2 QB 163(169).
\(^{98}\) Palandt before § 116 no 1.
Some argue that this reasoning is not applicable to electronic communications: prior intentions are not relevant because the principal has no influence on the single transaction directed by a complex program.\textsuperscript{99} This is not convincing. Even the most sophisticated software does not make autonomous decisions, but operates according to previous programming. The responsibility, therefore, remains with the principal, who decides to use such a software with the intention of being bound by its 'declarations'.\textsuperscript{100} The single transaction has to be seen in the context of the established communications system and its purpose.\textsuperscript{101}

The purpose of an EDI link, for instance, will be inter alia the formation of contracts. The parties clearly intend to be bound by the 'declarations' exchanged between their computer systems. Interactive web pages which are designed for commercial reasons are put on the World Wide Web in order to create binding agreements. Similarly, messages produced by a supplier's computer and communicated via videotex have to be seen as his declarations of intention.\textsuperscript{102} Therefore, as in the cases of automatic machines, it is of no legal consequence that a computer program completes a contract.\textsuperscript{103}

### 3.2.3.2 Classification of Data Transmission

Both systems examined here apply different rules for contract formation where the parties are face to face or in a likewise straight contact on the one hand and where they use more indirect means of communication on the other. Thus, it has to be determined in which category electronic contracting belongs.

#### 3.2.3.2.1 Germany

Declarations exchanged in contracting are placed in two categories: one contains those made in each other’s presence, the other those where the parties are in different places.\textsuperscript{104} Obviously, electronic communication will normally be \textit{inter absentes}. This, however, is also true for telephone conversations which are nevertheless treated as analogous to conversations face-to-face.\textsuperscript{105} Thus, it has to be determined whether offers and acceptances transmitted electronically are embodied or not.\textsuperscript{106}
A message is, for instance, ‘embodied’ by writing on paper\textsuperscript{107} or by recording on tape.\textsuperscript{108} Any form of material storing is sufficient.\textsuperscript{109} Consequently, declarations of intention by telex\textsuperscript{110} and fax are categorized along with letter and telegram as embodied messages \textit{inter absentes}.\textsuperscript{111}

Electronic messages are stored as files on computers, transmitted in data ‘packets’ and stored again on the addressee’s computer.\textsuperscript{112} Independent from the way of transmission (over a direct link between the parties or via networks), electronic declarations of intention are, therefore, likely to be regarded as embodied declarations \textit{inter absentes}.\textsuperscript{113} This view is confirmed by a court of appeal decision in which the rules for declarations \textit{inter absentes} were applied to a message sent by videotex.\textsuperscript{114}

3.2.3.2.2 \textit{Scotland}

As outlined above,\textsuperscript{115} Scots law distinguishes between \textit{instantaneous} communication such as face-to-face or telephone conversation and \textit{non-instantaneous} communication by letter,\textsuperscript{116} telegram,\textsuperscript{117} etc.

It is characteristic of the former that the participants communicate directly, without involving third parties or using special facilities. Where such facilities are employed, however, they have no recognizable impact on the communication. Thus, using a telephone very much resembles a face-to-face conversation although the interlocutors are not present at the same place. In an instantaneous communication, the contracting parties normally know when and where their messages are received. They can react immediately and are able to recognize any faults or misunderstandings.

If these criteria are applied to electronic data transmission, only communication via a direct link (e.g. EDI) is truly instantaneous. Where the parties communicate online there is no time lapse in the delivery of messages. Transmission errors will be recognized by the software installed on the communicating computers. The telecommunication pipe linking up the two systems fulfills the same function as a normal telephone line; third parties are not recognizably involved.

The situation changes when messages are not sent directly to the recipient but over a \textit{network} involving one or more service providers. No matter

\begin{enumerate}
\item[\textsuperscript{107}] Münchener Kommentar § 130 no 19.
\item[\textsuperscript{108}] Medicus no 48.
\item[\textsuperscript{109}] Köhler 182 AcP 126(140).
\item[\textsuperscript{110}] Schlesinger p 701.
\item[\textsuperscript{111}] Palandt § 130 no 6f.
\item[\textsuperscript{112}] See 2.1.2.
\item[\textsuperscript{113}] Fritsche/ Malzer DNotZ 1995, 2(12); S.Ernst, Der Mausklick als Rechtsproblem – Willenserklärungen im Internet, NJW-CoR 3/97, 165(166).
\item[\textsuperscript{114}] OLG (Courtof Appeal) Köl NJW 1990, 1608.
\item[\textsuperscript{115}] 3.1.2.2; 3.1.2.3.
\item[\textsuperscript{116}] Adams v Lindell (1818) 1 B&Ald 681; Dunlop v Higgins (1848) 6 Bell’s App 195; Thomson v James (1855) 18 D 1.
\item[\textsuperscript{117}] Caussa v O’Connor [1888] 20 QB 640.
\end{enumerate}
whether an EDI network, the Internet or any other network is used there is likely to be some time gap between dispatch and receipt of messages, an element of ‘store and forward’. Furthermore, the users have to rely on at least one third party (the service provider) whose computer system delivers the data to the addressee’s computer. Often, it will not be immediately known when a message is received, whether it has been transmitted correctly, or whether it has reached the other party at all. All this might change with the establishment of voice telephony and video-conferencing over Internet. At present, however, the common means of transmission via networks cannot be regarded as instantaneous.

3.2.4 Offer

3.2.4.1 Offer or Invitation to Treat?

3.2.4.1.1 Established Cases

In Germany as well as in Scotland a distinction is made between actual offers and statements merely inviting others to make an offer (so-called invitations to treat, negotiate, or deal). Cases in both systems have focused on three main situations; the outcome was very similar in both.

Thus, advertisements – for example, of goods for sale –, no matter in which way they are published or circulated, will not normally constitute offers. In the same category fall other kinds of announcements, the publication of price lists, etc.

The display of goods in shop windows and on self-service shelves is also likely to be seen as a mere invitation to treat. There is, however, some confusion as regards the Scottish position on this point. A very old case is said to confirm the view that shop window displays would not be treated as offers. This conclusion is somewhat surprising because the case actually held that the publication of a table of freights contained an offer to the public which could be accepted by everyone willing to pay the rates...

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118 Reed p 500.
120 3.1.1.1.2.
121 3.1.1.2.
123 Woolman p 21.
124 Palandt § 145 no 2; Black no 624.
125 RGZ 133, 391 (announcement of a theatre performance); Rohe v Dawson (1895) 1 Ch 488 (announcement of a scholarship examination).
127 Palandt § 145 no 2; Black no 621f.
128 Camphol v Ker 24 Feb 1810 FC.
129 Glegg p 210; Black no 621; Woolman p 19.
requested. Given the facts of this case, the conclusion, that ‘it was stated in argument as too clear for doubt that a shopkeeper, by affixing prices to his goods, only intimated his intention to sell them...and did not make any offer...’ seems clearly wrong.

The crucial argument in *Campbell v Ker* was that the gabbartmen (owners of cargo boats operated on the River Clyde) who had published the table of freights in question were bound to contract according to regulations issued by the Magistrates of Glasgow. Since bigger vessels were too large to come up the Clyde, trade depended on the services of the gabbartmen. By refusing to accept freights they could ‘...at their pleasure, stop the trade and cut off the subsistence of the city of Glasgow...’. In the face of its outcome the case could be used to advance the argument that price lists or displayed goods normally *do* constitute offers, but – considering the special circumstances of the decision – this argument holds no force. It is, therefore, submitted that Scottish courts would adopt the English approach; indeed, a shop is a place for bargaining, not for compulsory sales.

The situation with regard to automatic machines is different. The setting up of a vending machine, for instance, has been regarded as making a standing offer. This was confirmed in England in a decision concerned with a ticket machine at the entrance to a car park. A German case dealing with a cash machine came to the same conclusion.

### 3.2.4.1.2 The Electronic Environment

No special problems will arise when the parties communicate individually, say by e-mail or EDI. According to the general rules, it will have to be ascertained whether a proposal contains the essential contract terms and whether the party intends to be bound by the other party’s response.

The situation regarding websites or other online services displaying commercial information for several – maybe an indefinite number – of users or just the general public is rather different. Some suggest that these cases should simply be treated as advertisements; but it has also been argued that web site displays have to be considered as offers unless they otherwise stipulate.

If somebody puts information on the World Wide Web or another network encouraging the formation of contracts, the crucial question will be...
whether he intended to be bound by any responses or whether he himself wanted to decide whether to enter a contract. In answering this question, the courts are likely to employ the categories described above. It has, however, to be remembered that this is not a conclusive classification. The nature of a proposal must be ascertained with due regard to the circumstances of the transaction and its purpose. Thus, for instance, a general advertisement, normally regarded as a mere invitation to treat, may indicate an advertiser’s intention to be bound and, therefore, constitute an offer.

It is submitted that in an electronic environment interactive applications (e.g., interactive web pages or videotex) have to be distinguished from non-interactive applications. For example, if a web page only provides information, and any contact between the supplier and its client lies outside the electronic medium, there is little difference to a conventional advertisement. Subject to a contrary intention indicated by its owner, such a display will be an invitation to treat.

Interactive applications which may enable negotiation, conclusion and – in the case of data supply – even performance of a contract completely within computer systems go far beyond a mere advertisement. An analogy could be drawn to shop window displays. Like a web page, the information provided here can be detailed, and presented in various ways. The potential customer is able to react immediately by entering the shop (as he does by filling in an electronic form or ordering via e-mail).

A main argument against considering displays in shop windows and on self-service shelves as offers is that the seller cannot be held bound to an unforeseeable number of acceptances. If his stock is limited he might not be able to fulfill his obligations and find himself in breach of contract. This reasoning has been criticized as inconclusive: it would be more realistic to assume an offer with an implied term ‘open for acceptance while stocks last’. There are, however, no indications that the courts would alter their line of argument specifically to take account of electronic contract situations. Moreover, it may be doubted that operating with another implied term will make things easier.

And yet, if the envisaged contract deals with the supply of data, the limited stock argument might fail. Software, information and other data which can be digitally transmitted is available in an unlimited number of copies. Copyright law, however, could restrict reproduction and so, again, a supplier cannot be held bound to a unforeseeable number of acceptances.
Further, it can be argued that a website owner – like a shop keeper – should be allowed to choose with whom he enters a contract. This point becomes even more important for network contracting. When a page can be retrieved worldwide, offeror and acceptor will often be resident in different legal systems. A supplier of goods or services may, therefore, wish to avoid contacts with certain foreign jurisdictions. Another reason for restricting his contract activities may occur where a supplier wants to create geographical price differentials.

In the absence of additional circumstances indicating a different party will, it appears likely that website displays will be treated along with the common display of goods cases: it is the customer who makes the offer which can then be accepted by the website owner.

Often, however, an interactive application will be operated entirely by a computer. The client types an order together with his credit card number in an electronic form and the requested software, for example, is transmitted to him automatically. It has been submitted that such a ‘download’ is analogous to using a vending machine. Consequently, web pages designed like this should be treated as containing standing offers. And yet, it may be doubted that the courts would come to this conclusion. Most cases involving automatic machines seem to have dealt with relatively simple transactions (like the issue of tickets, for example) requiring only basic forms of ‘communication’ between client and machine. Depending on the software used, the interaction with an interactive website is likely to be much more complex. Furthermore, the arguments as regards licenses and international contacts still apply.

It seems that a general rule covering all possible variations of this situation cannot be established. While cases which do indeed resemble the use of vending machines are conceivable, other cases may come closer to a ‘normal’ contract situation. In the absence of special legislation for electronic contracts, these problems can only be solved case by case.

### 3.2.4.2 Communication of Offer

#### 3.2.4.2.1 Germany

As a result of the above considerations, an electronic offer will be effectively communicated when it reaches the offeree’s sphere of influence. It
will be sufficient that he reasonably can be expected to have noticed it: actual knowledge is not required.  

This raises hardly any problems where the parties are in online communication, using, for instance, a direct EDI connection or communicating via an interactive web page: the offer will be received directly on the offeree’s computer.

The situation is different when data are transmitted via networks involving service providers (EDI, e-mail, videotex). Will the offer here be effectively received as soon as it reaches the addressee’s mailbox (stored by the service provider) or is receipt on the addressee’s own computer required? Access to the content of an electronic mailbox is restricted to its user. He can normally retrieve his mail whenever and however often he wishes. The mailbox, therefore, clearly belongs to his sphere of influence. It may be compared to a PO box: a letter has ‘reached’ its user as soon as it is put in. Similarly, an electronic message has reached the addressee when it is stored in his electronic mailbox. In answering the question of when the offeree can be expected to retrieve such a message, private persons have to be considered separately from companies. If an offer is sent to a company during business hours, receipt can reasonably be expected the same day. A private person, on the other hand, cannot be expected to check his e-mail more often than once a day. In this case, an offer will not be effective before the day after receipt.

3.2.4.2.2 Scotland

In an instantaneous communication, the addressee has to notice an offer, while, in a non-instantaneous communication, mere receipt is sufficient.

Thus, where a message is instantaneously communicated by direct online transmission, an offer becomes effective when and where it is read by the offeree. In case of EDI, however, receipt by the offeree’s computer, which is programmed to respond automatically on the principal’s behalf, will be sufficient.

In a (non-instantaneous) network communication, mailboxes are likely to be used. Along with the argumentation outlined above for German law, it is submitted that the message is received when and where it reaches the electronic mailbox provided for the communication.
3.2.5  Acceptance

3.2.5.1  Use of Electronic Means

When can it be reasonably expected that an acceptance will be transmitted by electronic means? Normally, offer and acceptance will have to be exchanged in the same way; at least, an acceptance should not be sent using a slower means of communication than the one used by the offeror. No problems will occur where the parties communicate online or are permanently connected to their service provider. Often, however, e-mail users will check their mailbox stored on the service provider’s computer only from time to time. Thus, there may well be a period of days before a message is actually read. It is submitted that this will not affect the general rule. If someone sets up an electronic mailbox and uses it for contract negotiations or includes an e-mail address in his letterhead he has to expect that it will be used for the communication of answers. If he collects his electronic mail infrequently he will have to inform recipients of correspondence not to reply by e-mail.

3.2.5.2  Communication of Acceptance

A contract is normally concluded when and where acceptance has been communicated. The time and place of contract formation can be essential in questions of whether an agreement is binding and in order to decide the moment of the transfer of ownership and of risk, and for conflict of law issues.

3.2.5.2.1  Germany

Communication of offer and acceptance follow the same rules. Therefore, the results of the discussion above apply here as well. This means, for instance, that an e-mail acceptance will be effectively received by the service provider’s computer which stores the offeror’s mailbox.

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163 See 3.1.1.3; 3.1.2.3.
164 Ernst NJW-CoR 3/97, 165(166).
165 Gringras p 24.
166 See 3.1.1.3; 3.1.2.3.
167 See 3.1.1.2; 3.1.1.3 and 3.1.2.2; 3.1.2.3 for the question under which circumstances offer or acceptance may be withdrawn in German and Scots law.
170 See 3.1.1.5.
171 See 3.2.4.2.1.
3.2.5.2.2 Scotland

According to the general rule, a contract is formed when and where the offeror becomes aware of the offeree’s acceptance. An exception applies to cases of non-instantaneous communication: here, the contract is concluded upon dispatch of the acceptance (‘postal rule’). The postal rule, however, does not apply to telex messages. Although they are ‘not in fact received instantaneously by the responsible principal’ it was held that an acceptance by telex ‘should be treated as if it were an instantaneous communication between principals, like a telephone conversation’.

It appears that three main conditions had to be fulfilled to justify this outcome. The first was that dispatch and receipt of telex messages were seen as nearly simultaneous. Although they could not communicate completely instantaneously, the parties were treated as ‘to all intents and purposes in each other’s presence just as if they were in telephonic communication’. Secondly, it was considered that the contracting parties had not to rely on a third party. In contrast to a letter or telegram entrusted to the post office (or the telegram service today), a telex reaches the addressee directly. It is, therefore, ‘his responsibility to arrange for prompt handling of messages within his own office’. Finally, the risk of faulty transmission was balanced between the parties. A party who tries to send a telex message can usually tell if the message has not been received by the other party. It seemed, therefore, convenient to impose the responsibility of ensuring that acceptance has reached the offeror on the offeree. Thus, ‘the contract is complete when the Telex instrument...receives the notification of the acceptance...and the acceptance is then notified to the offeror...’

It has, however, been emphasized that this reasoning may have to be modified in the face of technical development and that there is no universal rule to cover all such cases. Neither the general rule nor the postal rule can be applied mechanically where this would lead to ‘manifest inconvenience or absurdity’.

Regarding the above criteria: how are electronic acceptances to be dealt
Some reject the application of the postal rule and suggest that electronic acceptances should be treated in the same way as telex messages. This approach is too simplistic. The ways of electronic communication differ considerably; thus, several contract situations have to be distinguished.

As pointed out above, an online communication where the parties are connected over a direct link is an instantaneous means of communication. Here, the general rule will apply: the contract is concluded when and where the offeror becomes aware of the acceptance. In an EDI transmission – the most likely case of a direct link –, this will be upon receipt of the message by the offeror’s computer. Even where a message is sent via a network the parties can be said to communicate directly as long as no third party is involved and the dispatch and receipt of the data is nearly simultaneous. Such a virtually instantaneous communication should, therefore, be dealt with under the general rule as well.

If data is transmitted over one or more networks involving one or more service providers the situation is different. Compared to face-to-face or telephone conversations, this is a non-instantaneous exchange of information. However, means of network transmission that are virtually instantaneous might have to be placed in the same category as telex and thus the general rule would be applicable.

Following this reasoning, it has been argued that in the case of electronic mail the general rule should prevail.

If we adopt the test that has been developed by the courts in the telex cases, this would first require near simultaneous dispatch and receipt of e-mail. In many cases e-mail will, indeed, be delivered very quickly. The transmission speed cannot, however, be compared to telephone or even fax. Sending problems arise even without computer hacking leading to an 'Internet crash'. A simple 'tailback' on the information highway may entail delay, or even prevent transmission. Thus, there is no certainty when or if an e-mail will arrive.

Secondly, an e-mail message has to be entrusted to service and network providers whose computers receive and send the data. Typically, e-mail is stored in mailboxes on the service provider’s computer from where it is retrieved by the addressee. This resembles letters sent by international post.
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to PO boxes where they have to be picked up. Others have suggested that
the clearest analogy to using an electronic system is with acceptance by tele-
gram.193 Be this as it may, there is in no case a direct connection between
acceptor and offeror comparable to telephone, telex or fax. The parties
actually have to rely on a recognizable third party.

Finally, it has to be asked whether the sender should rather bear the risk
of transmission than the recipient. Some software enables the user to
request confirmation of delivery or even confirmation of reading to be
automatically returned after sending an e-mail message. However, this
works only if the software of the addressee is able to answer such a request.194
Even if such a receipt is returned, this confirms only that a message has been
received by the addressee’s service provider (confirmation of delivery) or
that it has been retrieved by the addressee (confirmation of ‘reading’).195
Furthermore, it may take a long time before the sender gets the confir-
mation and he cannot be sure whether his acceptance arrived complete or
got garbled on the way.

These considerations clearly show that communication via e-mail cannot
be regarded as virtually instantaneous. Therefore, the postal rule will usu-
ally apply here and the contract is concluded when and where acceptance
was posted.

But what amounts to ‘posting’ in an electronic environment? Is it suffi-
cient that the sender presses the enter button on his computer so that the
contract is made in that moment and at the place where he is?200 Or does
‘posting’ mean that the message has been received by the service provider’s
computer system from where it is delivered to the addressee? We have seen
that the offeree has done everything he was bound to do when the letter is
in the post box198 or has been handed to the post-office199 from where it is
delivered to the offeror.200 Similarly, the acceptance is complete when
received by the telegram service which will communicate it to the other
party of the contract.201 The rationale appears to be that the offeree has to
enable the post office/telegram service to get hold of the message. Only
then can he reasonably rely on the delivery of his acceptance.

Applied to network communication, this means that the data containing
the acceptance has to be received by the node of the network from where it
is sent to the offeror.202 If, for instance, the message is sent from a home-pc

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193 Reed no. 10.3.1.3 p 305 with regard to EDI.
194 See Pegasus Mail Windows information under ‘help’.
195 Which also raises serious problems with regard to privacy!
196 Gringras p 18.
197 So Gringras p 42.
199 Thomson v James (1855) 18 D 1 (11).
200 Dunlop v Higgins (1848) 6 Bell’s App 195.
201 Cowan v O’Connor [1888] 20 QB 640(642); Re-London & Northern Bank [1900] 1 Ch 200.
202 Reed p 305; Hance p 155.

56
the time of acceptance will be the time when it reaches the computer of the service provider. Accordingly, the place of acceptance will be the place where this computer is situated.

It is submitted that the postal rule will also apply to EDI communications carried out using one or more service providers. Here, the situation will not be significantly different from e-mail use as outlined above. No direct link will be established between the parties and their communication cannot be seen as virtually instantaneous.203

Finally, acceptances over interactive web sites have to be examined. Unlike e-mail, the parties are here in an online communication. Depending on the way in which the messages are transmitted and the time of day, there is likely to be some time lapse between dispatch and receipt. The software controlling the web site, however, will recognize when no or faulty data has been received and sent an appropriate message back.204 The user waiting for confirmation or some reaction to his message will also realize when the connection fails. Thus, this form of communication is close to direct EDI and it seems reasonable to apply the general rule:205 the contract is complete when the offeror is notified of the acceptance.

3.3 UNICITRAL Model Law on Electronic Commerce

3.3.1 Background

In 1992 the United Nations Commission on International Trade Law entrusted the preparation of legal rules on electronic commerce to one of its working groups.206 The decision was a response to the increasing significance of international trade carried out by electronic means.207 It was felt that many national laws could not be applied satisfactorily to modern communication techniques and hindered commercial developments.208

The aim of the UNICITRAL Model Law on Electronic Commerce which was adopted on 12 June 1996 is to provide a tool for states to enhance their legislation as regards paperless communication and storage of information.209 It is also intended to help in interpreting existing international conventions and other instruments as far as they impede electronic commerce.210
3.3.2  **Structure of the Model Law**

Part one of the Model Law deals with electronic commerce in general. In chapter I it contains general provisions, such as the sphere of application (art. 1) and definitions of terms (art. 2). Chapter II considers the application of legal requirements (e.g. writing (art. 6) and signature (art. 7)) to data messages. The third chapter of this part provides rules on the communication of data messages. It addresses, for instance, questions of formation and validity of contracts (art. 11) and the dispatch and receipt of data messages (art. 15).

Under the heading ‘Electronic commerce in specific areas’, the second part of the Model Law contains provisions for the carriage of goods. It has an open-ended structure in order to allow additions in the future.

3.3.3  **Sphere of Application**

According to article 1 the Model Law applies ‘to any kind of information in the form of data message used in the context of commercial activities’. The term ‘data message’ explicitly comprises information sent by EDI and electronic mail (art. 2(a)). Although the focus is on paperless means of communication the law is intended to provide ‘truly ‘media-neutral’ rules’ covering all situations where information is generated, stored or communicated.

The term ‘commercial activities’ indicates that the regulations have been prepared against the background of trade relationships without special attention to consumer protection. This does not, however, exclude application in situations involving consumers.

The Model Law applies to both national and international use of data messages.

3.3.4  **Human Intention**

Article 11 (1) states that ‘...offer and acceptance may be expressed by means of data messages’. Read together with article 2(a), this is meant to make clear that offer and acceptance are deemed to express the parties’ intent even where they are exchanged without direct human intervention. The problem is also approached in article 2(c), which covers data messages within fully automated contract processes. Such messages should be regarded as originating from the legal entity on behalf of which the computer is operated.
Article 13 (2) (b) deals with the parties’ intention to communicate. It provides that, as between the originator and the addressee, a data message is deemed to be that of the originator if it was sent ‘by an information system programmed by, or on behalf of, the originator to operate automatically’.

3.3.5  Dispatch and Receipt of Messages
In using electronic communication systems it is often unclear how data is transmitted and where the systems are located through which communication is operated. Time and place of dispatch and receipt of messages may therefore be difficult to ascertain. Thus, the basic idea underlying article 15 is that the actual location of the information systems where messages are dispatched and received is irrelevant. It has, however, to be noted that article 15 is not meant to establish a conflict-of-laws rule.

3.3.5.1  Time of Dispatch
Article 15 (1) provides that dispatch occurs when a data message ‘enters an information system outside the control of the originator’. ‘Information system’ has to be interpreted broadly (art. 2(f)) as referring to any technical means and would, therefore, include the communication link between the sender and, for instance, his service provider. ‘Dispatch’ means the commencement of the electronic transmission. Thus, it is suggested that under the Model Law, offer and acceptance are dispatched when the enter button on the sender’s computer is pressed.

Indeed, article 15 (1) is meant to fulfil the function of a ‘mailbox rule’ by providing certainty as to the time of dispatch of a data message. It is, however, not meant to displace national rules.

3.3.5.2  Time of Receipt
Article 15 (2) distinguishes three situations. If the addressee has designated a certain information system, a message is received when it enters this system; if it is, nevertheless, sent to a different system, it is received when retrieved by the addressee. If no such system has been designated, receipt occurs when the message enters any information system of the addressee.

An information system has to be specifically ‘designated’. The mere...

217 Guide no 40.
218 Guide no 101.
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indication of, for example, an e-mail address on a letterhead should not be regarded as an express designation as required for article 15 (2).224

If no system has been designated what constitutes an information system ‘of’ the addressee? Does this include a mailbox stored on the service provider’s computer? An electronic mailbox is certainly an information system in the meaning of article 2(f). Considering that location is not an operative criterion of the Model Law, it is submitted that an e-mailbox can, indeed, be an information system ‘of’ the addressee.

A data message ‘enters’ an information system ‘at the time when it becomes available for processing within that information system’.225 Again, the Model Law does not intend to overrule national regulations, such as the provision that receipt occurs upon the mere reaching of the addressee’s sphere of influence.226

3.3.5.3 Place of Dispatch/Receipt

If not otherwise agreed by the parties, a data message is deemed to be dispatched and received at the parties’ place of business (art. 15 (4)). In the absence of a place of business, reference is to be made to the parties’ habitual residence (art. 15 (4)(b)). Thus, paragraph (4) introduces a distinction between the deemed place of receipt and the place actually reached by a data message at the time of its receipt under paragraph (2). This distinction is meant to be limited to computerized transmissions, excluding, for example, telex or telefax.227

Again, the rationale behind these provisions is to ensure that the location of an information system does not become a crucial element where, for instance, the service provider’s computer is located in a different jurisdiction from the addressee himself. Instead, an attempt has been made to create some reasonable connection between the place of dispatch or receipt and the parties.228

4 Issues in International Private Law

4.1 Introduction

It is quite possible that a network service provider will be situated in a different country to his client.229 Thus, if the latter concludes a contract electronically, his acceptance is sent via a legal system different from his own.

224 Guide no 102.
225 Guide no 103.
226 Guide no 103.
227 Guide no 107.
228 Guide no 105.
229 Reed p 305 (referring to EDI); Gringras p 42.
The place of contracting may then be crucial in determining which law governs the contract.\textsuperscript{230} An example will illustrate this.

A Scottish company accepts an offer from a U.S. company situated in State X. Both use a service provider for Internet access. The Scottish company has a German service provider; the U.S. company’s service provider has its place of business in State Y.

If in this situation the postal rule applies, the contract would be formed in Germany, where the message will be received for transmission to the U.S.\textsuperscript{231} Depending on the further circumstances of the case, the contract might therefore be subject to German law.

This consequence is avoided by the UNCITRAL Model Law on Electronic Commerce. Under article 15 (4) the place of dispatch would be deemed to be the Scottish company’s place of business.\textsuperscript{232} Thus, pressing the ‘enter’ button in Scotland would be enough to conclude the contract there.

If, however, the general rule applies, acceptance would not be communicated until the offeror takes notice of it. This would occur at his place of business; therefore, the law of U.S. State X could be applicable.

But even if only the contracting parties themselves are domiciled in different states, electronic agreements may raise special problems in international private law.

Within the scope of this paper it is not possible to cover the whole range of IPL issues in a comparative approach. Therefore, the following discussion focuses on some selected aspects of international conventions which are applicable under both German and Scottish law. National conflict-of-law rules are left out of consideration here.

4.2 Jurisdiction

If a case with a foreign element leads to litigation the first question is whether the courts have jurisdiction to hear the matter. The Civil Jurisdiction and Judgments Act 1982 gives effect in UK law to the Brussels Convention (1968). The Lugano Convention (1988) is in force since May 1, 1992. Both conventions also apply in Germany.
4.2.1 Brussels Convention (1968)

4.2.1.1 Introduction
The Convention applies in civil and commercial matters that are brought before a court of the contracting states (the 12 ‘old’ EU members).

The principal ground of jurisdiction is the defendant’s domicile (art. 2), if articles 16 (exclusive jurisdiction grounds), 18 (voluntary submission), or 17 (prorogation) do not apply. The seat of a company, other legal person, or association is treated as equivalent to domicile.

Article 5 lists several special jurisdictions where the defendant can be sued as an alternative to the general venue of article 2, such as the place of contractual performance (see below).

Finally, the provisions for matters relating to insurance (articles 7ff.) and, probably more important as regards Internet, for consumer contracts (articles 13ff.) have to be considered.

4.2.1.2 Article 5(1) – Place of Performance
In contract matters article 5 provides an alternative jurisdiction for the defendant to be sued. But which law determines the place of performance of the obligation in question?

In order to ensure a uniform application of the Convention, it could be argued that the ‘place of performance’ should be given a meaning independent of national legal systems. This view, however, has been rejected by the European Court. It decided that the court before which the matter is brought has to determine the applicable law following the choice of law rules of the lex fori. The place of performance has then to be defined in accordance to the law governing the contract.

If the obligation in question is payment, this will have no special consequences for Internet contracts. In absence of an agreement to the contrary the place of payment – according to Scots Law as well as German law – will be the creditor’s residence or place of business.

If performance requires the delivery of physical goods ordered via Internet, an analogy can be drawn to normal mail-order-sales. The place of performance is the address given by the customer.

The case of digitised products presents a different situation. Online transmission, for instance, will replace the delivery of software by mail. Nor-

233. Art 1.
235. Art 53.
236. For the latter see 4.2.1.3.
238. Ibid. at p 1485.
240. § 270 BGB.
mally the customer will not be able to retrieve the data himself. Thus, performance will require that the supplier sends the program from his computer to the customer’s mailbox. The place of performance will, therefore, be the computer of the service provider where the data is received. As this might not be in the same country in which the defendant lives, jurisdiction could differ from his domicile.

4.2.1.3 Article 13(3) – Consumer Contracts

Section 4 of Title II of the convention contains special regulations protecting consumers. Article 14 for instance provides that a consumer can only be sued in his domicile excluding the special jurisdictions of article 5.

This protection can only be achieved if the requirements of article 13 are met. Of special interest with regard to the Internet is section 3, which requires of any contract for the supply of goods or services that:

(a) in the State of the consumer’s domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

A similar provision of the Rome Convention241 adopts nearly the same wording. Nevertheless, the interpretation of ‘specific invitation’ and ‘advertising’ still presents difficulties.242

While it seems clear that an e-mail directly addressed to a potential customer constitutes a specific invitation, the classification of commercial web sites is controversial. Thus, it has been submitted that it is sufficient when the page is retrievable and intended to be retrieved over the net in the consumer’s state of domicile.243 Others argue that advertising implies more than the mere storing of a web page somewhere on the information highway.244

The word ‘advertising’, indeed, indicates that the supplier wants to enter a certain market.245 His message does not have to cause the conclusion of the contract. But it must precede the conclusion in the consumer’s state. An advert in a newspaper for instance must be published within this state,246 it is not sufficient that it just happens to be read there.

This interpretation is supported by the use of ‘advertising’ together with

241 Art 5(2).
243 B. Bachmann, Internet und IPR in: Lehman (Ed.), Internet- und Multimediarecht; Stuttgart: Schäffer-Poeschel 1997, p 177 referring to article 5(2) of the Rome Convention.
244 T. Stäheli, Kollisionsrecht auf dem Information Highway in: R.M. Hilty (Ed.), Information Highway; Berne: Stämpfli 1996, no 7.2 p 617 referring to art 13(3) of the Lugano Convention which is identical with art 13(3) Brussels Convention.
246 Palandt art 29 EGBGB (identical with art 5(2) Rome Convention) no 5.
‘specific invitation’. The latter clearly implies an active approach of the supplier to his potential customers.

Consumer protection is designed to deal with this situation. When a supplier markets his goods or services in another country, the consumers domiciled there may have to cope with an unfamiliar – and perhaps disadvantageous – foreign legal system.

If this argument is applied to the Internet it becomes clear that storing a web page on a server is not the method of advertising covered by art 13(3) of the Convention. Such a page may be retrievable anywhere in the world. This, however, is not enough to establish a sufficient relation to a certain legal system. In fact, it is the consumer who contacts the advertiser by retrieving the web page rather than the other way round.

4.2.2 Lugano Convention (1988)

The Lugano Convention is meant to provide a common basis of jurisdiction rules between members of the European Union and the European Free Trade Association (EFTA). It remains applicable for the ‘new’ EU member states (Austria, Sweden, Finland) until they have ratified the Brussels Convention.247

A discussion of the provisions of the Lugano Convention is not necessary here as it has been developed as a ‘parallel convention’ to the Brussels Convention.248

Differences exist only with regard to matters relating to individual contracts of employment249 and the recognition and enforcement of judgments.250 In other respects the Brussels Convention has been adapted to the Lugano Convention by the 1989 Accession Convention. Therefore the remarks made above apply to the Lugano Convention as well.

4.3 Choice of Law

4.3.1 Uniform Law

The starting point in deciding by which law a (electronic) contract is governed is to ask whether the countries involved have adopted a common international standard.251 Only if there is no uniform law, or as far as relevant issues are not covered, will choice of law rules have to be employed to determine the law applicable to the case.

For international commercial contracts, the Vienna Convention (CISG) has to be considered. Although not yet ratified by the United Kingdom, it

247 Hüftege p 34.
248 Anton & Beaumont no 12.01.
249 Art 5(1).
250 Art 28.
might well be relevant for a contract entered into by a UK-based party: the Vienna Convention applies when each party has its place of business in a (different) state that has ratified the Convention or when the rules of the private international law lead to the application of the law of a Contracting State. Given the hypothetical case of a Scottish company concluding a contract for the sale of goods with a German company. The contract contains no provisions as regards choice of law. If, according to conflict of law rules, this contract is governed by German law, it follows from article 1(b) CISG that the Vienna Convention is (as part of German law) applicable.

The convention does not deal with consumer sales and several questions such as the validity of the contract and the passing of property are left to national law.

4.3.2 Rome Convention (1980)

If no uniform rules apply the Convention on the law applicable to contractual obligations (Rome Convention) has to be considered. It came into force in the United Kingdom on April 1, 1991 and has been incorporated in the German conflict of law rules. It deals with "...contractual obligations in any situation involving a choice between the laws of different countries. According to the Contracts (Applicable Law) Act 1990 by which it was ratified the Rome Convention also applies in the case of conflicts between the laws of constituent parts of the UK. It is likely to cover all situations related to the typical subject matters of electronic contracts.

4.3.2.1 Choice of Law by Party Agreement

In article 3, the principle of party autonomy is found. An agreement about the law governing the contract can be express or implied. The latter has to be sufficiently demonstrated ("with reasonable certainty"). This could be done for instance by the choice of an arbitrator situated in a particular country or by providing for disputes to be submitted to certain courts.

The parties may change their choice of law at any time. The freedom to select the applicable law is, however, subject to certain restrictions. Thus, a

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252 Art 1(1)(a) CISG.
253 Art 1(1)(b) CISG.
254 Art 2(a) CISG.
255 Art 4 CISG.
256 Art 27ff EGBGB.
257 Art 1(1) Rome Convention.
258 1990 Act s 2(3).
259 Palandt art 27 EGBGB (corresponds to art 3 Convention) no 6.
variation of choice of law made after the conclusion of the contract will ‘not prejudice its formal validity under article 9’ nor ‘adversely affect the rights of third parties’. An example for the latter would be a contract for the benefit of a third party. If, for instance, the parties decide to change from Scottish or German law to English law (where such a contract is not recognized), after the conclusion of the contract the rights of the beneficiary would nevertheless continue to exist.

4.3.2.2 Applicable Law in the Absence of Choice

If there is no choice by the parties article 4(1) states the general principle that the contract ‘shall be governed by the law of the country with which it is most closely connected’. This corresponds to the ‘proper law’ doctrine of common law. There are, however, a number of limitations to this approach.

Thus, article 4 (2) contains a presumption for the law of that country where the party who is to effect the characteristic performance has his habitual residence or (in the case of a body corporate or unincorporate) its central administration.

The expression ‘characteristic performance’ has been criticized as unclear. In the case of most uniliteral contracts, however, it will not be difficult to identify the characteristic performance as the performance for which the payment is due. In electronic contracts, this would be (independent from contractual classification) the delivery of goods, the supply of information, the provision of services, etc.

The presumptions of article 4 may be rebutted if the other circumstances of the case indicate a closer connection to another country. Such circumstances could be the place where the contract has been formed, the nationality of the contracting parties or the language of the contract.

The latter, however, will probably be of limited significance for global networks. Even more than in a ‘conventional’ medium English is here the dominant language for international transactions. Only the exceptional use of other languages might therefore be some indication of a connection to a certain country.

4.3.2.3 Consumer Contracts

Article 5 contains special rules for ‘the supply of goods or services to a per-
son for a purpose which can be regarded as being outside his trade or profession...’ (consumer).  
For contracts involving consumers, article 5(2) restricts party autonomy as regards choice of law. The consumer must not be deprived of the protection by mandatory rules of the law of the country in which he is habitually resident.  
In the absence of a choice of law by the parties, the contract is governed by the law of the country in which he has his habitual residence. Both provisions do only apply if one of the alternative conditions enumerated in article 5(2) is met. The most important of these three cases requires a specific invitation addressed to the consumer by the other party or advertising in the consumer’s country of habitual residence. This regulation is identical to article 13(3) of the Brussels Convention discussed above.  

5 Conclusion

Electronic contracting offers immense possibilities for commercial use – and also raises new problems.  
It is not the subject matters that are new, but the methods for exchanging and displaying information. Transmission speed, for example, is usually very high, but may vary considerably depending on the medium chosen. This leads to significant problems in deciding whether a communication is instantaneous or not.  
If networks are used, electronic data will usually be exchanged and stored on computers of service-providers. This may influence the place of contract formation. A service provider is not necessarily situated in the country in which the contracting parties are domiciled or have their places of business. As a consequence, the contract could be governed by a law completely unfamiliar to the persons involved.  
Interactive web sites are another example. They allow various new ways of on-line shopping but in some situations it may be difficult to decide whether they contain offers or mere invitations to treat.  
Some of the problems clearly result from the fact the German BGB is still strongly influenced by the late nineteenth century and many of the leading cases in common law also go back to this time or even further. It simply proves difficult to apply legal rules that have been developed in the days when most contracts were concluded personally or by mail and the telephone was the most sophisticated technological facility.  
Of course, many of the difficulties can be avoided if the parties provide

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269 Anton p 345.  
270 See 4.2.1.3.  
271 See 3.2.3.2.2.  
272 See 3.2.5.2 and 4.1.  
273 See 3.2.4.1.2.  
274 Kilian/Heussen ch 20 no 1ff.
solutions in their contracts. And yet, it appears unlikely that the majority of people accessing the Internet from their home-pc will do so.

The UNCITRAL Model Law on Electronic Commerce indicates one possible way of tackling the problems by providing a model for national legislation.\(^{275}\) By adopting the principle that the location of an information system is not a determinant element, it creates, for example, more certainty as regards the time and place of contract formation. It is, however, not intended to create uniform rules. Thus, the conflict between the postal rule (as employed in the common law systems) and the reception rule (widespread among civil law systems) has, for instance, not been approached.

Another possible way of dealing with the problems would be to establish a uniform law aligned with the special situation of electronic data transmission.

Whatever approach maybe chosen, it seems clear that only an international solution can cope with the international nature of electronic data transmission and this solution should be found quickly. Otherwise, the ‘information revolution’ could produce more chaos than progress – and its chances thrown away.

\(^{275}\) See 3.3.