

July 2007

## Contemporary Legal Issues of Contract Formation through Online System

Ayman Khaled Masadeh  
*Yarmouk University, College of Law,, aymenmasadeh@yu.edu.jo*

Mohammad Bashayreh  
*Associate Professor of Commercial Law, Faculty of Law - Yarmouk University, mbashayreh@pmu.edu.sa*

Follow this and additional works at: [https://scholarworks.uaeu.ac.ae/sharia\\_and\\_law](https://scholarworks.uaeu.ac.ae/sharia_and_law)



Part of the [Civil Law Commons](#)

---

### Recommended Citation

Masadeh, Ayman Khaled and Bashayreh, Mohammad (2007) "Contemporary Legal Issues of Contract Formation through Online System," *Journal Sharia and Law*. Vol. 2007 : No. 31 , Article 6.  
Available at: [https://scholarworks.uaeu.ac.ae/sharia\\_and\\_law/vol2007/iss31/6](https://scholarworks.uaeu.ac.ae/sharia_and_law/vol2007/iss31/6)

This Article is brought to you for free and open access by Scholarworks@UAEU. It has been accepted for inclusion in *Journal Sharia and Law* by an authorized editor of Scholarworks@UAEU. For more information, please contact [sljournal@uaeu.ac.ae](mailto:sljournal@uaeu.ac.ae).

---

## Contemporary Legal Issues of Contract Formation through Online System

### Cover Page Footnote

Dr. Aymen Masadeh & Dr. Mohammad Bashayreh \* Assistant Professor, Faculty of Law, Yarmouk University, Jordan. \*\* Assistant Professor, Faculty of Law, Yarmouk University, Jordan.

## **Contemporary Legal Issues of Contract Formation by Online Orders\***

**Dr. Aymen Masadeh\* & Dr. Mohammad Bashayreh\*\***

### **Introduction**

Electronic commerce has put forward a new challenge to the efforts endeavoring to unify international trade law. Most international trade conventions are designed to apply to traditional means of communication as they were drafted before the recent informational revolution. Further, because in some countries conventions supersede domestic laws, adopting the United Nations Model Law on Electronic Commerce might not completely harmonize national laws. Hence, the United Nations General Assembly adopted a new Convention on the Use of Electronic Communications in International Contracts (hereinafter the Convention) prepared by the United Nations Commission on International Trade Law (UNCITRAL). Adopted on 23 November 2005, the Convention aims at enhancing legal certainty and commercial predictability where electronic communications are used in relation to international contracts. The convention will bring other conventions into line with recent developments in electronic communications.

The main aim of this work is to draw the attention of contract parties to certain issues that may arise under the Convention and to provide them with possible solutions. It addresses a number of contemporary issues that may arise in the field of electronic contracting by the use of online order forms. For example, this work asks whether an electronic contract can be concluded by filling and submitting an online order form. If yes, when and where online orders and other electronic messages are dispatched and received? Can a customer avoid the legal effect of erroneous information filled in an online order form by mistake? Can a customer withdraw from a transaction made by mistakenly

---

\* Approved for publication on 31/7/2006.

\* Assistant Professor, Faculty of Law, Yarmouk University, Jordan.

\*\* Assistant Professor, Faculty of Law, Yarmouk University, Jordan.

clicking the “I accept” or “submit” button? Should the receipt of electronic acceptance be electronically acknowledged by the addressee?

In answering these questions, this work starts by examining the legal nature of online orders and propositions. The Convention provides a *prima facie* characteristic that may be helpful to avoid the disparities among the legal systems in relation to the legal nature of propositions addressed to the public. Still, this *prima facie* rule may not be applicable in certain cases. Moreover, this study deals with the common problem of filling online order forms, i.e. the input errors. Although the Convention provides certain rules to protect Internet users against their own input errors, there are still a number of issues that should be tackled. For example, who will pay the expenses of carriage of goods sent back to the seller due to avoidance? Should avoidance be allowed in cases where the party in error did not receive benefit from the goods delivered but the other party will suffer detriment resulting from avoidance?

The time and place of dispatch and receipt of electronic messages play a significant role in determining the time and place of an electronic contract. As for the time of receipt, a distinction is drawn between designated and undesignated addresses. An attention will be paid to the legal effect of this distinction and the difficulties of proof that it may raise.

To attain its aim, this study is divided into four parts: the first part examines the characteristic of online propositions and orders. The second part deals with the use of error-correction system and its legal effect. The third part deals with the time and place of dispatch and receipt of electronic communications and the last part examines the nature and legal effect of the acknowledgement of receipt. This study ends with conclusions and recommendations that will hopefully help in drafting electronic contracts under the Convention.

### **1. The Legal Nature of Online Propositions and Orders**

Offer can simply be defined as a person’s declaration of intention to be bound by the terms stated in the declaration should it be accepted. In general, the offer must be definite, addressed to specific persons and made with the intention to be bound by it in case of acceptance. For example, Article 14(1) of the United Nations Convention on the International Sale of Goods (CISG) requires the offer to, at least, indicate the goods and fix expressly or impliedly the price. If any of such conditions is missing, the proposition will not be more than an invitation to

## **Contemporary Legal Issues of Contract Formation by Online Orders**

make an offer (so-called invitation to treat, negotiate, or deal).<sup>(1)</sup> A proposition addressed to the public is generally considered an invitation to negotiate unless the contrary is clearly indicated by the person making the proposition.

Online order forms (so-called interactive applications) are usually used in interactive websites where the customer may order goods or services online.<sup>(2)</sup> A customer may visit the website of an e-merchant and select the items or order the service that he is after. He may fill an order form and send it directly online. The online order will then be processed by an automated system or a natural person. In either case, the online order is usually considered as an offer that can be accepted or rejected depending on the result of its processing.<sup>(3)</sup>

Although means of communication may not be taken into account in discussing whether a statement constitutes an offer or not, they are quite significant in discussing the offer's effectiveness. The Convention makes it clear that a proposition sent through electronic communications, and generally accessible to parties making use of information systems, is *prima facie* an invitation to negotiate.<sup>(4)</sup> In this view, Internet propositions are generally considered as invitations to negotiate unless otherwise is indicated.<sup>(5)</sup> Indeed, in

- (1) Article 14 of the CISG states that "(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal."
- (2) Gbenga Bamodu, "Information Communications Technology and E-Commerce: Challenges and Opportunities for the Nigerian Legal System and the Judiciary" 2 *The Journal of Information, Law and Technology (JILT)*, section 5, (2004). Available at <[http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004\\_2/bamodu/](http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004_2/bamodu/)>.
- (3) The legal nature of online orders is still, for some companies, within a gray area. For example, Eastman Kodak accidentally placed a camera for sale on its UK website for £100 instead of £329. Thousands of orders were placed before the company could correct the error. The company honored the lower prices. Although the company argued that its advertisement is an invitation to negotiate and not an offer, it preferred not to take the risk of going through a lawsuit since its website had accepted and confirmed the orders. Discussed in Jennifer E. Hill, "The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods" 2 *Northwestern Journal of Technology and Intellectual Property* 1, para.1, (2003).
- (4) The *travaux preparatoires* of the Convention reveal that the drafters of the Convention aimed at providing a default rule that appropriately adapted the notions of offer and acceptance in other laws and the CISG. Report of the Working Group on Electronic Commerce on the Work of its forty-second session 2003, A/CN.9/546, paragraph 106 et seq.
- (5) An example of this kind of communication is Amazon.com. "This online company sells thousands of products such as books, compact disks, and electronics - a familiar example of B2C sales. Customers choose products from the Amazon.com website, place them in a virtual shopping basket and provide

## Dr. Aymen Masadeh & Dr. Mohammad Bashayreh

dealing with this issue, the court or arbitrator must look for the actual intention of the parties. The Internet proposition can be classified as an offer or invitation to negotiate depending on the language used and usage of trade.<sup>(6)</sup> In other words two main questions can be asked to differentiate between an offer and an invitation to negotiate: first, whether the proposition contains the essential contract terms<sup>(7)</sup> and, second, whether the party, who makes the proposition, intends to be bound by the other party's response.<sup>(8)</sup>

Article 11 of the Convention<sup>(9)</sup> uses the phrase of "generally accessible" to characterize the online proposition. Obviously, this phrase refers to propositions published on open websites and not to propositions sent via electronic mails to specific addresses. In principle, while the former is treated as an invitation to negotiate, the latter is considered as a legally binding offer, provided that such a proposition is made with the intention to be binding. The Convention, by adopting this approach, brings the law into line with reality. Indeed, it is unrealistic to presume that a proposition published online is an offer since it may raise unlimited number of acceptances, as people around the world will have a

---

credit card information to complete the purchase. When a customer clicks the 'Place Your Order' button, he or she contractually agrees to the purchase. The goods are mailed to the customer's designated address. There is no physical signature and no paper changes hands, which is the major concern for identification and authentication." See Jennifer E. Hill, "The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods" 2 *Northwestern Journal of Technology and Intellectual Property*, para.20, (2003).

- (6) Farooq Ahmad, "Electronic Commerce: An Indian Perspective", 9 *International Journal of Law and Information Technology*, 133, 142, (2001).
- (7) For example, Article L121-18 of the French Consumer Code states "the contract offer must include the following information: 1. The name of the product vendor or service provider, their telephone number, address or, if this is a legal person, its registered offices and, if different, the address of the establishment responsible for the offer; 2. Where appropriate, delivery costs; 3. Payment, delivery or performance procedures; 4. The existence of the right to withdraw, apart from where the provisions of this section excluded the exercising of this right; 5. The period of validity of the offer and the price of the latter; 6. The cost of operating the means of distance communication used where this is not calculated in reference to a basic tariff; 7. Where appropriate, the minimum duration of the contract proposed, where this relates to the continuous or periodic supply of goods or services." See also Khaled Zgool, "Legal Protection of Electronic Commerce" – in Arabic, 29 *Law Journal (Kuwait Univ.)* No.3, supplement, 169, 177 (2005).
- (8) Christoph Glatt, "Comparative Issues in the Formation of Electronic Contracts" 6 *International Journal of Law and IT*, section 3.2.4.1, (1998).
- (9) Article 11 of the Convention states that "A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

## **Contemporary Legal Issues of Contract Formation by Online Orders**

chance to accept it. If this becomes the case, the limited stock available for sale will not help in meeting the seller's obligations under the unexpected number of contracts.

However, a powerful counter-argument can be raised in cases of interactive websites used to supply software online. A customer may type his credit card number in an online order form and download the software within moments after the form is submitted. In such cases, the argument of limited stock will not apply since the supplier can make unlimited number of copies of the same software. However, one can still argue that the supplier should be able to choose with whom he enters in a contractual relationship.<sup>(10)</sup> A supplier of software may not want to supply the software to a customer residing in an area of poor copyright protection. Thereupon, considering the online order an offer, and not an acceptance, will give the supplier a chance to reject the offer without raising any contractual liability. If such software is supplied automatically, the system can be programmed to reject requests sent from certain countries.<sup>(11)</sup> In this case, the supplier, by activating the online download, will accept the offer and carry out his contractual obligations at the same time.<sup>(12)</sup> Certainly, the general rule should always be that online order is an offer and the contract is made only after the order is accepted whether by a natural person or an automated system. This rule must always apply to cases of advertisement where the sole purpose of the Internet announcement is to promote the goods' purchase by drawing the customers' attention to the goods.<sup>(13)</sup>

Nevertheless, one must not ignore those cases where the online proposition is intended to be a legally binding offer. For example, a proposition of sale of goods for a specific price to the first 100 customer or till the whole stock is sold, can be considered as an offer even though it is addressed to the public. In such

- 
- (10) Christoph Glatt, "Comparative Issues in the Formation of Electronic Contracts" 6 *International Journal of Law and IT*, section 3.2.4.1.2, (1998).
- (11) Online vendors may also resort to means of 'geographical identification' to avoid jurisdiction of foreign courts. Shafik Bhalloo, "Jurisdictional Issues in Electronic Commerce Contracts: A Canadian Perspective" 8 *Computer Law Review and Technology Journal*, 225, 275-276, (2004).
- (12) Fred M. Greguras, et al., "Electronic Commerce: On-line Contract Issues" section B-3, 452 P. LI. /P. AT. 11. (1996). Available at <[http://www.oikoumene.com/ec\\_contracts.html](http://www.oikoumene.com/ec_contracts.html)>.
- (13) This may not be the case where the advertisement is intended as an offer. For example, in the leading English case of *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 QB 256 where the defendant advertised its product, i.e. smoke ball, as preventive against influenza. The defendant made it clear that he would pay £100 for anyone who used the smoke ball and still caught flu. The Court held that the advertisement was an offer and hence there was a contractual relationship.

**Dr. Aymen Masadeh & Dr. Mohammad Bashayreh**

cases, it is reasonable to expect the offeror to have the intention to be bound by the proposition; and, thus, it is generally accepted that ‘clicking’ a button by a customer can be a valid acceptance.<sup>(14)</sup> This is why the Convention provides only a default rule that the Internet proposition is an invitation to negotiate and does not preclude either party from proving otherwise. Furthermore, a proposition published on a website protected by a password is clearly addressed to those who acquire such a password. This proposition is addressed to limited number of people and, hence, can be treated as a legally binding offer.

Article 11 of the Convention is of vital significance in light of the disparities existing among legal systems regarding the legal nature of propositions addressed to the generic public. By virtue of Article 11, the diversity of domestic legal systems will no longer affect the formation of contracts governed by the Convention. However, in cases of contracts concluded for personal, family or household purposes, deciding whether a contract exists depends on the applicable domestic law since they are beyond the scope of the Convention.<sup>(15)</sup> For example, Spanish law does not require the offer to be addressed to specific people and, thus, filling and submitting an online order form can be considered an acceptance under Spanish law.<sup>(16)</sup> However, under Article 134(2) of the United Arab Emirates civil law, propositions addressed to the public is considered as invitations to make offers unless that there is no doubt that the propositions are intended to be offers.<sup>(17)</sup>

- 
- (14) As some commentators point out “There are a number of Canadian cases which suggest that the acceptance requirement may be satisfied without written or verbal assent provided the offeror has made a reasonable attempt to bring the terms of the agreement to the attention of the Customer and/or the Customer has had a reasonable opportunity to read such terms. In the context of this paper, we define this attempt to notify the Customer as ‘inferred acceptance’ on the part of the Customer.” Skip Sigel, et al., ‘The Validity of Webwrap Contracts’ Uniform Law Conference of Canada, available at <<http://www.ulcc.ca/en/cls/index.cfm?sec=4&sub=4i#Footnote1>>.
- (15) Article 2(1) of the Convention states “This Convention does not apply to electronic communications relating to any of the following: (a) Contracts concluded for personal, family or household purposes...”. Article 2 provides for a number of exclusions from the scope of the Convention that have been justified on grounds of public policy, and on the basis that they relate to matters falling outside the trade-mandate of the UNCITRAL . Report of the Working Group on Electronic Commerce on the Work of its forty-four session 2004, A/CN.9/571, paragraph 64.
- (16) Under Spanish law, the doctrine (Luis Diez-Picazo) makes it possible to address a valid offer to the public at large. See Sergio Maldonado, “Cross-border Formation of Online Contracts” Available at <[http://www.smaldonado.com/marcos/docs/ct\\_form\\_an\\_ww\\_en.html](http://www.smaldonado.com/marcos/docs/ct_form_an_ww_en.html)>.
- (17) Article 2 of the United Arab Emirates Federal Electronic Transactions Law refers to the general principles of civil law in cases where this law does not wholly regulate.

## **Contemporary Legal Issues of Contract Formation by Online Orders**

Anyhow, parties may avoid any misunderstanding in cases of formation of electronic contract by agreeing on a Letter of Intent stipulating the procedures of formation. The service provider may also provide instructions of how a contract can be formed on its website.<sup>(18)</sup> Where a pre-contractual agreement on how the contract is formed exists, the default rule of the Convention, i.e. Article 11, will not apply.

The Convention is unclear on online auctions. Unlike the CISG, the Convention does not exclude auction sales from its scope of application. However, it says nothing regarding the issue of whether the highest bid is an offer or acceptance. Therefore, deciding whether the highest bid makes a contract or not is to be considered under the applicable domestic law. For example, under English law the contract will be concluded by the highest bid in cases of auction without reserve, while the auctioneer will be able to reject the highest bid in cases of auction with reserve.<sup>(19)</sup>

In most cases, submitting an online order form constitutes an offer. Under both Common and Civil legal systems, the offer can be withdrawn before or at the time it reaches the offeree; it can also be revoked before acceptance is dispatched unless it is irrevocable. These rules have limited significance in cases of electronic contracting between two automated systems or between a natural person and an automated system since the submitted interactive form usually reaches the offeree within moments and the acceptance can be issued immediately. Although the use of automated systems, or e-agents, is not within the scope of this work, it is worth mentioning that Article 12 of the Convention provides that the contract “shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.”

### **2. Input Error and the Use of Error-Correction Systems**

Due to the speed of online communications, it easily happens that something goes wrong in online contracting. One may mistakenly press the “yes,

(18) Christina H. Ramberg, “The E-Commerce Directive and Formation of Contract in a Comparative Perspective” 1 *Global Jurist Advances*, Article 3, p.12, (2001). Available at <<http://www.bepress.com/gj/advances/vol1/iss2/art3>>.

(19) Sergio Maldonado, “Cross-border Formation of Online Contracts” Available at <[http://www.smaldonado.com/marcos/docs/ct\\_form\\_an\\_ww\\_en.html](http://www.smaldonado.com/marcos/docs/ct_form_an_ww_en.html)>.

**Dr. Aymen Masadeh & Dr. Mohammad Bashayreh**

I accept” button which makes him involved in a contractual relationship that he did not intend to make. Moreover, a person may mistakenly fill certain sections of an online form with unintended information; for example, typing 11 instead of one simply by double pressing the “one” button on the keyboard.<sup>(20)</sup> Input errors can be in spelling, quantity, quality, etc. The Convention deals with this problem under Article 14, which states

*“1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if: (a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and (b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party. 2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.”*

Article 14 is not intended to provide a general rule for the issue of mistake. It deals only with one type of mistake, i.e. input errors; it does not provide for the mistake concerning the type of goods or the nature of transaction. Generally, the risk of mistake is placed on the party making it unless the other party knew or ought to have known of the error at the time of making the contract. This makes an incentive to act carefully and protect the other party who had no knowledge of the mistake. Applying this general rule to all electronic contracts is impossible. In cases of communications exchanged by individuals, a party in error may argue that the other party knew or ought to have known of the error at the time of making the contract. This is not possible where the party in error contracted with

(20) This may also occur in commercial advertisements. For example, in the UK, Argos advertised a 21-inch television set carrying a company price of £299 on its website but by mistake the price shown was only £2.99. The mistake was noticed after a huge number of orders was taken. One buyer alone placed an order for 1700 sets. See Farooq Ahmad, “Electronic Commerce: An Indian Perspective”, 9 *International Journal of Law and Information Technology*, 133, 154, (2001).

## **Contemporary Legal Issues of Contract Formation by Online Orders**

an automated system<sup>(21)</sup>. In most cases of contracts, made by the use of online order forms, the online order is processed by an automated system and not an individual. By virtue of Article 14, the general rule of mistake is replaced by a more suitable rule for electronic contracting.

Article 14 deals with the case of automated transactions where a natural person makes a simple mistake, e.g. “single keystroke error” in dealing with an automated system.<sup>(22)</sup> Indeed, Article 14 makes an exception to the traditional rule of “mistake in expression” by allowing the party who made the input error to avoid the contract due to his own error. Article 14 applies only where electronic communications are exchanged between a natural person and an automated system, regardless of whether the natural person is acting on his own behalf or on behalf of a legal entity, e.g. company. However, it does not apply where the contract is made by the exchange of electronic communications between two automated systems or between two natural persons. The purpose of this limited sphere of application is to make the rule applicable only to cases where the error cannot be noticed at the time when the order is processed. In cases where the online order is processed by an automated system, it will not be reviewed by individuals and, thus, errors will not be noticed. Article 14 deals with this type of communications leaving other types to be governed by the general rules of mistake. Indeed, “in a transaction between individuals there is a greater ability to correct the error before parties have acted on it. However, when an individual makes an error while dealing with the electronic agent of the other party, it may not be possible to correct the error before the other party has shipped or taken other actions in reliance on erroneous record.”<sup>(23)</sup>

It is worth noting that Article 14 imposes no obligation to provide an electronic error-correction system. However, absence of such a system will allow the other party to avoid the contract in cases of erroneous input. In other words,

- 
- (21) Article 1 of the United Arab Emirates Federal Electronic Transactions Law defines the Electronic Automated Agent as "A software or an electronic system of information technology that operates automatically and autonomously, totally or partially, without any supervision of a natural person at the time it operates or responds." Article 12 of this law allows electronic transaction to be made between automated agents or between a natural person and an automated agent.
- (22) Report of the Working Group on Electronic Commerce on the Work of its forty-four session 2004, A/CN.9/571, paragraph 189. See also John D. Gregory, “UNCITRAL Convention on Electronic Contracts” 59 *The Business Lawyer* 313, 337, (2003).
- (23) Comment 4 on Section 10 of the US Uniform Electronic Transaction Act (UETA). Both the UETA and the US Uniform Computer Information Transactions Act (UCITA) provide for input errors made an individual in communications exchanged with an automated system.

Article 14 provides an incentive to establish error-correction procedures in automated contracting systems and provides protection to the party who makes input errors in the absence of such procedures.

It is arguable whether error-correction systems can be helpful in consumer transactions. What a consumer needs, is a protective rule against input errors regardless of whether the seller provides an electronic error-correction system or not.<sup>(24)</sup> This can be provided under domestic consumer protection law since the Convention does not apply to contracts concluded for personal, family or household purposes.

### ***2.1. Nature of the Error-Correction System***

Article 14 of the Convention says nothing about the type of the error-correction system used. It only requires such a system to give an opportunity to correct the input error. It is unclear what this requirement exactly means. Is it enough for the system to function before the order is placed? Or should the system allow the order to be corrected after submission is made? It is unclear whether a system provided to avoid input errors would fit under Article 14. Some active websites provide a confirmation service which allows the customer to confirm the submission of his online order; that is to say that the customer after clicking the “submit” button, a message appears on the screen, e.g. “are you sure?”, asking him to confirm the submission. Although this system helps to avoid making input errors, it does not allow the customer to correct any input error after submission. It is a system to avoid making input errors more than a system to correct input errors. Another system may provide a summary of the online order before dispatch. If the originator noticed an error, such a system should allow him to go back to the online order form in order to correct the error before sending it.

The European E-Commerce Directive requires the service provider to provide “the technical means for identifying and correcting input errors prior to the placing of the order.”<sup>(25)</sup> Similarly, the American Uniform Computer

(24) Christina H. Ramberg, “The E-Commerce Directive and Formation of Contract in a Comparative Perspective” 1 *Global Jurist Advances*, Article 3, at p.3, (2001). Available at <<http://www.bepress.com/gj/advances/vol1/iss2/art3>>.

(25) Article 10 of the E-Commerce Directive L178/1 Official Journal 17.7.2000 states “... Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service: ... (c) the technical means for

## **Contemporary Legal Issues of Contract Formation by Online Orders**

Information Transactions Act (UCITA) uses the words “reasonable method to detect and correct or avoid the error”.<sup>(26)</sup> Commentary to Section 213 of UCITA states that “a reasonable procedure may entail no more than requiring two separate indications confirming that the bid should be entered or, where the formatting allows correction, requesting that the consumer check and correct the bid before the “Bid Now” button is pressed.” Article 14 of the Convention should be interpreted, it is submitted, to approve the automated system which requires confirmation of the information intended to be submitted.

It should be noted that Article 14 does not require the customer’s actual knowledge of the error-correction system. The word “opportunity” indicates that the system available in a manner that can be noticed by a reasonable man. In other words, the question of whether the available system gives an opportunity to correct the input error or not must be answered under an objective test, i.e. whether a layman in the position of the customer could have noticed and used the error-correction system. Under the Uniform Computer Information Transactions Act of the State of Virginia, “a person has a reasonable opportunity to review a record or a term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.”<sup>(27)</sup> Virginia’s Act is clearer on the point of the objective test required for, and gives more guidance on the meaning of, ‘a reasonable opportunity’ to review records and errors. By analogy, an error correction system should be clearly brought to the attention of the customer.

---

identifying and correcting input errors prior to the placing of the order.” Article 11(2) states “Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.”

- (26) Section 213 of the American Uniform Computer Information Transactions Act (UCITA) states “(a) In this section, “electronic error” means an error in an electronic message created by a consumer using an information processing system if a reasonable method to detect and correct or avoid the error was not provided.” Similarly, Section 10(2) of the American Uniform Electronic Transaction Act states that in an automated transaction involving an individual, the individual may avoid the effect of an electronic record thus resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error...”
- (27) Adam Rittenberg & Jack Kerrigan, “Formation of Click Wrap Agreements under Virginia’s Uniform Computer Information Transactions Act” 1 *West Virginia Journal of Law & Technology*, (2001). Available online at <<http://www.wvu.edu/~law/wvjolt/Arch/kerrigan/kerrigan.htm>>.

***2.2. The Legal Effect of the Absence of Error-Correction System***

If there is no opportunity to correct the input error at the time it is made, the contract will be avoidable. However, the Convention does not allow avoidance of the whole transaction. Article 14 makes it clear that the party who does not have an opportunity to remedy the input error has the right to withdraw the portion of the electronic communication in which the input error was made. Under this Article, a party who ordered 11 units instead of one unit, due to the error of pressing the button one twice, should not be allowed to withdraw from the whole transaction. In other words, he will be obliged to accept the quantity that he actually intended to purchase. Adopting this approach, the Convention seems to be more plausible than some domestic laws, such as the US Uniform Computer Information Transactions Act (UCITA) which allows the party who made the input error to avoid the whole contract in cases of the absence of a reasonable opportunity to detect and correct or avoid the error.<sup>(28)</sup>

Again, Article 14 of the Convention applies only where a natural person makes an input error in an electronic communication exchanged with an automated system. The burden of proving the occurrence of error and not merely having a second thought is not an easy task. The Convention does not deal with the standard of proof, which is left to be dealt with under the applicable domestic law. For example, under Article 117 of the United Arab Emirates Civil Law, the claimant must produce evidence that proves his allegation whereas the other party can deny such an allegation under oath. Generally, the person is required to prove what he is alleging; however, in cases of electronic input error, it is submitted, the burden of proof must be shifted to the party who had not provided an adequate error-correction system. This can be justified on the ground that the burden of proof can be avoided by providing an adequate error-correction system. Furthermore, this will induce the e-merchant to provide such a system. Indeed, the party who fails to provide an adequate error-correction system must not get benefit from the other party's failure to prove the occurrence of the input error.

(28) Section 213 of the American Uniform Computer Information Transactions Act (UCITA) states "(b) In an automated transaction, a consumer is not bound by an electronic message that the consumer did not intend and which was caused by an electronic error...".

## **Contemporary Legal Issues of Contract Formation by Online Orders**

Although consumer transactions is out of the scope of this paper as they were excluded by Article 2 of the Convention,<sup>(29)</sup> it is worth noting that under the EU directive on distance selling,<sup>(30)</sup> the consumer receives better protection. Under this Directive, the consumer has a period of seven working days to withdraw from the contract without giving any reason. This period starts from the day of receipt of goods by the consumer.<sup>(31)</sup> This is stated also under Article L121-20<sup>(32)</sup> of the French Consumer Code which allows the consumer to cancel the contract within seven days.<sup>(33)</sup>

The Convention does not regulate the right of avoidance in all cases. It deals with expressing the will of the parties through electronic means in international trade; it aims at solving problems relating to the binding nature of offer and acceptance to ensure that they are issued and communicated properly and that they reflect the true intention of the parties. If, however, the seller subsequently fails to comply with the terms of the contract, then this is a question that has to be settled under the applicable law of contract.<sup>(34)</sup> In the context of international trade, the CISG may be applied.

The Convention does not distinguish between material and immaterial errors. However, courts and arbitrators, it is submitted, must not allow trivial

- 
- (29) Article 2 of the Convention states that "this Convention does not apply to electronic communications relating to any of the following: (a) Contracts concluded for personal, family or household purposes...".
- (30) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts.
- (31) Article 6 of the EU Directive on Distance Selling states "1. For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods. The period for exercise of this right shall begin: in the case of goods, from the day of receipt by the consumer where the obligations laid down in Article 5 have been fulfilled; in the case of services, from the day of conclusion of the contract or from the day on which the obligations laid down in Article 5 were fulfilled if they are fulfilled after conclusion of the contract, provided that this period does not exceed the three-month period referred to in the following subparagraph... 2. Where the right of withdrawal has been exercised by the consumer pursuant to this Article, the supplier shall be obliged to reimburse the sums paid by the consumer free of charge. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods. Such reimbursement must be carried out as soon as possible and in any case within 30 days."
- (32) Order no. 2001-741 of 23 August 2001 art. 5 and art. 11 Journal officiel of 25 August 2001. Article L121-20 of the French Consumer Code states that "the consumer has seven clear days in which to exercise his/her right of withdrawal without having to give reasons or pay penalties, with the exception, where appropriate, of the cost of returning the goods. The deadline mentioned... runs from the receipt of the goods or acceptance of the offer of services."
- (33) Nabeel Soboh, "Consumer Protection in Consumer Transactions" – in Arabic, 29 Law Journal (Kuwait Univ.) No.3, supplement, 134, 137 (2005).
- (34) For example, under Articles 226-230 of the United Arab Emirates Civil Law, the buyer may not be bound by the contract till he sees the goods if he did not see them at the time of making the contract.

**Dr. Aymen Masadeh & Dr. Mohammad Bashayreh**

errors, which do not cause detriment to the party in error, to cause avoidance of contract under Article 14 of the Convention. This can be justified on the basis of good faith. Ruling otherwise may allow the person who made a bad bargain to shift his loss to the other party by claiming avoidance for trivial input errors. This view can be found under Article 3.5 of the UNIDROIT Principles of International Commercial Contracts. This Article does not allow avoidance for unilateral mistake unless the mistake is of “such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms...”. Thereupon, the buyer who made an input error regarding the delivery date, while filling the online order form, should not be allowed to avoid the contract if the erroneous delivery date is suitable for him. Indeed, the drafters of the Convention should have paid more attention to the type of input error that allows avoidance.

The party in error is not allowed to withdraw the portion in which the input error was made unless he notifies the other party of such an error. According to Article 14(1) of the Convention, such a notification must be made as soon as possible after having learned of the error. Unfortunately, while this Article conforms with good faith, it applies a subjective test under which proof is usually difficult.<sup>(35)</sup> In other words, the period of notification starts from the time when the customer becomes actually aware of the error (the subjective test) even though he could have known of the error before that time (the objective test). Applying the latter test will encourage the customer to examine the goods in order to make sure that he made the right order. If he did not do so, and the error could have been discovered by such an examination, the period of notification must start at the time when the buyer had a reasonable chance to examine the goods.

Another condition for the right of avoidance can be found in Article 14(1-b) of the Convention under which the person in error must not have “used or received any material benefit or value from the goods or services, if any, received from the other party”. It should also be realized that causing benefit or

(35) Virginia’s Uniform Computer Information Transactions Act also provides that a customer must notify the other party ‘promptly’ after an electronic error is detected. The Act also requires prompt returning of goods to the other party or, pursuant to instructions of the other party, makes delivery to another person. Adam Ruttenberg & Jack Kerrigan, “Formation of Click Wrap Agreements under Virginia’s Uniform Computer Information Transactions Act” 1 *West Virginia Journal of Law & Technology*, (2001). Available at <<http://www.wvu.edu/~law/wvjolt/Arch/kerrigan/kerrigan.htm>>.

## **Contemporary Legal Issues of Contract Formation by Online Orders**

value to be received by a third party may well fall within the ambit of article 14.<sup>(36)</sup>

This Article leaves a number of significant questions unanswered: How is it possible to prove or disprove that the customer had not used the software, especially if such software was downloaded directly online? How is it possible to prove or disprove that the customer who sent the software back after avoidance did not keep a copy? Moreover, who will pay the expenses of carriage of goods, which were sent back to the seller due to avoidance? Does Article 14 apply where the party in error did not receive benefit but the other party will suffer detriment in case of avoidance?

Proving that software has been used or unused is too difficult, especially in cases where the software is downloaded online directly. In cases of software delivered via packed CD or floppy diskette, one may argue that the CD or floppy diskette should not have been unpacked if the type of software is written on the package. The European Distance Contract Directive requires the software to be returned unopened in order to rescind the contract.<sup>(37)</sup> Anyhow, this is a matter of proof not of the rightness of the rule, and the hassle of proof will always depend on the facts surrounding every single case. To avoid this hassle, the person who offers services or goods online can provide an adequate error-correction system. By providing such a system, the contract cannot be avoided for input errors and such questions will not come into picture.

As for the cost of carriage, it is fair enough to require the person, who received goods due to his own mistake, to cover the expenses of sending the goods back. The party in error must be encouraged to act promptly to put the other party in the position that he would have been in if the contract had not been made.<sup>(38)</sup> This case is different from the case where the goods are rejected due to nonconformity with the contract. In the latter case, the seller must cover the

(36) This situation is expressly covered under the Virginia's Uniform Computer Information Transactions Act. See Adam Rutenberg & Jack Kerrigan, *Ibid*.

(37) Article 6(3) of the European Directive on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19) states "Unless the parties have agreed otherwise, the consumer may not exercise the right of withdrawal... in respect of contracts... for the supply of audio or video recordings or computer software which were unsealed by the consumer."

(38) This approach is adopted under Article 6 of the European Directive on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19), which states "For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods."

**Dr. Aymen Masadeh & Dr. Mohammad Bashayreh**

expenses incurred on sending the goods back since he did not comply with the conformity obligation. As the risk of unilateral mistake is normally placed on the party making the mistake, Article 14 is an exception made to suite the nature of electronic contracting. This exception must not be widely interpreted and, thus, should not allow the party who made the mistake to claim the expenses incurred in sending the goods back.

Receiving no benefit from the goods delivered or services supplied does not mean that the other party will not suffer detriment due to avoidance. Whether or not detriment is expected may depend on the type of contract and the circumstances surrounding every single case.<sup>(39)</sup> For example, the seller may suffer detriment resulting from avoidance where there is a sharp fall in the market price or where he lost the chance to sell the goods to others. In these cases, the seller will suffer detriment caused by avoidance regardless of whether or not the buyer has used the goods. Article 14 allows avoidance if the customer has not received benefit from the goods delivered regardless of whether or not the other party will suffer detriment due to avoidance.<sup>(40)</sup> Equity principles require taking both parties' interests into consideration. In other words, avoidance must not be allowed, it is submitted, in both cases, i.e. where benefit has been received from the goods supplied and where the supplier will suffer detriment due to avoidance. However, trivial detriments, such as costs of filling erroneous orders, should not be allowed to prevent avoidance.<sup>(41)</sup>

Parties can deal with the above-mentioned gaps in the Convention by their agreement terms. Article 3 recognizes the party autonomy by providing that "the parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions." Thereupon, parties may agree that the absence of an adequate error-correction system will have no effect on the enforceability of their agreement and the erroneous order cannot be withdrawn.

(39) Christina H. Ramberg, "The E-Commerce Directive and Formation of Contract in a Comparative Perspective" 1 *Global Jurist Advances*, 20, (2001).

(40) A different approach can be found under Article 3.5(1) of the UNIDROIT Principles of International Commercial Contracts which allows a party to avoid the contract for unilateral mistake if "the other party had not at the time of avoidance acted in reliance on the contract." In this sense, the mere reliance on the contract prevents avoidance.

(41) Commentary to Section 213 of the UCITA, at p.116, states "this defense [received benefit] builds on equity principles that permit a party to avoid the consequences of its error if the error causes no detrimental effect to another party and does not give a benefit to the person making the mistake.... Since there may be unavoidable detrimental effects on the party who received an erroneous message (e.g., costs of filling erroneous orders), courts must apply this rule with care.

### **Contemporary Legal Issues of Contract Formation by Online Orders**

This may raise the issue of whether this agreement can be implied rather than express; for example, if a person proceeds to contract without finding an error-correction system, can it be held that he impliedly consented to carry the responsibility for his own input errors? In answering this question, one has to pay attention to the purpose of Article 14 of the Convention. This Article protects the party who fills the online order form in cases of absence of adequate error-correction system and also protects the other party in cases where such a system is available. Therefore, a person who chooses to proceed with the submission of an online order form without subjecting the order to the error-correction system should not be held to have consented to avoid his right to drop the contract for input errors. In most cases, the customer will not know whether such a system exists until he presses the 'submit' or 'send' button;<sup>(42)</sup> that is when an electronic note (a dialogue box) appears asking him to confirm the precision of the information filled in the form or to confirm his assent.

### **3. Time and Place of Dispatch and Receipt of Online Order**

Time and place of electronic contract are of vital significant for certain legal issues, such as jurisdiction, the applicable law, the limitation period, capacity of the parties, etc. Neither the Convention nor the UNCITRAL Model Law on E-Commerce determines when and where e-contract is made. The issue is left to be dealt with by other laws. Generally, the time and place of the conclusion of a contract is the time when, and the place where, the acceptance becomes effective.

Universally, there seem to be four theories dealing with the time when acceptance becomes effective: the time of expression, the time of dispatch (the postal or mailbox rule),<sup>(43)</sup> the time of receipt (the receipt rule) and the time of actual awareness of acceptance. Under the first theory, the contract is made at the time when the offeree points out his acceptance of the offer. Under the postal rule theory, the contract is made at the time when the acceptance is dispatched.

(42) It may be argued that clicking the "submit" button under the misapprehension that such conduct amounted to an informal communication may be considered a type of mistake. Mark E. Budnitz, "Consumer Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?" 16 *Georgia State University Law Review* 741, 753, (2000).

(43) See Valerie Watnick, "The Electronic Formation of Contracts and the Common Law 'Mailbox Rule'" 56 *Baylor Law Review* 175, (2004). The writer argues that the "mailbox rule" should be retained in electronic commerce in order to allow the offeree to immediately act upon the electronically formed contract in much the same way as it does in the case of a contract that has been formed through the use of regular mail."

**Dr. Aymen Masadeh & Dr. Mohammad Bashayreh**

However, under the receipt rule, the contract is made at the time it is received. Actual awareness of the acceptance is required under the legal systems that adopt the forth theory. While the offeror carries the risk of any transmission failure of the acceptance under the first and second theories, the offeree carries such a risk under the other two theories.

The same legal system may adopt more than one theory depending on the type of communication. For example, English law applies the receipt rule to messages communicated via instantaneous communications and the postal rule to messages communicated by other means. It is worth noting that online communications are not always instantaneous. Some writers argue that neither the Electronic Data Interchange EDI nor the electronic mail system is instantaneous since there is usually no direct link between the parties, and breach in communication may not be immediately noticeable.<sup>(44)</sup> However, the case of communication via active websites is completely different since the originator usually notices the breach in communication when a message appears reading “server not responding”.<sup>(45)</sup> Still, the time of conclusion of contract is often uncertain in the cases where the contract is made via electronic communications.<sup>(46)</sup>

In electronic contracting, time and place of dispatch and receipt of electronic communications play a significant role in determining the time and place of contract.<sup>(47)</sup> Indeed, determining when the electronic message, e.g. online order, is dispatched or received is of vital significance in deciding who bears the risk of a message not reaching the addressee or being delayed. Article 10 of the Convention explains when and where the message is deemed to be dispatched or received in the digital environment. It states

“1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party

(44) Farooq Ahmad, “Electronic Commerce: An Indian Perspective”, 9 *International Journal of Law and Information Technology*, 133, pp.146-147, (2001).

(45) Ibid, p.147.

(46) Rebecca Ong, “Consumer Based Electronic Commerce: A Comparative Analysis of the Position in Malaysia and Hong Kong” 12 *International Journal of Law and Information Technology* 101, 104, (2004).

(47) The drafters of the Convention noted that “one of the main objectives of the draft convention was to provide guidance that allowed for the application, in the context of electronic contracting, of concepts traditionally used in international conventions and domestic law, such as “dispatch” and “receipt” of communications.” Report of the Working Group on Electronic Commerce on the Work of its forty-second session 2003, A/CN.9/546, paragraph 61.

## **Contemporary Legal Issues of Contract Formation by Online Orders**

who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.

4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.”

### ***3.1. Time of Dispatch and Receipt of Online Order***

The expression of dispatch refers to the commencement of transmission of electronic message. Article 10(1), like Article 15 of the UNCITRAL Model Law on E-Commerce,<sup>(48)</sup> distinguishes between an electronic message sent out of an information system and that sent and received within the same information

(48) Article 15 of the UNCITRAL Model Law on E-Commerce states “(1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator. (2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows: (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs: (i) at the time when the data message enters the designated information system; or (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee; (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee. (3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).”

**Dr. Aymen Masadeh & Dr. Mohammad Bashayreh**

system. The former message is deemed to be dispatched at the time when the originator sends it and cannot stop its transmission. This occurs when the message leaves an information system under the control of the originator and enters an information system outside its control, which can be an intermediary or an information system of the addressee. Obvious examples are interactive forms and e-mails communicated via the Internet. In most cases, the time of dispatch is the time when the sender presses the 'enter' button or clicks the 'submit' button.<sup>(49)</sup>

However, an electronic message sent within the same information system is deemed to be dispatched at the time when it is received. Receipt does not require the addressee's actual awareness of the message, as explained below. An obvious example is the communications via closed networks such as the Intranet.

As for receipt, Article 10 distinguishes between designated electronic address and other electronic addresses.<sup>(50)</sup> An e-mail address can be considered as designated if the offer expressly specifies that it is the address to which acceptance can be sent. The Convention does not provide a specific method of designation. Therefore, it does not matter whether the sender or the addressee has designated the address for sending, or in a negotiated or standard-form contract,<sup>(51)</sup> or by individual rather than public or widespread designation. However, an e-mail address announced to the public on letterhead or other documents may not be considered as designated. Commentary on Article 15 of the UNCITRAL Model Law on E-Commerce provides that the "mere indication of an electronic mail or telecopy address on a letterhead or other document should not be regarded as express designation of one or more information systems."<sup>(52)</sup> A person may use the same e-mail for both personal and business matters. This does not make it undesignated as long as it is used for business affairs. Indeed, it is unclear how a designated e-mail can be de-designated

(49) Christoph Glatt, "Comparative Issues in the Formation of Electronic Contracts" 6 *International Journal of Law and IT*, section 3.3.5.1, (1998).

(50) Similar approach can be found under Article 15 of the United Arab Emirates Federal Electronic Transactions Law.

(51) Most contracts concluded through the Internet are standard forms contracts. See Robert A. Hillman & Jeffrey J. Rachlinski, "Standard-Form Contracting in the Electronic Age", Available at <<http://ssrn.com/abstract=287819>>; See also Assafa Endeshaw, "Web Services and the Law: A Sketch of the Potential Issues" 11 *International Journal of Law and Information Technology* 251, 262, (2003).

(52) UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, commentary on Article 15. Available at <[http://www.uncitral.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf)>.

## **Contemporary Legal Issues of Contract Formation by Online Orders**

especially when it is well known to the generic public as designated address for certain transactions.<sup>(53)</sup> The Convention does not provide an answer to this question. An announcement to the generic public that the e-mail address is not designated anymore may suffice to de-designate it.

Under Article 10 of the Convention, an electronic message sent to a designated electronic address is deemed to be received at the time when it enters the addressee's e-mail box since this is the time when the message becomes capable of being retrieved by the addressee.<sup>(54)</sup> This makes it clear that actual retrieval is not required for an electronic message to be considered received. Indeed, a great deal has been left to prove that the electronic communication has entered the e-mail box of the addressee. If there is no automated message system of receipt-acknowledgement, the addressee can simply delete the electronic message and claim that he has not received the message. Under Article 10, the originator is left with the hassle of proving that the electronic message he sent had entered the e-mail box of the addressee. Therefore, the requirement of acknowledgement of receipt is of vital significance in such a case, as explained below. Furthermore, Article 10 presumes that the addressee's designated electronic address is active. If it is not, the electronic message will not enter his e-mail box and hence the contract will not be made. It is also unclear whether the originator can be sure that the designated electronic address is active. Here, an earlier test e-mail may be helpful.

In cases of undesignated electronic addresses, the electronic message is deemed to be received only when the addressee becomes aware that the message was sent to such an address and it is capable of being retrieved by the addressee. Indeed, under Article 10, the originator is not required to prove the actual retrieval of the message. It avoided the difficulty in proof imposed by Article 15 of the UNCITRAL Model Law on E-Commerce which considers the data message, sent to undesignated information system, to be received at the time when it is retrieved by the addressee. Proving that the addressee had actually retrieved the message is not an easy task.

(53) John D. Gregory, "UNCITRAL Convention on Electronic Contracts" 59 *The Business Lawyer* 313, 334, (2003).

(54) Similarly, Section 15(a-b) of the US Uniform Electronic Transaction Act (UETA) considers the electronic message to be received when it enters the recipient's processing system in a form capable of being processed by the system.

**Dr. Aymen Masadeh & Dr. Mohammad Bashayreh**

---

Article 10 does not deal with the case where the message enters the e-mail box of the addressee but cannot be retrieved due to malfunctioning of the system. The words of the Article make it clear that receipt does not occur till the message becomes capable of being retrieved by the addressee. In the legal systems where acceptance becomes effective on receipt, the contract will not be concluded till the malfunctioning is fixed. In such cases, one may question how the originator will know that the addressee's information system is not working properly. The originator may avoid this situation by requiring acknowledgment of actual receipt and making the effectiveness of the message conditional on such an acknowledgement. The UNCITRAL Model Law on E-Commerce avoids this issue in cases of designated electronic address where the data message is deemed to be received when it enters the information system designated by the addressee.

Article 10 uses the subjective test, under which the originator has to prove that the addressee was actually aware that the message was sent to undesignated electronic address. It could be much easier to prove under the objective test, where it is enough for the originator to prove that the addressee ought to have been aware or had reason to be aware that the message was sent to the undesignated address. Probably, the strictness of the use of the subjective test can be justified on the ground that the addressee must not be required to actually receive business messages to an undesignated electronic address. In any case, parties can always agree that correspondences between them must be sent to specific electronic addresses exclusively. By such an agreement, any electronic communications between the parties sent to other electronic addresses will be with no legal effect.

Article 10 of the Convention, like Article 15 of the UNCITRAL Model Law on E-Commerce, distinguishes between the time of receipt and the time when the message actually reaches its deemed place of receipt, explained below. Time of receipt is the time when the message becomes capable of being retrieved by the addressee. This rule applies regardless of whether the place, where the information system used by the addressee is located, is different from the deemed place of business of the addressee.

## Contemporary Legal Issues of Contract Formation by Online Orders

### 3.2. Place of Dispatch and Receipt of Online Order

Article 10 of the Convention, like Article 15 of the UNCITRAL Model Law on E-Commerce,<sup>(55)</sup> refers to the “place of business” in order to specify the place of dispatch and receipt. Electronic communication is deemed to be dispatched at the originator’s place of business and is received at the addressee’s place of business. Therefore, where a message is sent from a place other than a place of business, the place of dispatch will be decided according to the type of communication used. This will result in that messages, which have been sent from the same place at the same time by the same sender, will be deemed to have been dispatched from different places, depending on whether they are sent electronically or by post or telephone. The same problem exists in cases of receipt. Although this seems unrealistic, it can be said that it suits the case of online communications where the place of dispatch is not apparent.<sup>(56)</sup> Indeed, it is too difficult for the addressee to find out where the online order form was filled and submitted. Thereupon, it was necessary to settle this confusion in reliance on the “place of business” rule.

Place of business is defined by Article (4-h) of the Convention as the “place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.”<sup>(57)</sup> Article 6 provides a number of rules for determining the relevant place of business considered under the Convention. Under this Article, if a party specifies at the time of making the contract the location of his place of business, this place will be considered for determining the dispatch and receipt of electronic message unless it is proved that the party has no business at the

- (55) Article 15(4) of the UNCITRAL Model Law on E-Commerce states “Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph: (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business; (b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.”
- (56) Although most domestic and international legislation are moving towards lifting up the barriers of electronic contracting, paper contracting and electronic contracting will never be identical. The later needs modern rules that suit its peculiar nature. See Juliet M. Moringiello, “Signals, Assent and Internet Contracting” 57 *Rutgers Law Review* 1307, 1340, (2005).
- (57) A place of business will very probably affect matters of jurisdiction over e-contracts; some courts may assume jurisdiction over persons abroad carrying on business online. Shafik Bhalloo, “Jurisdictional Issues in Electronic Commerce Contracts: A Canadian Perspective” 8 *Computer Law Review and Technology Journal*, 225, 244-246, (2004).

**Dr. Aymen Masadeh & Dr. Mohammad Bashayreh**

location specified. In cases of multi-place of business, if the party did not specify his place of business at the time of making the contract, the place of business that has the closest relation to the contract will be considered for determining the place of dispatch and receipt of electronic messages. In the absence of any place of business, the party's habitual residence will be relied upon. There is nothing new in such rules as they can be found under Article 10 of the United Nations Convention on Contracts for the International Sale of Goods.<sup>(58)</sup>

However, the Convention adds two rules pertaining to contemporary issues in the field of electronic contracting. Article 6(4) makes it clear that the location of information system has no effect in determining the place of business of dispatch and receipt. Although time of receipt is usually the time when the message enters the information system of the addressee, the place of receipt is deemed to be the place of business of the addressee and not the location of the information system, i.e. the actual place of receipt. However, there is no chance of applying this rule where the addressed entity has no other place of business. In this case, the place of business will be the place where the information system is located.

The Convention also deals with the issue of whether it is possible that the domain name or electronic mail address, connected to a specific country, can be taken into account in determining the location of the parties. Article 6(5) rules out this possibility. Domain names and electronic addresses may end with letters showing a connection with certain country, such as uk, ca, jo, etc. Other domain names and electronic mail addresses end with letters that have no connection with certain location, such as com, tv, etc. Whether or not such letters have a connection with a certain location has no effect on determining the place of business. This can be understood on the ground that a company based in France may use an information system based in UK. This, of course, does not change the actual place of business of such a company.

(58) Article 10 of the United Nations Convention on Contracts for the International Sale of Goods states "For the purposes of this Convention: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract; (b) if a party does not have a place of business, reference is to be made to his habitual residence."

## **Contemporary Legal Issues of Contract Formation by Online Orders**

### ***4. Acknowledgement of Receipt of Online Order***

An electronic message may include a request for receipt-acknowledgement. Such an acknowledgement may also be required under bilateral or multilateral communication agreements. The main purpose of the acknowledgement is to inform the originator that the message is received. In normal circumstances, Acknowledgement of receipt does not indicate that the addressee has knowledge of the content of the message. The acknowledgement can be requested for the receipt of offer, acceptance, pre-contractual negotiation messages and post-contractual communications.

The Convention says nothing about receipt-acknowledgment unlike the UNCITRAL Model law on E-Commerce which provides thorough regulation for such an acknowledgement, as discussed below. There seems to be no apparent reason why the drafters did not consider regulating it. The issue is left to be dealt with by other laws. Acknowledgement is usually used as a kind of good practice and to reduce the risk of misunderstanding. This is of vital significance in the field of electronic contracting where parties are not in face-to-face negotiations and messages may not reach their destinations due to transmission failure. This does not suggest that such an acknowledgement is not important in cases of pen-on-paper contract. Indeed, electronic acknowledgement requirement is equivalent to the so-called “return receipt requested” in the postal system.

Although the Convention does not provide for receipt-acknowledgment, merchants are expected to require such an acknowledgement whenever it is necessary. However, the Convention could have added a significant value to its application by addressing the legal issues arising out of the use of acknowledgement procedures. For example, the UNCITRAL Model law on E-Commerce does not impose the use of acknowledgement procedures but it does address a number of legal issues that may arise out of the use of acknowledgement procedures.<sup>(59)</sup>

(59) The European E-Commerce Directive adopts another approach by requiring the service provider to issue electronic acknowledgement without undue delay in cases of electronic order. Article 11 of the Directive states that “Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply: - the service provider has to acknowledge the receipt of the recipient’s order without undue delay and by electronic means...”. Under this Article, the effect of acknowledgement is unclear. The contract is made at the time when acceptance becomes effective. If acknowledgement is not made, it is unlikely to hold the contract void for lack of receipt-acknowledgement of acceptance. Perhaps Member States can deal with this issue by imposing

**Dr. Aymen Masadeh & Dr. Mohammad Bashayreh**

Acknowledgement of receipt can be made in various methods. It can be sent electronically by a natural person or by an automated system. Where formation of contract is not conditional on receipt-acknowledgement, performance of contract can also be a kind of acknowledgement. For example, if a software contract is made, the transfer of the software online may constitute both performance and acknowledgement of receipt of acceptance.

Therefore, the legal effect of acknowledgement depends merely on its content and method of communication. Acknowledgement can be used as a confirmation of receipt or as an expression of agreement with the content of a specific electronic message. For example, if submitting an online order form is considered an offer, the contract will be made by a reply indicating the receipt of the form and the approval of its content. This reply is legally considered as an acceptance and a receipt-acknowledgement of the offer. Therefore, it can be noted that acknowledgment is not an acceptance although an acceptance can also be treated as an acknowledgement.<sup>(60)</sup> However, if the submission of an online order form constitutes an acceptance, the receipt-acknowledgement of the order will not be more than a confirmation of the conclusion of contract. In the latter case, the acknowledgement can be used in proof and to reduce the risk of misunderstanding although it has no direct legal effect.

However, one may question whether the electronic message will have any legal effect if it is conditional on receipt of acknowledgement. Article 14(3) of the UNCITRAL Model Law on E-Commerce makes it clear that such a message will have no effect till acknowledgement is received.<sup>(61)</sup> The addressee bears the risk of transmission of the receipt-acknowledgement.

If the electronic message is not made conditional on acknowledgement, one may presume that the message will be effective regardless of whether acknowledgement is made or not. Article 14(4) of UNCITRAL Model Law on E-Commerce provides specific regulation of this case. It states

- 
- certain punishments, e.g. fines, for the lack of such a service. See Christopher T. Poggi "Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation" 41 *Virginia Journal of International Law Association* 224, 271, (2000).
- (60) See the commentary on Section 214 of the UCITA, at p.116. Available at <http://www.law.upenn.edu/bll/ulc/ucita/2002final.htm>.
- (61) Article 14(3) of UNCITRAL Model Law on E-Commerce states "Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received."

## **Contemporary Legal Issues of Contract Formation by Online Orders**

---

Where the originator has not stated that the data message is conditional on receipt of the acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time, the originator: (a) may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time by which the acknowledgement must be received; and (b) if the acknowledgement is not received within the time specified in subparagraph (a), may, upon notice to the addressee, treat the data message as though it had never been sent, or exercise any other rights it may have.

According to Article 14(4), absence of receipt-acknowledgment of electronic message has nothing to do with the legal effect of the message itself. In other words, the formation of contract is not affected by the acknowledgement. Indeed, the addressee will be bound by the contract regardless of whether or not the acknowledgement is given. As for the originator, he may go on with the contract and disregard the request of acknowledgement; alternatively, he may give the addressee an additional period of time within which the acknowledgement must be given. If he chose the latter choice and the addressee did not comply, he could avoid the contract or exercise any other right he may have agreed on with the addressee.

## Conclusions

An online proposition is generally treated as an invitation to negotiate. By filling and submitting an online order form in response to an online proposition, the customer usually makes an offer. This may not be the case where the proposition makes it clear that it is intended to be an offer; here, filling and submitting an online order form will make an acceptance.

The Convention protects, to a certain extent, the users of interactive websites against their own mistakes. A customer who makes an input error can withdraw from the transaction if the other party does not provide an error-correction system. Unfortunately, the Convention says nothing about the nature of error-correction systems. It only requires such a system to give the customer an opportunity to correct input errors. This system should also, it is submitted, give a chance to detect and avoid input errors. Moreover, the Convention does not distinguish between material and immaterial errors. Indeed, a party in error must not be allowed to avoid a contract for immaterial errors. The Convention, it is submitted, should have followed the UNIDROIT Principles of International Commercial Contracts which does not allow avoidance for immaterial mistakes. In addition, the Convention does not determine who will cover the expenses of sending the goods back in cases of avoidance due to an input error. It is submitted that such expenses must be covered by the party in error as he chose to avoid the contract for his own error.

Anyhow, the party in error is not allowed to avoid the contract unless he notifies the other party of such an error as soon as possible after having become aware of the error. By requiring the proof of the actual knowledge of the error, the Convention ignores the objective test in proof. Proving that the party in error could have been aware of the error should suffice. Another problem of proof can be found in cases where the party in error had received software under the electronic contract. If the party wishes to avoid the contract due to his own error, he must return the software. In such cases, it is hard to find out whether the party has retained a copy of the software, especially if the software is downloaded directly online. Nevertheless, it is worth noting that the difficulty in proof should not affect the rightness of the rule.

## **Contemporary Legal Issues of Contract Formation by Online Orders**

---

In determining the time of receipt of an electronic message, e.g. online order, the Convention distinguishes between designated and undesignated addresses. However, the Convention does not state how an address can be designated. A great deal is left to the court or arbitrator to determine whether the address is designated or not. In the normal circumstances, the address must be dealt with as designated when the offer expressly states that responses must be sent to it. Parties are advised to agree on a designated address in the pre-contract negotiations. Although the Convention makes it clear that electronic message is deemed to be received at the time when it becomes capable of being retrieved by the addressee, it does not provide specifically for the case where electronic message cannot be retrieved due to malfunctioning of the system used by the addressee. In this case, the message will not be deemed to be received till it becomes capable of being retrieved, i.e. till the system is fixed. It follows that the originator of the message will carry the risk of the retrieval failure of the message due to the malfunctioning of the system used by the addressee. As for the place of dispatch and receipt, the Convention brings the law into line of reality by ignoring the place of equipment and, instead, relying primarily on the parties' place of business in determining the place of dispatch and receipt.

Electronic messages might be lost due to transmission failure and neither the originators nor the addressees may know that. Acknowledgement of receipt can play a significant role to reduce the risk of misunderstanding that may be caused by the transmission failure. Unfortunately, there is nothing in the Convention regulating such an acknowledgement unlike the UN Model Law on Electronic Commerce, which provides thorough regulations of the use of the acknowledgement of receipt.

To sum up, as the Convention does not cover all issues that may arise in cases of Internet contract, parties may take precaution measures in their contracting process. In electronic contracting by the use of online order forms, parties are advised to take the following recommendations into account:

First: parties are advised to agree on a Letter of Intent stipulating the procedures of formation of electronic contract in order to reduce the risk of misunderstanding of the legal nature of online propositions and orders.

Second: online sellers and service providers should provide instructions on their websites explaining the procedures of formation of electronic contract.

**Dr. Aymen Masadeh & Dr. Mohammad Bashayreh**

---

Third: in making online propositions to provide services or goods, providers should make it clear whether they reserve the right to accept or reject online orders.

Forth: online sellers and service providers should have in place an error-correction system to deal electronically with online orders. Their website should clearly draw the attentions of visitors to the existence of such a system.

Fifth: parties making online orders are advised to take benefit of error-correction systems, if available, since the existence of such systems may affect their ability to avoid the contract.

Sixth: parties may require receipt-acknowledgement for their electronic messages. They may agree expressly that their communications will be with no legal effect if receipt-acknowledgements are not sent in response to them.

## **Contemporary Legal Issues of Contract Formation by Online Orders**

---

### **References:**

1. Adam Ruttenberg & Jack Kerrigan, "Formation of Click Wrap Agreements under Virginia's Uniform Computer Information Transactions Act" 1 *West Virginia Journal of Law & Technology*, (2001).
2. Assafa Endeshaw, "Web Services and the Law: A Sketch of the Potential Issues" 11 *International Journal of Law and Information Technology* 251, (2003).
3. Christina H. Ramberg, "The E-Commerce Directive and Formation of Contract in a Comparative Perspective" 1 *Global Jurist Advances*, Article 3, (2001). Available at <<http://www.bepress.com/gj/advances/vol1/iss2/art3>>.
4. Christoph Glatt, "Comparative Issues in the Formation of Electronic Contracts" 6 *International Journal of Law and IT*, (1998).
5. Christopher T. Poggi "Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation" 41 *Virginia Journal of International Law Association* 224, (2000).
6. Farooq Ahmad, "Electronic Commerce: An Indian Perspective" 9 *International Journal of Law and Information Technology*, 133, (2001).
7. Fred Greguras, Trudy Golobic, Robert Mesa & Rebecca Duncan, "Electronic Commerce: On-line Contract Issues" 452 P. LI. /P. AT. 11. (1996). Available at <[http://www.oikoumene.com/ec\\_contracts.html](http://www.oikoumene.com/ec_contracts.html)>.
8. Gbenga Bamodu, "Information Communications Technology and E-Commerce: Challenges and Opportunities for the Nigerian Legal System and the Judiciary" 2 *The Journal of Information, Law and Technology (JILT)*, (2004). Available at <[http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004\\_2/bamodu/](http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004_2/bamodu/)>.
9. Jennifer E. Hill, "The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods" 2 *Northwestern Journal of Technology and Intellectual Property* 1, (2003).

10. John D. Gregory, “UNCITRAL Convention on Electronic Contracts” 59 *The Business Lawyer* 313, (2003).
11. Juliet M. Moringiello, “Signals, Assent and Internet Contracting” 57 *Rutgers Law Review* 1307, (2005).
12. Khaled Zgool, “Legal Protection of Electronic Commerce” – in Arabic, 29 *Law Journal (Kuwait Univ.)* No.3, Supplement, 169 (2005).
13. Mark E. Budnitz, “Consumer Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?” 16 *Georgia State University Law Review* 741, (2000).
14. Nabeel Soboh, “Consumer Protection in Consumer Transactions” – in Arabic, 29 *Law Journal (Kuwait Univ.)* No.3, supplement, p.134 (2005).
15. Rebecca Ong, “Consumer Based Electronic Commerce: A Comparative Analysis of the Position in Malaysia and Hong Kong” 12 *International Journal of Law and Information Technology* 101, (2004).
16. Robert A. Hillman & Jeffrey J. Rachlinski, "Standard-Form Contracting in the Electronic Age", Available at <<http://ssrn.com/abstract=287819>>.
17. Sergio Maldonado, “Cross-border Formation of Online Contracts” Available at <[http://www.smaldonado.com/marcos/docs/ct\\_form\\_an\\_ww\\_en.html](http://www.smaldonado.com/marcos/docs/ct_form_an_ww_en.html)>.
18. Shafik Bhalloo, “Jurisdictional Issues in Electronic Commerce Contracts: A Canadian Perspective” 8 *Computer Law Review and Technology Journal*, 225, (2004).
19. Skip Sigel, Theo Ling & Joshua Izenberg, ‘The Validity of Webwrap Contracts’ Uniform Law Conference of Canada, available at <<http://www.ulcc.ca/en/cls/index.cfm?sec=4&sub=4i#Footnote1>>.
20. Valerie Watnick, “The Electronic Formation of Contracts and the Common Law ‘Mailbox Rule’” 56 *Baylor Law Review* 175, (2004).

## **Contemporary Legal Issues of Contract Formation by Online Orders**

---

### **Reports:**

1. Report of the Working Group on Electronic Commerce on the Work of its forty-second session 2003, A/CN.9/546.
2. Report of the Working Group on Electronic Commerce on the Work of its forty-four session 2004, A/CN.9/571.

## قضايا قانونية معاصرة في التعاقد عبر مواقع الإنترنت

إعداد

د. أيمن مساعده\* و د. محمد بشايرة\*

### ملخص البحث

صدرت مؤخراً معاهدة الأمم المتحدة المتعلقة باستعمال الوسائل الإلكترونية والتي تهدف إلى إزالة بعض الإشكاليات القانونية الناتجة عن استعمال الوسائل الإلكترونية في التعاقد. تناقش هذه الدراسة مدى نجاعة هذا التطور القانوني من خلال تسليط الأضواء على بعض أهم المشكلات القانونية في التعاقد الإلكتروني، حيث تبدأ بمناقشة إمكانية التعاقد من خلال نماذج الطلب الإلكترونية. كما تسعى كذلك إلى تحديد زمان ومكان المراسلات الإلكترونية لما لهذا الأمر من أهمية في تحديد زمان ومكان انعقاد العقد الإلكتروني. في هذا الشأن، تناقش هذه الدراسة مدى تأثير تحديد مكان المراسلات الإلكترونية بمكان وجود النظام الإلكتروني المستخدم في المراسلات عبر الإنترنت.

وفي إطار الحد من الآثار السلبية الناتجة عن المشكلات الفنية التي تواجه المراسلات عبر الإنترنت تعرض هذه الدراسة لأهمية استعمال رسالة الاستلام الإلكترونية والآثار القانونية الناتجة عن ذلك. أما فيما يتعلق بمعالجة الآثار القانونية الناتجة عن خطأ مستعمل الإنترنت في تعبئة نموذج الطلب الإلكتروني أو الكبس خطأ على مفتاح مخصص لإرسال طلب إلكتروني، تناقش هذه الدراسة مدى إمكانية فسخ العقد أو إنقاصه في مثل هذه الظروف.

تنتهي هذه الدراسة بمجموعة من التوصيات الهادفة إلى مساعدة أطراف العقد الإلكتروني المبرم بواسطة استعمال نماذج الطلب الإلكترونية لتفادي بعض الإشكاليات القانونية من خلال التعرض لها مسبقاً خلال مرحلة التعاقد.

\* أجيّل للنشر بتاريخ ٢٠٠٦/٧/٣١ م  
\* أستاذ مساعد في القانون المدني - كلية القانون - جامعة البرموك.  
\* رئيس قسم القانون الخاص وأستاذ مساعد في القانون التجاري - كلية القانون - جامعة البرموك.