Chapter-3

Formation of Electronic Contracts: Contracts in the Context of Information Technology

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Having delineated the general principles of contract in the previous chapter, in this chapter, the focus will be on the different modes through which electronic contracts (e-contracts) are concluded.

3.1 INTRODUCTION

Technological advancement has had a great influence over societal life. The world has been witnessing various new technological advancements which had an impact on human existence, and which will keep influencing the human existence. In the World Conference on Science\(^1\), it was resolved that, ‘The inherent function of the scientific endeavour is to carry out a comprehensive and thorough inquiry into nature and society leading to new knowledge. This new knowledge provides educational, cultural, and intellectual enrichment, and leads to technological advances and economical benefits. Promoting fundamental and problem oriented research is essential for achieving endogenous development and progress. Governments through national scientific policies, and in acting as catalysts to facilitate interaction and communication between stakeholders should give recognition to the key role of the scientific research in the acquisition of knowledge. Research funded by the private sector has become a crucial factor of socio-economic development but this cannot exclude the need for publicly funded research.’

New communication systems, especially digital technology, have replaced the traditional snail-pace systems of communication. Business communities and consumers are all the time more using computers to transmit and restore information in electronic form. The information technology (IT) has abridged the time and distance factor in transacting business. Nowadays, inflow and outflow of information has become instant and momentary.

One principal contribution of IT is in the field of contract-formation. An agreement between the parties is legally valid if it satisfies the requirements of the law governing its formation. This is evidenced by its (agreement’s) compliance to the

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\(^1\) ‘Science For the 21\textsuperscript{st} Century: A New Commitment’ – Declaration on Science and the Use of Scientific Knowledge, The World Conference on Science Report, 5 (1) Science, Technology, & Society 81 (2000). This Conference was organized by UNESCO in cooperation with the International Council for Science (ILSU) and hosted by the Government of Hungary, 26\textsuperscript{th} June-1\textsuperscript{st} July 1999.

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requirements of the Contract Law. In India, it is S.10 of the Indian Contract Act (ICA) which provides that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. The ICA governs the ways in which contracts are made and executed in India. It governs the manner in which the provisions (terms) in a contract are implemented, and (it) codifies the effect of a breach of contractual provisions. Within the framework of the Contract Act, parties are free to enter into contract on any terms they wish. The ICA also provides for some limiting factors, subject to which contract may be entered into, executed, and the breach of which may be enforced. This Act only provides a general framework of principles which govern formation and discharge of contracts. The rights and duties of parties and terms of agreement are determined by the contracting parties themselves.

Electronic contracts (e-contracts) are born out of the need for speed, convenience and effectiveness. The law has already recognized contracts-formation using facsimile, telex and other similar technology.

One may just envision a contract that an Indian exporter and an English importer wish to enter into. One option is that one party first draws up two copies of the contract, signs them and sends (through postal or courier service) them to the other, who in turn signs both copies and sends one copy back. The other option would be that the two parties meet somewhere and sign the contract. In this age of IT, the whole transaction can be completed in seconds, with both parties simply affixing their electronic signatures to an electronic copy of their contract. There is no need for delayed couriers and additional travelling costs in such a scenario.

3.2 E-COMMERCE BUSINESS MODELS

Electronic commerce (e-commerce), in a very general sense, refers to buying and selling products and services over the internet and the World Wide Web (www). E-commerce, however, in actuality, includes all forms of commercial transactions involving both—organizations and individuals—that are based upon the electronic processing and transmission of data including text, sound, and visual images. In
addition, e-commerce also refers to the effects that the electronic exchange of commercial information may have on the institutions and processes that support and govern commercial activities.

3.2.1 Types of Online Transaction
Online transactions can be recognized in three ways:

3.2.1.1 Business to Customer (B2C)
It is the transaction where a business entity on one side and an individual customer on the other hand conduct business. The expression B2C has been commonly used to refer to a sale by a business enterprise or retailer to a person or ‘consumer’ conducted through the internet. For instance, www.rediff.com which provides facilities for customers to buy goods from the website—is an example of a B2C e-business. In this situation, the website itself serves the purpose of a shop. The B2C is further divided into two major segments: Intangible and Tangible Products.

3.2.1.2 Business to Business (B2B)
It is the type of e-commerce where two business organizations conduct commercial transactions with each other using the internet.

3.2.1.3 Customer to Customer (C2C)
It is the transaction which involves two or more customers with business entity merely providing a web based interface to facilitate the consumer to consumer transaction. The expression C2C generally refers to the sale of a product pertaining to a consumer to another consumer either directly or through an intermediary exclusively dedicated to this activity. One best example of C2C website is www.ebay.com, where any person can buy and sell, and exchange goods and articles using this website. This website provides the web based interface (i.e. the website with its database and other functions) and users can transact freely with each other.

3.3 WHAT IS AN E-CONTRACT
An e-contract is the computerized facilitation or automation of a contract in a cross-organizational business progression. It is the most recent mechanism to govern and facilitate electronic trading relationships between business parties, and is modeled,
specified, executed, enacted, controlled, monitored and deployed (fully or partially) by a software system. Theoretically, an e-contract is very similar to traditional (paper-based) commercial contract. For instance, vendors present their products, prices and terms to prospective buyers; vendees (buyers) mull over their options, negotiate prices and terms (wherever possible), place orders and make payments. Subsequently, the vendors deliver the purchased products/services. Therefore, as the name suggests, an e-contract means a contract formed in electronic form, fully or partially.

An electronic contract is, thus, a species of an enforceable agreement created and signed in electronic form—that is to say, no paper or other hard copies are used. It is not a paper-based contract, but a contract in the electronic form. For example, X makes (writes) an offer on his computer and e-mails it to a business associate; and later, that business associate e-mails it back with an electronic signature indicating acceptance; these e-mails, thereby, give rise to a contract. Similarly, an e-contract can also be in the form of a 'Click to Agree' contract, generally used with downloaded software: the user clicks an 'I Agree' button on a page containing the terms of the software license before the transaction can be completed.

The expressions 'e-contracts' and 'online contracts' are synonymously used; however, it must be noted that e-contract is a broader expression which includes within its ambit 'online contract'. This is because e-contracts may be concluded by exchange of any type of electronic record, like MP3 audio file, Short Message Service (SMS), Multimedia Message Service (MMS), e-mails, etc by means of a mobile phone or similar devices. They are, generally, used to connote contracts (including all their implications) that emerge on account of transactions involving computer networks, and more particularly, real time transactions. The said expressions do not necessarily restrict themselves to a transaction over the internet. Besides the internet, they include transactions involving any form of a computer network.

In an e-contract, all or some of the activities are carried out by electronic means. Thus, one of the advantages of an e-contract is that it overcomes the delays involved
in the manual system and personal biases. This is one reason why most of the web services technologies support the coordination of activities between parties and, thus, shore up the e-contracts.

### 3.4 ESSENTIALS OF AN ELECTRONIC CONTRACT

The fundamental principles of contract law, as discussed in Chapter-2, have been developed over the years through the judicial decisions of the courts. These principles apply to all contracts notwithstanding whether they are formed electronically, orally or through paper based communications. Many of the issues that arise for consideration relate to how these conventional contract law principles will apply to modern forms of technology. As in every other contract, an e-contract also requires the following necessary elements:

1. **Offer**: Like every other case, an offer is to be made to form an e-contract. In several transactions (whether online or conventional), however, the offer is not made directly one-on-one. The consumer 'browses' the available goods and services displayed on the vendor's website and then 'chooses' what he would like to purchase.

2. **Acceptance**: The offer needs to be accepted. The acceptance is more often than not undertaken by the business/ vendor after the offer has been made by the consumer in response to the invitation to treat. The offer is revocable at any point of time before the acceptance is made.

3. **Lawful Consideration**: There has to be lawful consideration. Any agreement formed electronically, to be enforceable by law, must have lawful consideration. For instance, if an auction site facilitates a contract between two parties where one person provides a pornographic film as consideration for purchasing a video camera, then such an agreement is void.

4. **Intention to Create Legal Relations**: There has to be an intention to create legal relations. If there is no intention on the part of the parties to create legal relationships, then no contract is likely to take effect between them. By and large, agreements of a domestic or social nature are not contracts and are, therefore, not enforceable.
5. **Competency of the Parties:** All the parties to the contract must be lawfully competent to enter into contract. Agreements entered into by incompetent persons, such as, minors, lunatics, insolvents, etc are void.

6. **Free Consent:** There must be free and genuine consent. Consent is said to be free when it is not caused by coercion, misrepresentation, undue influence or fraud. To be precise, there must not be any subversion of the will of any party to the contract to enter into such contract. Generally, in online contracts, especially when there is no active real-time interaction between the contracting parties, e.g., between a website and the customer who buys through such a site, the 'click through procedure' ensures free and genuine consent.

7. **Lawful Object:** The object of the contract must be lawful. A contract presupposes lawfulness of the object of contract. For that reason, an agreement for selling narcotic drugs or pornography films online is void.

8. **Certainty and Possibility of Legal Performance:** There must be certainty and possibility of performance. A contract, to be enforceable, should not be vague or uncertain or ambiguous; and there must be possibility of its performance. A contract, which is impossible to perform, is void, e.g., where a website promises to sell land on the moon. Similarly, an agreement, the meaning of which is not certain or capable of being made certain is void.

### 3.5 THE WAYS IN WHICH AN ONLINE CONTRACT CAN BE CONCLUDED

The advent of the internet as a means of facilitating contract formation does not, at first blush, present a situation different from that applicable to a facsimile or telex. An e-contract may be created either through an exchange of e-mails or by completion of a document on an internet web-site which is submitted to another party electronically. There are three broad classes of subject-matter for e-contracts:

1. **Sale of physical goods:** Goods are ordered over the internet with payment via the internet, but delivery occurs in the usual way;
2. **Sale of digitized products**: Goods, such as software, can be ordered, paid for and delivered online; and

3. **Supply of services**: Examples of this category include electronic banking, sale of shares, financial advice, or consumer advice.

While it may be possible to view these methods as presenting a modern dimension to the accepted methods of contract formation rather than requiring any particular changes to the law, the electronic medium presents some particular issues arising from their electronic form. There are various ways in which online contracts can be concluded. The important ones are as follows:

1. **Contract Formation through Electronic Communications** (such as, e-mails): The simplest e-contract is concluded by the exchange of text documents via electronic communications such as e-mail. Offers and acceptances can be exchanged totally by e-mails, or can be combined with paper documents, faxes, telephonic discussions, etc.

2. **By Acceptance of Orders Entered/ Placed on E-Commerce Websites**: The vendor/ supplier can offer goods or services (such as, air tickets, software, etc) through his website. The consumer, in such cases, places an order by completing and transmitting the order-form provided on the website. The merchandise may be physically delivered later (e.g, in case of outfits, music CDs, etc) or be immediately delivered electronically (e.g., in case of e-tickets, software, etc).

3. **Online Agreements**: In some cases, users are required to accept an online agreement in order to be able to avail of the services e.g. clicking on 'I accept' while installing software or clicking on 'I agree' while signing up for an e-mail account.

4. **The Electronic Data Interchange (EDI)**: It is the inter-process of communication of business information in a standardized electronic
form. That is, they are contracts used in trade transactions which enable the transfer of data from one computer to another in such a way that each transaction in the trading cycle (for example, commencing from the receipt of an order from an overseas buyer, through the preparation and lodgment of export and other official documents, leading eventually to the shipment of the goods) can be processed with virtually no paperwork. In this case, the data is formatted by means of standard protocols, so that it can be implemented directly by the receiving computer. EDI is, frequently, used to transmit standard purchase orders, acceptances, invoices, and other records, and thus, reduces paperwork and the potential for human errors. In this type of contracts, in contrast to the above methods, there is an exchange of information and completion of contracts between two computers and not an individual and a computer. The conventional fore-runner of EDI was the postal service.

5. Through Electronic Agents:

It is possible for computer users to instruct the computer to carry out transactions robotically. For instance, in today’s supermarket, the computer updates its inventory as items are scanned for sale. When the stock of an item falls to a predetermined level, the computer is programmed, without human involvement, to contact the computer of the supplier and place an order for replacement stock. The supplier’s computer, exclusive of human intervention, accepts the order and the next morning automatically prints out worksheets and delivery sheets for the supply and transport staff.

These electronic agents are programmed by and with the authority of the purchaser and supplier. The legal status of electronic agents has not been clarified by the courts, but the most common view is that like any other piece of equipment under the control of the owner, the

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owner accepts responsibility. The computer is a tool programmed by
or with a person’s authority to put into operation their intention to
make or accept contractual offers.

According to Russell and Norving, ‘An agent is anything that can be
viewed as perceiving its environment through sensors and acting upon
that environment through effectors. A human agent has eyes, ears, and
other organs for sensors; and hands, legs, mouth and other body parts
for effectors. A robotic agent substitutes cameras and infrared range
finders for sensors and various motors for effectors. A software agent
has encoded bit strings as its precepts and actions.’ Wooldridge and
Jennings define an electronic agent as, ‘a hardware or software-based
computer system that enjoys the following properties: autonomy
(capacity to act without the direct intervention of humans or others),
the capacity to interact with agents or humans, the capacity to
perceive their external environment and to respond to changes that are
coming from it, and the capacity to exhibit goal-directed behaviour by
taking the initiative.’

Such electronic agents exhibit characteristics which are very close to
human characteristics, such as, intelligence, autonomy and pro-
activeness. The idea of having intelligent systems—to assist human
beings with routine tasks, to shift through enormous amount of
information available to a user and select only that which is
relevant—is not novel and a lot of work and results have already been
achieved in the field of artificial intelligence (‘AI’).

The E-Commerce Directive does not take in hand the issue of
automated transaction made through electronic agents. The

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4 For an example of a legislative provision, see Uniform Electronic Transactions Act (US) s14.
explanatory notes of the proposal of the E-Commerce Directive state that Member States should refrain from preventing the use of certain electronic systems such as intelligent electronic agents for making a contract. But, the final version makes no reference to electronic agents in the main text or in the recital. The deletion of the proposed text furnishes a sign of the EU’s failure to respond to the tremendous growth of e-commerce.7 It is also not in consonance with the preamble to the Directive, which states that the purpose of the Directive is to stimulate economic growth, competitiveness and investment by removing many legal obstacles to the internal market in online provision of electronic commerce services. However, the exclusion of the provision giving legal recognition to electronic agents is a step backward and a failure to recognize the role of electronic agents in fostering the development of e-commerce such as, lower transaction costs, facilitate technology and adherence to international conventions.8

The United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (hereinafter referred to as the ‘UNCUECIC’) contains provisions dealing with issues such as determining a party’s location in an electronic environment; the time and place of dispatch and receipt of electronic communications and the use of automated message systems for contract formation. Art 12 of the UNCUECIC, which deals with use of automated message systems for contract formation, states, ‘A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, 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

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The objective behind the adoption of the uniform rules was to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, and to enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes.

The Uniform Electronic Transactions Act (UETA) expressly recognizes that an electronic agent may operate autonomously, and contemplates contracts formed through the interaction of electronic agents and those formed by the interaction of electronic agents and individuals.\(^9\) Besides, the Uniform Computer Information Transaction Act (UCITA) also has provisions supporting the ability of electronic agents to make binding contracts.

### 3.6 Offer and Acceptance Rules Applicable to E-Contracts

The requirement of 'offer and acceptance' in contract formation with new modes of communication is as much essential as it is essential in contract formation through postal communication. In the twentieth and twenty-first centuries, these new modes embraced telex, fax, e-mail and the internet. The application of the offer and acceptance rules to these more recent electronic technologies will go on with to operate effectively. There are nonetheless a number of unanswered questions in relation to the application of the offer and acceptance rules to these new means of communication, and in this Chapter the researcher sets out what he thinks these questions are and tries to find answers to them.

The practical importance of the offer and acceptance rules is beyond question. There are quite a few reasons why are the offer and acceptance rules important in practice. Firstly, the offer and acceptance rules provide the answer to the question whether or not a contract is formed, at all; secondly, they also tell us when a contract is formed;

\(^9\) UETA § 14.
and thirdly, they tell us where the contract is formed. The answers to these questions decide different issues, such as, 'whether an online retailer is bound by an apparent agreement to sell goods at a significant undervalue arising out of a pricing error on its website'

10, the precise moment at which an offer is held to have been communicated will decide 'when, the period within which, the offer must be accepted begins', 'the place where a contract is formed' may still be of importance for the purposes of 'jurisdiction', so on and so forth.

3.6.1 Contract Formation through Telex, Telephone, Fax, etc

For the rules applicable to the formation of contracts by telex and telephone, it is pertinent to discuss, examine and analyse some important English and Indian judgments, such as, Entores Ltd v Miles Far East Corp11, Brinkibon v Stahag Stahl mbH,12 and Bhagwandas Goverdhandas Kedia v M/s Girdharilal Parshottamdas & Co13.

3.6.1.1 Telex

In Entores, Entores (the plaintiff) was a London based trading company that sent an offer by telex for buying copper cathodes from a company based in Amsterdam. The Dutch company sent the acceptance by telex. The contract was not fulfilled, and consequently, Entores attempted to sue the owner of the Dutch company for damages. The Court of Appeal had to decide, for the purpose of determining jurisdiction, whether the contract had been made in the Netherlands—where the acceptance had been sent, or in England—where the acceptance had been received. It was held that the postal rule did not apply, and, hence, the contract had been made in England, where the acceptance had been received. At the outset of his judgment, Denning LJ distinguished contracts made by telephone and telex from contracts made by post on the grounds that the former were 'virtually instantaneous and stand on a different footing', and made the following remarkable observations:14

11 [1955] 2 QB 327 (CA).
13 AIR 1966, 543; 1966 SCR (1) 656.
14 [1955] 2 QB 327 (CA), at 332-34
'When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by Telex. Communications by these means are virtually instantaneous and stand on a different footing.

The problem can only be solved by going in stages. Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound. I do not agree with the observations of Mr Justice Hill in *Newcomb v De Roos* [(1859) 2, Ellis & Ellis at page 275].

Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes "dead" so that I do not hear his words of acceptance. There is no contract at that moment. The other man may not know the precise moment when the line failed. But he will know that the telephone conversation was abruptly broken off: because people usually say something to signify the end of the conversation. If he wishes to make a contract, he must therefore get through again so as to make sure that I heard. Suppose next that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contract is made, not on the first time when I do not hear, but only the second time when I do hear. If he does not repeat it, there is no contract. The contract is only complete when I have his answer accepting the offer.

Lastly take the Telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send his complete sentence. But it may happen that the line does not go dead, yet the message does not get through to London. Thus the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the ink at the London end
fails or something of that kind. In that case the Manchester clerk will not know of the failure but the London clerk will know of it and will immediately send back a message “not receiving”. Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until his message is received that the contract is complete.

In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. But suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated: or the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated: so that the man who sends an acceptance reasonably believes that his message has been received. The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance—yet the sender of it reasonably believes it has got home when it has not—then I think there is no contract.

My conclusion is that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror; and the contract is made at the place where the acceptance is received.’

From Entores, the rule, which is followed elsewhere also (including India), which emerges for instantaneous communications is that the contract is only complete ‘when the acceptance is received by the offeror’. Birkett LJ also concurred with Denning, LJ, adding that the ordinary rule of law, ‘to which the special considerations governing contracts by post\textsuperscript{15} were exceptions, was that the acceptance of an offer must be communicated to the offeror. Lastly, Parker LJ said that there was no need for the postal rule where the parties were in each other’s presence or where, though separated in space, communication between them was, ‘in effect, instantaneous’ and that although the dispatch and receipt of a message by

\textsuperscript{15} [1955] 2 QB 327 (CA), at 335
telex was ‘not completely instantaneous’, the parties were ‘to all intents and purposes in each other’s presence’ and there was no reason to depart from the general rule.\textsuperscript{16}

The verdict of the Court in \textit{Entores} not to apply the postal rule to telex communications was upheld by the House of Lords in the \textit{Brinkibon} case. This case involved a contract for the sale of steel bars between an English company (Brinkibon), the buyer, and an Austrian company, the seller (Stahag). The buyer sent its acceptance to the offer of the seller by telex to Vienna. The contract was not performed, therefore, the buyer wished to sue the seller. The buyer wanted to issue a writ against the seller and applied to serve an out of jurisdiction party. It could only be able to do so if the contract had been formed in England. The question, at issue, was, therefore, ‘where the contract was made’. The House of Lords decided that the contract was formed in Vienna. It accepted the principle in \textit{Entores v Miles Far East Co} where in the case of instantaneous communication, which includes telex, the formation of contract generally occurs at the place where the acceptance is received. The House of Lords again accentuated that the general rule required that the acceptance be communicated,\textsuperscript{17} with Lord Wilberforce describing the postal rule as ‘an exception applying to non-instantaneous communication at a distance’.\textsuperscript{18}

Although Lord Wilberforce laid emphasis on the fact that the involvement of agents or other intermediaries and error or default at the recipient’s end might complicate matters, yet in ‘the simple case of instantaneous communication between principals’,\textsuperscript{19} the general rule applied. Lord Brandon observed that the postal rule was based on considerations of commercial expediency which applied where there was ‘bound to be a substantial interval between the time when the acceptance is sent and the time when it is received’, but not where the means of communication was instantaneous in nature.\textsuperscript{20}

\textsuperscript{16} \textit{Ibid} at 337.
\textsuperscript{17} [1983] 2 AC 34 (HL), at 41 (Lord Wilberforce), at 48 (Lord Brandon).
\textsuperscript{18} \textit{Ibid}, at 41-2
\textsuperscript{19} \textit{Ibid}, at 42.
\textsuperscript{20} \textit{Ibid}, at 48.
8.1.2 Telephone

Bhagwandas Goverdhandas Kedia v M/s Girdharilal Parshottamdas & Co21—A Case Study: It is an important and relevant Indian case on the subject. In this case, the respondents-plaintiffs (Girdharilal Parshottamdas & Co) entered into a contract with the appellants-defendants (Bhagwandas Goverdhandas Kedia) by long-distance telephone. The proposal was spoken by the respondent at Ahmedabad and the acceptance was spoken by the appellants at Khamgaon.

On the plea that the defendants had failed to supply cotton seed cake which they had agreed to supply under an oral contract negotiated between the parties by conversation on long distance telephone, the plaintiffs sued the defendants at City Civil Court, Ahmedabad. The plaintiffs submitted that the cause of action for the suit arose at Ahmedabad, as the defendants had offered to sell cotton seed cake which was accepted by the plaintiffs at Ahmedabad, and also because the defendants were under the contract bound to supply the goods at Ahmedabad, and the defendants were to received payment for the goods through a Bank of Ahmedabad. The defendants, on the other hand, contended that the plaintiffs had by a message communicated by telephone offered to buy cotton seed cake, and they (the defendants) had accepted the offer at Khamgaon; that, under the contract, delivery of the goods contracted for was to be made at Khamgaon; and that price was also to be paid at Khamgaon and, therefore, no part of the cause of action for the suit had arisen within the territorial jurisdiction of the City Civil Court Ahmedabad.

On the issue of jurisdiction, the trial Court found that the Plaintiffs had made an offer from Ahmedabad by long distance telephone to the defendants to purchase the goods and that the defendants had accepted the offer at Khamgaon; that the goods were under the contract to be delivered at Khamgaon and that payment was also to be made at Khamgaon. The contract was, in the view of the Court, to be performed at Khamgaon, and because the offer was made from Ahmedabad to purchase goods, the Court at Ahmedabad could not be invested with jurisdiction to entertain the suit. But, the Court held that when a contract is made by conversation on telephone, the place where acceptance of offer is intimated to the offeror, is the place where the contract

is made, and therefore the Civil Court at Ahmedabad had jurisdiction to try the suit. A revision application was filed by the defendants against the order, directing the suit to proceed on the merits, was rejected in limine by the High Court of Gujarat. Against the order of the High Court of Gujarat, an appeal was preferred to the Supreme Court of India.

In the Supreme Court, a majority of judges [Hidayatullah, J (afterwards CJ) (dissenting)] preferred to endorse and followed the rule laid down in Enotres case, and found no reason for extending the postal rule to telephonic communications. The Court upheld the judgment of the trial Court which took the view that a part of the cause of action arose within the jurisdiction of the City Civil Court Ahmedabad, where acceptance was communicated by telephone to the plaintiffs. The important findings of the Supreme Court may be summarized as follows:

1. By a long and uniform course of decisions the rule is well-settled that mere making of an offer does not form part of the cause of action for damages for breach of contract which has resulted from acceptance of the offer. Ordinarily, it is the acceptance of offer and intimation of that acceptance which results in a contract. The intimation must be by some external manifestation which the law regards as sufficient.

2. On the general rule that a contract is concluded when an offer is accepted and acceptance is intimated to the offerer, an exception is engrafted based on grounds of convenience which has the merit not of logic or principle in support, but of long acceptance by judicial decision. The exception may be summarized as follows: When by agreement, course of contract or usage of trade, acceptance by post or telegram is authorized, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission by the offeree (by posting a letter or dispatching a telegram).

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22 See also, Rickmers Verwaltung GMBH v Indian Oil Corporation Ltd, AIR 1999 SC 504: (1999) 1 SCC 1 at p. 9.
3. The rule that applies to acceptance by post of telegram does not, however, apply to contracts made by telephone. The rule which applies to contracts by telephone is the ordinary rule which regards a contract as complete only when acceptance is intimated to the purchaser. In the case of a telephonic conversation in a sense the parties are in the presence of each other, each party is able to hear the voice of the other. Intervention of an electrical impulse which results in the instantaneous communication of messages from a distance does not alter the nature of the conversation so as to make it analogous to that of an offer and acceptance through post or by telegram. It is true that the Posts and Telegraphs Department has general control over communication by telephone and especially over long distance telephones, but that is not a ground for assuming that the analogy of a contract made by post will govern this mode of making contracts. In the case of correspondence by post or telegraphic communication, a third agency intervenes and without the effective intervention of that third agency, letters or messages cannot be transmitted. In the case of a conversation by telephone, once connection is established there is in the normal course no further intervention of another agency. Parties holding conversation on the telephone are unable to see each other; they are also physically separated in space, but they are in the hearing of each other by the aid of a mechanical contrivance which makes the voice of one heard by the other instantaneously and communication does not depend on external agency.

4. The draftsmen of the Indian Contract Act did not envisage use of the telephone as a means of conversation between parties separated in space and could not have intended to make any rule in that behalf.

Justice (afterwards CJ) Hidayatullah expressed his dissenting opinion, which may be summarized as follows:

1. In the Entores case, Lord Denning, no doubt, held that acceptance given by telephone was governed by the principles applicable to oral acceptance where the parties were in the presence of each other and that the analogy of letters
sent by post could not be applied. But the Court of Appeal was not called
upon to construe a written law which brings in the inflexibility of its own
language. It was not required to construe the words found in S. 4 of the Indian
Contract Act, namely, ‘The communication of an acceptance is complete as
against the proposer when it is put in a course of transmission to him, so as to
be out of the power of the acceptor.’

2. The law under consideration was framed at a time when telephone, wireless,
Telstar and Early Bird were not contemplated. If time has marched and
inventions have made it easy to communicate instantaneously over long
distance and the language of our law does not fit the new conditions, it can be
modified to reject the old principles. But it is not possible to go against the
language by accepting an interpretation given without considering the
language of our Act.

3. The language of S. 4 of the Indian Contract Act covers a case of
communication over the telephone. Our Act does not provide separately for
post, telegraph, telephone, or wireless. Some of these were unknown in 1872
and no attempt has been made to modify the law. It may be presumed that the
language has been considered adequate to cover cases of these new
inventions. It is possible today not only to speak on the telephone but to
record the spoken words on a tape and it is easy to prove that a particular
conversation took place. Telephones now have television added to them. The
rule about lost letters of acceptance was made out of expediency because it
was easier in commercial circles to prove the dispatch of letters but very
difficult to disprove a statement that the letter was not received.

4. Where the acceptance on telephone is not heard on account of mechanical
defects there may be difficulty in determining whether at all a contract
results. But where the speech is fully heard and understood there is a binding
contract, and in such a case the only question is regarding ‘the place where
the contract can be said to have taken place’. In the present case, both sides
admitted that the acceptance was clearly heard. It was obvious that the word
of acceptance was spoken at Khamgaon and the moment the acceptor spoke his acceptance he put it in course of transmission to the proposer beyond his recall. He could not revoke acceptance thereafter. It may be that the gap of time was so short that one can say that the speech was heard instantaneously, but if we are to put new inventions into the frame of our statutory law, we are bound to say that the acceptor by speaking into the telephone put his acceptance in the resource of transmission to the proposer.

Despite some soundness in the judgment of Justice Hidayatullah, the majority view of the Supreme Court appears to be more logical and reasonable. The application of this ordinary rule of law to contract settled on telephone is in no way inconsistent with the provisions of the Contract Act or with the principles of natural justice, equity and good conscience.24

3.6.1.3 Fax

Fax messages seem to occupy an intermediate position between postal and instantaneous communications.25 As regards faxes, it is submitted that the acceptance should be valid unless the offeree knows or should have reasonably known that it has not got through properly. If the fax has not got through at all, the sender will know this at once, so can he reasonably be expected to resend.26

In JSC Zestafoni v Ronly Holdings Ltd27, it has been held that a fax is a form of instantaneous communication wherein if a message has not been received, the sender is informed by his machine. Most machines also indicate to the sender whether the message has been effectively, as distinct from only partly, received. Accordingly, by analogy with telegrams and telex messages,28 the agreement to appoint a person (in this case, Mr Kinnell) as sole arbitrator was made when the fax was received in England. That (England) was the place where the contract was made.

26 JSC Zestafoni G Nikoladze Ferrvalloy Plant v Ronly Holdings Ltd [2004] EWHC 245 (Comm), [2004] Lloyd’s Rep 335 (QB)
Some noteworthy points/ principles emerge from *Entores, Bhagwandas, Brinkibon, and JSC Zestafoni*. They are:

1. Firstly, the general rule ‘requiring communication of acceptance’ still holds good, and has always been emphasized upon. The postal rule presents a special exception to the general rule, and is justified by particular considerations of commercial convenience.

2. Secondly, the postal rule is held not to apply where the means of communication is ‘instantaneous’, with this concept being interpreted broadly, to include a mode of communication which was described as ‘virtually’ and ‘not completely’ instantaneous—such as telex and telephone. In this regard, Lord Brandon’s description of the postal rule (in *Brinkibon*) ‘as based on considerations applicable where there is bound to be a substantial delay between the sending and the receipt of the acceptance’ is worthy of note.

3. Thirdly, some emphasis is attached to the fact that in the case of a telex, it is more likely that the offeree will be able to tell that his attempt to communicate has failed than that the offeror will be in a position to tell that there has been an unsuccessful attempt to communicate with him.

### 3.6.2 Contract Formation through E-Mail

Since the basic structure of e-mail communication is similar to that of older methods of communication—such as the post—the extension of the offer and acceptance model to e-mail should not pose too many difficulties. The principal issues such an extension seems to raise are as follows: (i) whether the postal rule applies to e-mail; (ii) if not, when exactly an e-mail acceptance takes effect; and (iii) what the position

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29 See, Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford: Oxford University Press, 2008), para 1.53: 'A contract concluded by an exchange of emails is not substantially different from a contract concluded by an exchange of letters, the fact that the parties communicate via computer technology rather than by another method of communication changes neither the fundamentals of the legal relationship nor the legal issues to which it gives rise.'
When looking at these questions/ issues, it has to be borne in mind that any rule(s) that emerge will represent only the default position, and that an offeror generally has the power to control the effectiveness of any communication of acceptance.

### 3.6.2.1 Issue-1: Should the Postal Rule Apply to E-mail?

Since, apparently, there are some similarities between an electronic mail and a mail delivered by post, it has been argued that this ‘postal rule’ should be extended to e-mail, with the result that an e-mail acceptance would be effective when sent, and the contract formed then and there. However, such an extension of the postal rule appears highly unlikely and the arguments against it overwhelming.

It is worth noting that since the introduction of the postal rule in the nineteenth century, it has been extended to only one other form of communication, the telegraph. Far from extending the rule, the courts have tended to limit its scope, both by developing exceptions to the operation of the rule in the postal context, and by refusing to extend its application to faster modes of communication, such as telex and telephone.

Moreover, the leading English cases, such as, *Entores Ltd v Miles Far East Corp* and *Brinkibon v Stahag Stahl mbH*, on the application of the rule to other technologies, provide little support for the extension of the rule to e-mail.

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31 See e.g., Paul Fasciano, ‘Internet Electronic Mail: a Last Bastion for the Mailbox Rule’ (1997) 25 *Hofstra L Rev* 971; and Valerie Watnick, ‘The Electronic Formation of Contracts and the Common Law “Mailbox Rule”’ (2004) 56 *Baylor L. Rev* 175. Paul Fasciano, in particular, puts forth very considered arguments for the application of the postal rule to email, but the significance of his analysis for the present discussion is limited by the outdated assumption he makes (at 1001) about the speed of e-mail transmission (‘it will typically take minutes, hours, or in some cases, days’) and by the fact that the US Restatement. Second, Contracts (1981) §64 limits the application of the alternative ‘receipt rule’ to instances to ‘substantially instantaneous two-way communication’, which he interprets as requiring that there must be the possibility of interaction between the two parties, allowing each to ensure that there has been understanding by the other. More importantly, as it is known, this is not a condition of the application of the ‘receipt rule’ under the English law.

32 See, Simone Hill, ‘Flogging a Dead Horse—The Postal Acceptance Rule and Email’ (2001) 17 *Journal of Contract Law* 151.

33 See, *Cowan v O’Connor* (1888) 20 QBD 640 (QB).

34 See, e.g., *Howell Securities Ltd v Hughes* [1974] 1 WLR 155 (CA) 161 (Lawton LJ) (the rule probably does not operate if its application would produce ‘manifest inconvenience and absurdity’).

35 [1955] 2 QB 327 (CA).
Although it is sometimes argued that e-mails are non-instantaneous, for they usually pass through various servers, routers and internet service providers before reaching their destination\(^{37}\); yet telephone calls and faxes may also pass through a number of different exchanges, and, more so, it is not clear why the complexity of the transmission process should be thought to determine whether or not the transmission is 'instantaneous'. In the same way, although it is sometimes argued that e-mail is not instantaneous because e-mail messages sent over the internet are broken into smaller 'packets' of information which are sent along different routes to their destination\(^{38}\); yet again, in these cases also, it is not clear why this is thought to be relevant to whether or not they are 'instantaneous'.

Commentators sometimes argue that the postal rule should apply to e-mail because the sender of an e-mail may not know whether or not the e-mail has been received; but the same is true of the sender of a telex message\(^{39}\), and in the *Entores* case, Denning LJ expressed the opinion that where the offeror, through no fault of his own, did not receive a telex acceptance, and yet the offeree reasonably believed that it had got through, there would be no contract.

Since e-mail is also 'virtually instantaneous', the implications for e-mail appear clear. As 'any delay in the electronic relaying of an e-mail message is now infinitesimal'\(^{40}\)—the general rule requiring communication of the acceptance should be relevant and applicable. Furthermore, the sender of an e-mail is more likely, than the recipient, to be aware that it has not arrived, for in most cases he will receive a message telling him that there is a problem. He is, for that reason, in a very different position from the sender of a letter, who will rarely have any indication that it has gone astray. These considerations are armoured by the subsequent classification of fax transmissions as an instantaneous form of communication not subject to the

\(^{36}\)[1983] 2 AC 34 (HL).
\(^{39}\) Donald Nolan, supra, n 30, at 67.
\(^{40}\) Simone Hill, 'Flogging a Dead Horse—The Postal Acceptance Rule and Email' (2001) 17 *Journal of Contract Law* 159.
postal rule,\textsuperscript{41} despite the fact that they are subject to short delays similar to those involved in the sending of e-mails. All things considered, it seems clear that e-mails resemble more the class of communications to which the postal rule does not apply than the class to which it does.\textsuperscript{42}

A further argument against the extension of the postal rule to e-mail is the fact that the rule (postal rule) itself is unpopular, and the justification for it obscure.\textsuperscript{43} In a report published in 1993, the Scottish Law Commission said that the postal rule 'gives rise to well-recognised difficulties', and that the law would be much more coherent if there were only one rule for all means of communication.\textsuperscript{44} All the consultees who had expressed an opinion on the matter supported the abolition of the postal rule, which the Commission recommended be replaced by a rule requiring that the acceptance reach the offeror. It follows that even if the analogy between the post and e-mail communication were thought to be close, there would be little justification for extending the rule to the new modes of communication.

In the light of these considerations, it is not surprising that the majority of commentators have come down in opposition to the application of the postal rule to e-mail,\textsuperscript{45} and it seems sensible to conclude that to be effective an e-mailed acceptance must be received by the offeror.

\textsuperscript{41} JSC Zestafon v Ronly Holdings Ltd [2004] EWHC 245 (Comm), [2004] Lloyd’s Rep 335 (QB)

\textsuperscript{42} John Dickie, 'When and Where are Electronic Contracts Concluded?' (1998) 49 NILQ 332, 332. See also, Jonathan Hill, Cross-Border Consumer Contracts, Oxford University Press, Oxford, 2008, para 1.61 ('[A] contract concluded by e-mail has much more in common with a contract concluded by telephone than with a contract concluded by post') \textit{supra}, n 4, para 1.61 ('[A] contract concluded by e-mail has much more in common with a contract concluded by telephone than with a contract concluded by post')

\textsuperscript{43} Donald Nolan, \textit{supra}, n 30, at, 68


3.6.2.2 Issue-2: When Exactly is an E-mail Acceptance Said to be Received by the Offeror?

Once it is evident that the postal rule does not apply to e-mail acceptances, it might be thought that there is little more to say; to be precise, the acceptance must be received by the offeror, and that is that. However, the position is not so simple, as there are a number of different points of time at which it could be said that the offeror has ‘received’ an e-mail. The three possibilities, the researcher would like to consider, are the following:\(^\text{46}\) (1) when the e-mail is read by the offeror; (2) when the e-mail arrives on the server which manages the offeror’s e-mail; and (3) when the e-mail ought reasonably to have come to the offeror’s attention.

Option one (‘when the e-mail is read by the offeror’) is not workable because such a rule would give rise to evidentiary problems, since unless an acknowledgement is sent it is difficult to prove when a particular e-mail was read. Such information is generally not being recorded by e-mail software, and therefore, it would be unfair on the offeree because it would seem to give the offeror the power to nullify the acceptance by deciding not to read it, or to delay its taking effect by putting off reading it.

Option two (‘when the e-mail arrives on the offeror’s e-mail server’) is much more workable. The moment at which the e-mail arrives on the offeror’s email server is recorded in the email itself, so this option provides the greatest clarity and raises only few evidential difficulties. Although it will mean that the offeror may be bound before he realizes, or should have realized, that he is; the postal rule shows that in itself that is not a fatal objection as far as English law is concerned, and since (all being well) he will not be bound until he has at least had an opportunity to read the e-mail, any injustice to him is likely to be minimal.\(^\text{47}\) Moreover, it is open to the offeror to stipulate that an acceptance is not effective until it is read or acknowledged by him.


\(^{46}\) Donald Nolan, \textit{supra}, n 30, at 70.

\(^{47}\) \textit{Ibid}, at 71.
if he so wishes. This option also has the advantage of being compatible with a number of established rules relating to the ‘receipt’ of contractual communications in circumstances where the postal rule does not apply. An example is Article 24 of the UN Convention on Contracts for the International Sale of Goods, which states that an offer or acceptance ‘reaches’ the addressee when ‘it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address’, and which has been interpreted as meaning that an electronic communication ‘reaches’ the addressee when it has entered his server, provided the addressee has expressly or impliedly consented to receiving electronic communications of that type, in that format, and to that address. Similarly, the Second US Restatement of Contract states:

A written revocation, rejection, or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him.

Further, there is support for option two in some of the model legislation relating to electronic commerce, for instance, the UN Model Law on Electronic Commerce, and the US Uniform Computer Information Transaction Act, and the Information Technology Act 2000 (of India).

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48 See also, the UNIDROIT Principles of International Commercial Contracts, Art 1.9 (3); and the Commission for European Contract Law’s Principles of European Contract Law, Art 1.303 (3).
49 CISG Advisory Council Opinion no 1, Electronic Communications under CISG (15 August 2003), Opinion on Art. 24. See also, the Advisory Council’s Opinion on Art 18 (2) (‘An acceptance becomes effective when an electronic indication of assent has entered the offeror’s server.’).
50 Restatement, Second, Contracts (1981) §68. See also, the Uniform Commercial Code, §1-201(26) (‘A person “receives” a notice … when (a) it comes to his attention; or (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications’); and Paul Fasciano, ‘Internet Electronic Mail: a Last Bastion for the Mailbox Rule’ (1997) 25 Hofstra L Rev 997. (‘Receipt may be proper where a letter… is placed in the addressee’s mailbox’).
51 See, Art 15(2) which lays down a default rule that where the addressee has designated when the data message enters the designated information system for the purpose of receiving data messages, receipt occurs at the time when the data message enters the designated information system (an ‘information system’ being defined in Art 2(1) as a system for generating, sending, receiving, storing or otherwise processing data messages’). This provision was transposed into Australian law by s. 14 of the Electronic Transactions Act 1999 (Cth), S 14(3).
52 See, s 102 (a) (52) (B) (II), which defines ‘receipt’, in the case of an electronic notice, as ‘coming into existence in an information processing system or at an address in that system in a form capable of being processed by or perceived from a system of that type by a recipient’.
53 S 15 of the IT Act which deals with ‘time and place of dispatch and receipt of electronic record’
A variation of option two would be to say that an e-mail acceptance takes effect as soon as the addressee is able to access it. This would have the advantage of being consistent with Article 10(2) of the UN Convention on the Use of Electronic Communications in International Contracts 2005, which provides that 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 he has designated—this being presumed to happen when it reaches that address—and with the Electronic Commerce (EC Directive) Regulations 2002, under which acknowledgements of receipt of orders sent by web-based service providers are deemed to be received when the persons to whom they are sent are able to access them. However, it is submitted that this variation ought not to be adopted on account of at least two reasons: firstly, it would introduce a degree of uncertainty into option two, since there is scope for disagreement as to what it means to say that someone is 'able to access' an e-mail; and secondly, the only situations where this variation might make a difference would seem to be those where the e-mail has arrived on the offeree's e-mail server, but he is unable to access it because of a problem with his computer, the server, or the connection between the two; and that, in such cases, it seems fair that the offeree should nonetheless be bound, since the e-mail is within, what might be said, his 'sphere of control'.

Option three ('when the e-mail ought reasonable to have come to the offeror's attention') is also a conceivable solution to the 'receipt' issue; however, it is also not free from difficulty. The disadvantage of making the effectiveness of an e-mail acceptance at the time when it ought reasonably to have come to the offeror's attention is that it creates uncertainty. The concept of 'ordinary business hours'
may be of limited utility in this regard. Ordinary business hours may vary across different types of businesses, and between businesses operating in the same field, and if the business hours of the offeror differ from those of the offeree, for example, the offeree may think that his acceptance has been communicated to the offeror before it in fact has. In addition, it is questionable how much significance should be attached to ordinary business hours in business contexts where it is now common for those working in the field to check their e-mail in the evenings and at weekends, and the concept will be of little use in non-business contexts, where many contracts are, of course, concluded. One particular issue that would have to be resolved if option three were to be adopted; and that is, the perspective from which the question of 'when the acceptance ought reasonably to have come to the offeror's attention' is to be judged. Suppose, for instance, that the offeror's business hours differed from the norm. In this case, it would seem to make sense to say that if the offeree knew or ought reasonably to have known this, an e-mailed acceptance would take effect only within the offeror's actual business hours, but that otherwise the 'ordinary business hours' principle would apply. That would suggest that the apt perspective is that of the reasonable person in the offeree's position, with the result that if option three were to be adopted the acceptance would take effect when the offeree would reasonably expect it to have come to the attention of the offeror. Ultimately, since it is possible that an e-mail acceptance could actually come to the attention of the offeror before the offeree might reasonably expect it to. Strictly speaking, the test under option three should be that the e-mail acceptance takes effect either when it

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59 Donald Nolan, supra, n 30, at 75.
60 According to Gerald Spindler and Fritjof Borner (eds), E-Commerce Law in Europe and the USA, Springer-Verlag, Berlin, 2002, 164, German law adopts a version of option three to determine the timing of receipt of a declaration of intent such as a contractual acceptance, the test being whether 'it is within the recipient's sphere of dominion such that one can expect that the recipient would become aware of it'. Nonetheless, the authors point out that while the recipient of an e-mail relating to a commercial transaction is expected to be aware of the declaration of intent on arrival of the e-mail during normal business hours, in the case of a private transaction, this will depend on the particular circumstances.
61 Donald Nolan, supra, n 30, at 75
62 This would mean for instance, that if the offeror is away on holiday, the time that the acceptance would take effect would depend on whether or not the offeree received an automatically generated 'vacation reply' to this effect—if so, the acceptance would take effect on the offeror's return; if not, it would take effect immediately (if sent within business hours).
comes to the attention of the offeror, or when the offeree would reasonably expect it to have come to his attention, whichever is the earlier.

Taking into consideration the additional uncertainty generated by option three, the most sensible answer to the second question (‘When exactly is an e-mail acceptance said to be received by the offeror?’) seems to be option two, that is, ‘an e-mail acceptance should, in general, be held to have been received by the offeror when it arrives on the server that manages his e-mail’. Furthermore, it is submitted that in circumstances where it is necessary to identify the precise moment at which an offer sent by e-mail takes effect—as where the offeror lays down a time period within which his offer must be accepted—the default rule should be the same, so that the offer should generally take effect when it arrives on the offeree’s e-mail server.63

3.6.2.3 Issue-3: What will be the Consequences if Things Go Wrong?

No means of communication is perfect, and therefore, e-mail is no exception. Some e-mails never arrive, or arrive in a garbled form, and some are automatically deleted as ‘junk mail’. While a default rule for the taking effect of an e-mailed acceptance of the kind (as discussed above) is essential, it is also important to identify the principles which apply when things go wrong, owing to which an attempt at e-mail communication fails.

There are some general principles which govern such cases where things go wrong.64 The first principle is: if the offeree knows or ought to know that the e-mail has not been received, he must send it again (and if he does not, there is no contract). The second principle is: where the first principle does not apply—because the offeree has neither actual nor constructive knowledge of the failure of communication—then the offeror is bound if it is his fault that he does not receive the e-mail, but if it is not his fault, there is no contract.65 And the third principle is: a contract is also concluded if,

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63 See, CISG Advisory Council Opinion no 1, Electronic Communications under CISG (15 August 2003), Opinion on Art 20 (1) (‘A period of time for acceptance fixed by the offeror in electronic real time communication begins to run from the moment the offer enters the offeree’s server’).
64 The first two of these general principles have been adapted from Denning LJ’s discussion of failed attempts to communicate acceptance in the Entores case.
65 See, Entores, at 333; See also, Simone Hill, ‘Flogging a Dead Horse—The Postal Acceptance Rule and Email’ (2001) 17 Journal of Contract Law 151, 158 (‘Actual communication is still the legal requirement, but communication might be deemed in the event that it is the fault of the receiver that
even though the offeror is not at fault, the problem lies within his 'sphere of control',
as where the responsibility for what has happened lies with one of his employees or
independent contractors.

Having found answers to the first two important questions, it is now pertinent to
discuss and examine as to what would be the outcome if these general principles
(governing the situations when things go wrong) were applied to those situations
when some of the things go wrong with e-mail communication.\(^6\)

(i) The e-mail does not arrive because of the incorrect e-mail address:
In this case, it is expected that it is the offeree, rather than the offeror, who is at fault,
whether because he has mistyped the e-mail address, or because he has received an
error message telling him that the e-mail has not arrived, and then failed to resend the
message after checking the address. In these state of affairs, there would be no
contract. This may be corresponding to a case\(^6\) where it was held that a fax which
never arrived because the appropriate international dialling code had not been
entered was ineffective to conclude an agreement to nominate an arbitrator. On the
other hand, if it is the offeror who is at fault because, for example, he gave the
offeree the wrong address, and the offeree is not at fault (no error message having
been generated), then it is submitted that a contract would be formed at the time
when the e-mail would have arrived on the offeror's server, but for the offeror's
fault.

(ii) The e-mail arrives on the offeror’s e-mail server, however it cannot be
accessed because it is blocked by the offeror’s firewall or is automatically
deleted as ‘junk mail’:
In this case, the general test for ‘receipt’ is satisfied, and in view of the fact that the
problem lies within the offeror’s ‘sphere of control’, there is no reason why an
exception should be made. There is, hence, a contract.

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\(^6\) These situations have been adapted from Donald Nolan, supra, n 30, at 77-79
\(^6\) LJ Korbets v Transgrain Shipping BV [2005] EWHC 1345 (QB).
(iii) The e-mail is rejected by the offeror’s e-mail server because of the reasons, such as, the offeror’s e-mail ‘inbox’ is full or because of a problem with the server:

In both these cases, although the test of arrival on the offeror’s e-mail server is not satisfied, yet, since the problem lies within the offeror’s ‘sphere of control’, and consequently, the acceptance should be deemed to have arrived unless the offeree has been alerted to the problem.

(iv) The e-mail is rejected by the offeror’s e-mail server because it contains a virus:

Given that this could be said to be the responsibility of the offeree, the default rule should be applied, and therefore, no contract would come into existence.

(v) The e-mail arrives but the contents are garbled, with the result that the acceptance of the offer is not communicated:

In this situation, if the offeree knows or should have known of the failure of the communication, then there is no contract. However, this is implausible to be the case, and where the offeree is unaware of the problem, it is clearly incumbent on the offeror to alert him to what has happened. If the offeror fails to do so, there is, thus, a contract. In this latter situation, an exception might perhaps be made where it is the offeree’s fault that the message has been corrupted, but on balance even here it seems more reasonable to require the offeror to act.

(vi) The e-mail arrives on the offeror’s e-mail server, but the offeror does not see the e-mail because he was not expecting it to be sent to the e-mail address in question:

Where the offeror has several e-mail addresses, it is submitted that an e-mailed acceptance should take effect only when it reaches an e-mail address to which it was reasonable for the offeree to send the acceptance.\(^{68}\) Where the offer is also made by

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\(^{68}\) According to the UNCITRAL *Explanatory Note* written by the UNCITRAL Secretariat on the UN Convention on the Use of Electronic Communications in International Contracts, ‘parties should be expected not to address electronic communications containing information of a particular business nature... to an electronic address they know or ought to know would not be used to process communications of such a nature’ (para 188)
e-mail, it will usually be reasonable to reply to the e-mail address from which the offer is sent; where the offer is communicated by another means, it will usually be reasonable to send the acceptance to any e-mail address which the offeror has held out as suitable for a communication of this kind.\(^6\) If this reasonableness test is not satisfied, then it is submitted that the acceptance should take effect only when the offeror becomes aware that it has been sent to the e-mail address in question.\(^7\)

3.6.2.4 Trimex International Fze Limited, Dubai v Vedanta Aluminum Ltd\(^7\)—Contract Concluded through E-Mail—A Case Study

This is a recent Supreme Court judgment where Trimex (petitioner) is a company registered under the laws of Dubai and is engaged in the business of minerals trading. Vedanta (respondent) is an Indian company whose business involves aluminium as a major raw material. Several e-mails were exchanged between the petitioner and the respondent regarding the material terms of the supply. Subsequently, the respondent conveyed its acceptance of the terms on October 16, 2007 and further confirmed 5 (five) shipments of bauxite from Australia to Vizag/ Kakinada, India. On receiving the confirmation, the petitioner entered into a binding charter party agreement with a ship owner for making delivery of the 5 shipments. Pursuant to this, in a meeting between the parties on October 26, 2007, the respondent acknowledged its acceptance of the petitioner’s offer which was recorded in the minutes of the meeting. Later, on 8 November 2007, the respondent sent a draft formal agreement (‘Contract’), including a detailed arbitration clause to the petitioner which was accepted with a few changes and sent back the very same day. The next day, the petitioner entered into a separate agreement with the supplier in Australia for the supply of bauxite.

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\(^6\) See, Bermuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator), (2005) EWHC 3020 (Comm); (2006) 1 Lloyd’s Rep 537, where it was held that an e-mailed notice of arbitration was effective notwithstanding the fact that it had never reached the relevant managerial or legal staff of the addressee company because it had been sent to an e-mail address that the company had held out to the world as its e-mail address, and that it was not necessary for service of the notice to be effective that the e-mail address in question had been notified to the serving party as an address to be used in the context of the relevant dispute.

\(^7\) See, the UN Convention on the Use of Electronic Communication in International Contracts, Art 10(2).

On November 12, 2007, the respondent requested the petitioner to hold the consignment due till further notice. In response, the petitioner said that it was not possible to hold the consignment at that point in time and requested the respondent to sign the Contract. On receiving no response from the respondent by an e-mail on November 16, 2007, the petitioner terminated the agreement while reserving its right to claim damages.

Thereafter, on November 18, 2007 the petitioner informed the ship owner of the cancellation of the order and the ship owner made a claim of US$ 1 million towards commercial settlement. The petitioner requested the respondent to pay the said amount to the ship owner and an additional 0.8 million US$ towards compensation for loss of profit and other costs and expenses for cancellation of the order.

The respondent rejected the claim of the petitioner, and due to this, the petitioner, after negotiations had to pay 0.6 million US$ in two instalments to the ship owners. On September 1, 2008, the petitioner served a notice of claim-cum-arbitration on the respondent asking it to either pay up or treat the notice as reference to arbitration. The respondent rejected the arbitration notice stating that there was no concluded contract between the parties. Accordingly, the petitioner filed a petition for appointment of arbitrator.

The petitioner's primary contention is that the Contract was valid and binding. To support this argument, the petitioner submitted that:

- the contract was concluded upon acceptance of the offer for five shipments.
- the offer of October 16, 2007 was in reply to the request of the respondent and was on the basis of a similar transaction which had been concluded in the previous month.
- the offer that was accepted by the respondent contained the arbitration clause, which was never objected to.

The petitioner further argued for the validity of the Contract by contending that only after several e-mail exchanges and agreeing on the material terms of the contract, the respondent agreed to place the order of 5 (five) shipments, based on which the
petitioner then further contracted with the bauxite supplier in Australia and also entered into a charter party agreement with the ship owner. The petitioner stressed on the fact that the arbitration clause was included under the copy of the Contract that the respondent had sent and as there was no change in it, the obvious conclusion was that the arbitration clause was acceptable to both parties.

It further contended that the offer dated October 15, 2007 contained all the essential ingredients for a valid acceptance by the respondents such as offer validity period, product description, quantity, price per tonne, delivery (CIF) and payment terms (irrevocable L/C), shipment lots, discharge port, governing law and arbitration. Relying upon the minute to minute correspondence exchanged between the parties, the petitioner attempted to prove that the parties were under a time constraint and that the respondent was aware of the urgency of the acceptance of the offer to avoid a price variation and that the acceptance conveyed by the respondent is complete.

The respondent, on the other hand, argued that there cannot be a concluded contract as the parties were not ad idem with respect to various essential and material features of the transaction. It stated that:

- besides the number of consignments, all other terms and conditions pivotal and essential to the transaction were under negotiation, which is evident from the several e-mail exchanges between the parties.

- the product specifications, price, inclusions in the contract price, delivery point, insurance, commencement and conclusion dates of the contract, transfer of title, quality check and demurrage remain undecided and, therefore, no concluded contract can be said to be in existence.

Accordingly, the respondent argued that in such a scenario, (i) the parties cannot be said to be ‘in one mind’ with respect to all aspects of the transaction which is necessary for the formation of a binding contract; (ii) despite being provided with a notice to defer the shipment, the petitioner permitted the nomination of the vessel of its own accord and attempted to fasten the liability on to the respondent.
Though the respondent admitted the exchange of e-mails with the petitioner, it contended that there was no concluded contract as the Contract remained unsigned without which the petitioner cannot enforce certain obligations reflected in those e-mails and invoke the arbitration clause as if a formal agreement existed. The Respondent, relying upon the decision of the Court in *Dresser Rand S.A. v Bindal Agro Chem Ltd.*\(^72\), contended that an agreement upon the terms which will govern a contract is not the same as entering into the Contract itself.

The Court, after hearing both parties at length, rejected the contentions of the respondent and held that the offer made on 15 October 2007 was accepted on 16 October 2007, and accordingly any dispute between the parties will have to be subjected to arbitration in accordance with the terms and conditions agreed to. Once a contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialed by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialed. The Court held that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegram and other means of communication. The Supreme Court accepted the unconditional acceptance through e-mails and held the same to be a valid contract which satisfies the requirements of Ss. 4 and 7 of the Contract Act 1872 and further it satisfies Section 2(1)(b), 7 of the Arbitration and Conciliation Act 1996.

While providing the reasoning for holding the Contract as concluded, the Court considered the decision of the Court of Appeal in *Pagnan SPA v Feed Products Ltd.*\(^73\), which observed that, usually in practice, to hold a contract as concluded, parties must agree on the essential terms and matters of details can be left over for determination at a later period in time.

The Court reiterated its stand that one of the main objectives of the Arbitration Act is to minimize the supervisory role of the courts. In holding this, the Court observed

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\(^72\) (2006) 1 SCC 751.
\(^73\) (1987) 2 Lloyd's Rep 601 (CA).
that if a number of extra requirements, such as, seals and originals, stamps, etc are added in considering an arbitration agreement, it would amount to increasing the role of courts and not minimizing it. Relying upon the UNCITRAL Model Law, the Court concluded it would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The court’s objective should be to achieve the legislative intent. Accordingly, the Court held in favour of the petitioner and appointed a former judge to arbitrate the matter.

In conclusion, this decision of the Supreme Court has an impact on contract formation and also on arbitration agreements. Through this decision, vis-à-vis initiation of arbitration, the Court has eliminated the requirement of a formal executed document. This, though seemingly a positive step, has introduced incidental perils into contract formation. Usually where a party wishes to enter into a commercial contract, negotiations take place, pursuant to which a formal agreement is executed containing the final terms and conditions mutually agreed upon. The decision of the Court, however, gives sufficient opportunity to either party to raise a dispute and submit to arbitration where a contract has not been formally executed, but where the parties have concluded negotiations on the material terms and conditions. It is evident from the tenor of the Court’s decision that it is largely in favour of enforcing the intention to arbitrate and is in line with the UNCITRAL Model Laws and the Act. The Court has very aptly upheld the object of the Act and restricted the role of courts by referring the parties to arbitration. The decision focuses upon the intention of both parties to arbitrate and for formation of a concluded contract, by virtue of e-mail correspondences and the action of the petitioner pursuant to the correspondence. In light of this decision, parties entering into negotiations must be very careful in wording their correspondence and clearly and categorically indicate that a simple ‘yes’ or ‘no’ does not imply acceptance of the complete proposal, lest the contract be considered concluded.
3.6.3 Contracting Through Websites

The proliferation of internet trading over the last decade means that a substantial proportion of all transactional activity now takes place over the web.\footnote{Donald Nolan, \textit{supra}, n 30, at 79.} However, the formation of contracts online is, in some respects, quite different from earlier modes of contract formation, and, for that reason, the application of the offer and acceptance rules to contracts made in this way raises a number of issues.

The ways in which such a contract can be made could be 'straightforward or simple', or 'complicated or complex'. The simple case of contracting through website involves situations where a consumer goes onto the retailer's website and downloads the digital products (such as, software, music, or videos, etc) in return for payment. In such a case, the website is essentially a 'digital vending machine', which responds to the user's action in predetermined manner. As soon as the buyer's order has been placed, performance of the contract by the retailer is likely to begin immediately, as the product is downloaded onto the buyer's computer, so that the buyer will have little or no opportunity to alter or cancel the transaction. In such cases, the offer and acceptance analysis seems obvious: as with a real vending machine, the presence of the website is a standing offer, which the customer accepts by making the relevant payment.\footnote{Ibid, at 79.} However, one possible difference between the two is that with a real vending machine, the terms of the offer are likely to be found in a notice placed on or near the machine, whereas with a website, the customer will usually be required to click a button expressing his agreement with the retailer's standard terms, so that the acceptance is, strictly speaking, expressing agreement with the standard terms and then making the appropriate payment.

The complex case of website contracting is, for example, where the retailer's performance does not immediately follow the placing of the customer's order, but comes at a later time, as in the online sale of a book or an airline ticket. A portrayal

\footnote{See also, \textit{Thornton v Shoe Lane Parking}, [1971] 2 QB 163 (CA), at 169 (Lord Denning MR): 'It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot.'}
of such a transaction can be found in *Chwee Kin Keong v Digilandmall.com*[^76], a Singaporean case concerning the purchase of laser printers from an online retailer:

To effect the purchase transactions on the respective websites, the plaintiffs had to navigate through several web pages. In terms of chronological sequence, the initial page accessed was the shopping cart, followed by checkout-order particulars, checkout-order confirmation, check-out payment details and payment.... In the final stage of the process, after the payment mode was indicated, each of the plaintiffs was notified ‘successful transaction...your order and payment transaction has been processed’. Upon completing this sequence, each of the orders placed by the plaintiffs was confirmed by automated responses from the respective websites stating ‘Successful Purchase Confirmation from HP online’.

To understand the aspects of website contracting, it is pertinent to know ‘what is’ and ‘what amounts to’ an offer, and ‘what is’ and ‘what amounts to’ a valid acceptance.

### 3.6.3.1 ‘What is’ or ‘what amounts to’ a Valid Offer in an Online Transaction?

In *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern)*[^77], the Court of Appeal held that the display of goods on the shelves of a self-service shop (system) did not amount to an offer by the defendants to sell, but merely to an invitation to the customer to offer to buy; and in *Fisher v Bell*[^78] it was held that where goods are displayed in a shop together with a price label, such display is treated as an invitation to treat by the seller, and not an offer. The offer is instead made whilst the customer presents the item to the cashier together with payment. Acceptance takes effect at that point of time when the cashier takes payment. The same is, by and large, true of advertisements, catalogues, and the like[^79]. An advertisement may, however, be construed as an offer of a unilateral contract, as in *Carlill v Carbolic Smoke Ball Co*[^80].

[^77]: [1953] 1 QB 401 (CA).
[^79]: See e.g., *Partidge v Crittenden* [1968] 1 WLR 1204 (QB) (newspaper advertisement) An advertisement may, however, be construed as an offer of a unilateral contract, as in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA).
[^80]: [1893] 1 QB 256 (CA).
Several commentators like Chitty, Simon P Haigh, have pointed out that the principle (of Pharmaceutical Society of Great Britain and Fisher v Bell) would also seem to apply to the display of goods or services on a website, with the result that the offer is not made by the retailer, but by the customer when he places his order. Rajah JC, expressed a similar view in Chwee Kin Keong v Digilandmall.com, in the following words:

Website advertisement is in principle no different from a billboard outside a shop or an advertisement in a newspaper or periodical. The reach of and potential response(s) to such an advertisement are however radically different. Placing an advertisement on the Internet is essentially advertising or holding out to the world at large. A viewer from any part of the world may want to enter into a contract to purchase a product as advertised. Websites often provide a service where online purchases may be made. In effect the Internet conveniently integrates into a single screen traditional advertising, catalogues, shop displays/windows and physical shopping.

The above conclusion is also in agreement with Article 11 of the UN Convention on the Use of Electronic Communications in International Contracts (UNCUECIC), which 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.

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84 This provision is based on Art 14(2) of the UN Convention on Contracts for the International Sale of Goods, which provides that a proposal not 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. According to the *Explanatory Note*, at paras 200-4, written by the UNCITRAL Secretariat on the UN Convention on the Use of Electronic Communications in International Contracts, regarding the transposition of this principle to website trading, while UNCITRAL noted the argument that parties dealing with websites offering goods or services through interactive applications enabling immediate conclusion of a contract might reasonably assume that by placing an order they were concluding a binding contract, it considered that in the light of the 'potentially unlimited reach of the Internet' and the widespread practice of online traders indicating on their websites that they are not bound by these offers, the general principle should be applied.
Furthermore, with a view to have clarity and to avoid any perplexity, the operators of websites may also frequently make it clear that the presentation of goods and services on their site is not intended to be binding.

Certainly, like shop displays and advertisements, there may be exceptional cases where an online display of goods or services is construed as a binding offer; for example, where the retailer states unequivocally that an item will be sold to the first ten customers whose orders are processed. In these circumstances, the placing of the order by such customers will amount to acceptance of the offer, and the contract will be formed at that time. In *Chwee Kin Keong*86, Rajah, JC, observed that ‘...pertaining to a display of goods for sale. The goods are not an offer but are said to be an invitation to treat. The prospective buyer has to make an offer to purchase which is then accepted by the merchant. While this is the general principle for shop displays, it is open to a merchant to offer by way of an advertisement the mechanics of a unilateral or bilateral contract. This is essentially a matter of language and intention, objectively ascertained. As with any normal contract, internet merchants have to be cautious how they present an advertisement, since this determines whether the advertisement will be construed as an invitation to treat or a unilateral contract. Loose language may result in inadvertently establishing contractual liability to a much wider range of purchasers than resources permit.’

Similarly, in *Lefkowitz v Great Minneapolis Surplus Stores*87, the defendant (Great Minneapolis Surplus Store) published advertisements in a newspaper for a sale of fur coats, mink scarves, and a lapin stole. Each of the advertisements indicated that the sale items would be sold on a first come first served basis, stated the quantities of each item available, and stated that they would be sold for one dollar apiece. The plaintiff (Lefkowitz) was the first shopper to present himself and offer the one dollar price as per the terms of the advertisement. The defendant refused to sell the sale items to Lefkowitz and told him that in accordance with the ‘house rules’, the offer was intended for women only. The issue before the court was: under what

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87 86 NW 2d 6809 (Minn 1957)
circumstances does an advertisement for the sale of goods constitute an offer? The trial court determined that the advertisement was clear, definite, and explicit and left nothing open for negotiation; and held that Lefkowitz was entitled to performance by the defendant because he complied with the terms of the advertisement and offered the stated purchase price. Hence, from this ruling it is clear that an advertisement involving a transaction in goods is an offer when it invites particular action, and when it is clear, definite, and explicit and leaves nothing open for negotiation.

The general rule, however, is that advertisements are invitations to treat rather than offers; for contract formation purposes, the prospective buyer makes the offer and the seller can accept or reject the offer when received. An advertisement construed in such a way does not become a contract for sale until a buyer's offer is accepted by the seller, and the advertised terms can be modified or revoked without notice. The test is, therefore, whether the facts confirm that some performance was promised in positive terms in return for something requested. Whether or not such an advertisement is an offer, rather than an invitation to make an offer, depends upon the legal intention of the parties and the surrounding circumstances. In the above case, the offer was clear, definite, explicit, and left nothing open to negotiation. While the offeror had the right to modify his offer prior to acceptance, he could not change his offer after acceptance.

It has been suggested that the range and the variety of sales that can take place over the internet may mean that less weight will be placed on the default rule 'and more on the words used in particular advertisement', the wording of the advertisement is always determinative, and it is doubtful whether advertisements on the web are more likely to be interpreted as offers than those found in another places/situations.

However, in general a website provider will not be bound to deal with every customer who seeks to place an order, but may, for example, choose to decline an order if his supply of stock is limited, or if the customer is in a jurisdiction where it is illegal to sell the goods in questions.

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89 Donald Nolan, *supra*, n 30, at 82.
Types of Websites:
Determining whether a particular representation is an ‘offer’ or an ‘invitation to treat’ is very important in the process of contract formation. The display of goods for sale, either in a shop window or on the shelves in a store, is ordinarily considered to be an invitation to treat. When the well recognized points of distinction are imposed upon the world of the internet, it is suggested that the courts should look to the interactive and/ or automated nature of a particular website. Advertisements on a non-interactive website are similar to conventional advertisement, where the implied intention is to commence negotiations. On the other hand, if a website is interactive or automated, the advertisements on such a site may be considered to be an offer. One of the grounds for treating goods on display as an invitation to treat is that the storekeeper has to be able to negotiate and be able to turn down an offer when stock runs out. It would follow that the treatment of interactive websites should, thus, depend on the nature of the product and whether there is an infinite supply. Interactive websites will also often include a click wrap agreement (clearly being positioned as an offer), but the argument is that the agreement and the advertisement fuse into one combined offer. It has been suggested that in the absence of any decided cases on the issue, the terms and conditions displayed on a website should specify whether an invitation to treat or an offer is being made.

If the website is worded and arranged in such a way as to encourage the formation of a contract, the crucial question is whether the seller intended to be bound by any response or whether the seller wanted to decide whether or not to enter into a contract and, if yes, with whom. It is suggested that in addition to the language used on the website, the type of website may also be relevant. A website may be of two types—non-interactive or interactive.

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Non-Interactive Sites:
A site is said to be *non-interactive* where it only provides information and any contact with the seller is through other means, such as, confirmation of an order by phone or delivery of goods. There may be a very little difference between an advertisement on this type of site and a conventional advertisement. The website will convey through its non-interactive nature the implied intention on the part of the vendor to negotiate the terms of any contract.

Interactive Websites:
An *interactive* website is to be treated differently from a non-interactive one. Where a person is able to log into a website, chooses an item for sale, enters the payment details and concludes the agreement, the display on the site may go beyond a mere invitation to treat. However, if by analogy the website is considered to be the same as a display of goods in a store window or on a shelf, the court may be reluctant, depending on the terms placed on the website, to find the existence of an offer. One of the rationales for holding a display of goods to be an invitation to treat was that a shop owner should not be bound to an unforeseeable number of acceptances.\(^94\) While this may equally apply to a seller of goods over the internet, the application of this rationale becomes more difficult in relation to the sale of services or information, for in each of those cases the seller may be able to supply an unlimited number.\(^95\)

Interactive websites will also usually display the terms of any agreement entered into on the website and the buyer indicates his acceptance of the terms at the time of ordering. This fact together with the design of the site may add additional weight to the argument that the website forms an *offer* and not an *invitation to treat*. By displaying the terms on the site (which, in some cases, limit the liability or obligations of the seller), the seller is indicating the terms upon which he will be immediately bound. The whole transaction (including payment) may be completed online with only delivery occurring in the normal manner. It is plausible that these types of sites may be interpreted as offers and not invitations to treat.

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\(^94\) *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401; *Grainger v Gough* [1896] AC 325 at 333-4; *Esso Petroleum Ltd v Commissioners of Customs & Excise* [1976] 1 All ER 117 at 126.

\(^95\) Sharon Christensen, *supra*, n 93.
A website owner/vendor of an interactive site may have specific reasons for wanting to limit the number and type of persons they may intend to contract with due to the worldwide nature of the internet. For instance, a website owner/vendor may wish to avoid contracting with persons in foreign jurisdictions owing to the potential disputes as to the governing law, and thereby rendering enforcement of the contract uncertain.

Automated Interactive Sites:
There are some interactive sites that are operated totally by a computer. The buyer puts in his credit card details and requests certain information or software, which is thereafter transmitted automatically over the internet. In this type of case, there may be a stronger argument for an analogy to be drawn with the offering of goods or a ticket in a vending machine.\(^\text{96}\) In *Thornton v Shoe Lane Parking Ltd*\(^\text{97}\), the English Court of Appeal considered that generally for vending machines, ‘the offer is made when the proprietor of the machine holds it out as being ready to receive money’.\(^\text{98}\) In some situations, the vending machine displays goods with little or no terms displayed, except the price. A contract comes into being when the consumer places money into the slot and selects items. There is very little opportunity for the consumer to change his mind in the process. In other cases, a considerable number of terms of purchase may appear on the machine and the consumer accepts those terms by purchase of a product or ticket. However, in these cases also, the consumer will have little opportunity for changing his mind or making another choice. Contrasting a vending machine, a transaction conducted *via* an interactive website is more complex. The contract is likely to be governed by the terms on the website which the consumer normally needs to accept before being able to proceed with the transaction. In addition, the consumer is required to place personal details and other information onto the site and make a choice prior to submitting the order. The consumer is able to make a different selection at any point of time before selecting the submit button. This differs from a vending machine where the money is generally paid prior to a selection being made. Due to the differences in types and complexities of websites, it

\(^{96}\) Sharon Christensen, *supra*, n 93.
\(^{97}\) [1971] 2 QB 163.
\(^{98}\) *Ibid*, at 169.
is unlikely that any general rule could be developed and each situation should be decided on a case by case basis.\textsuperscript{99}

\textbf{3.6.3.2 What is the Acceptance in an Online Transaction?}

The precise moment at which online retailer \textit{does} become bound is less obvious.\textsuperscript{100} Since, in general, it will be the customer who makes the offer, therefore, the acceptance must, in general, come from the online merchant. Beyond this, however the position becomes little less precise. One probability is that by taking the customer’s payment, the retailer will be held to have accepted the customer’s offer by conduct.\textsuperscript{101} Indeed, it might be thought to be unfair for the customer to have to pay for the goods before a contract is formed. In such a case, at least, one would expect the online merchant who/which took payment without intending to be bound to tell its customers that this was the case and that it would reimburse them if a contract did not materialize. On the contrary, where the retailer holds off on taking payment until the goods are delivered, that might be taken as an indication that the acceptance came only at that time. Then again, the retailer’s acknowledgement of the receipt of the order may also constitute the acceptance. However, there would often be more than one of these, in which case, a choice would have to be made between them.

It is usual for the website to display a message (stating that the customer’s order has been processed) after payment has been accepted, or an automated e-mail confirming that ‘the order has been received’. Indeed, the sending of such an e-mail is a legal requirement in a wide range of internet transactions by virtue of the Electronic Commerce (EC Directive) Regulations 2002.\textsuperscript{102} Which, if either, of these acknowledgements will amount to a contractual acceptance should in the end be determined by their wording, the test being whether, judged objectively, they amount to ‘a final and unqualified expression of assent to the terms’ of the offer. A mere acknowledgment that an offer has been received will not satisfy this test—\textit{a fortiori} if the sending of the acknowledgement was a legal requirement—but an e-mail

\begin{footnotes}
\item[99] Sharon Christensen, \textit{supra}, n 93.
\item[100] Donald Nolan, \textit{supra}, n 30, at 82.
\item[101] On acceptance by conduct, see \textit{Chitty}, (2008 ed) para 2-030
\item[102] (SI 2002/2013) Reg 11.
\end{footnotes}
confirming that the order has been successfully processed may well be interpreted as a clear expression of agreement, subject, of course, to the precise contents of the message.\textsuperscript{103} Where more than one acknowledgment sent by the retailer passes this test, the acceptance will be the one the customer receives first.\textsuperscript{104} If there is no acknowledgement that amounts to an acceptance, then the online trader will be at liberty to resile from the transaction until acceptance does take place later on, which will generally be when the goods are actually delivered, or when a message is sent confirming their dispatch.

Last but not least, there is no scope for the operation of the postal rule in online transactions. The communications between the customer and the website are, as a rule, instantaneous, and the sender gets immediate feedback, and any problems should be readily apparent. If, for instance, the customer’s web browser were to shut down after he clicked ‘confirm’, so that he did not know whether or not his order had been received, it would then be incumbent on him to make contact with the retailer, just as it would be if the line went dead immediately after he made an offer over the telephone. And where an e-mail acceptance is sent by an online retailer to a customer following an online transaction the default rule should be the same as it is when a contract is concluded through an exchange of e-mails, namely that the acceptance takes effect when the message arrives on the customer’s e-mail server.

\textbf{3.6.3.3 Can an Online Retailer Control the Contract Formation Process?}

\textbf{If Yes, to What Extent?}

One significant issue to be considered is the extent to which an online trailer can control the process of contract formation. There are a number of ways by which a retailer can control the contract-making process. The foremost thing the online retailer can do is to make it clear to viewers of its website that the presentation of goods and services on the website is an invitation to treat, as opposed to an offer. Another thing which the online retailer can do is to make clear the status of any e-mail it sends to customers after receipt of an order. In some cases, the retailer may wish to postpone the moment of contract formation, in order to retain the option of later refusing to fulfil the order. There are various reasons (such as, unavailability of

\textsuperscript{103} Donald Nolan, supra, n 30, at 83
\textsuperscript{104} Ibid
the goods ordered in stock, a problem with the customer's payment, a pricing error on its website, or the customer being in a different jurisdiction) why a retailer might wish to do this (defer the moment of contract formation). In such cases, the retailer can make it clear that the mail it sends out is simply an acknowledgement of receipt of the order, and that the contractual acceptance will follow later on. For example, the e-mail which the online retailer Amazon.co.uk sends out includes the following statement:\(^{105}\) 

Please note that for items ordered from Amazon.co.uk this e-mail is only an acknowledgment of receipt of your order and your contract to purchase these items is not complete until we send you an e-mail notifying you that the items have been dispatched to you.

In contrast, other online retailers, such as airlines and hotels, may wish their customers to be bound immediately, so that they can be certain that a seat or room which has been booked has been taken, and plan accordingly. Such a retailer may, for that reason, wish to make it clear that the e-mail it sends out is intended as a contractual acceptance, so that the contract will be concluded upon its receipt.

Furthermore, the online retailers do try to control the timing of the offer and acceptance by inserting a clause in their terms and conditions that purports to lay down how a contract made through their website is formed. In fact, in some circumstances, the retailer is required to do this under the Electronic Commerce (EC Directive) Regulations 2002, which stipulate that where a contract is to be concluded by electronic means, a provider of an 'information society service' must (unless parties who are not consumers have agreed otherwise), before an order is placed by the recipient of the service, provide to that recipient information including 'the different technical steps to follow to conclude the contract'.\(^{106}\) An example of a clause of this kind is provided by clause 14 of the terms and conditions of Amazon.co.uk, which says:

When you place an order to purchase a product from Amazon.co.uk, we will send you an e-mail confirming receipt of your order and containing the details of your order. Your order represents an offer to us to purchase a product which is accepted

\(^{105}\) *Ibid.*

\(^{106}\) (SI 2002/2013) Reg 9(1) (a). This condition does not apply to 'contract concluded exclusively by exchange of electronic mail' [Reg 9(4)].
by us when we send e-mail confirmation to you that we’ve dispatched that product to you (the ‘Dispatch Confirmation E-mail’). That acceptance will be complete at the time we send the Dispatch Confirmation E-mail to you.107

If a clause along these lines is properly incorporated into the contract, it would be effective to determine the process of contract formation, as the customer’s acceptance of the terms and conditions as a part of the ordering process would turn this clause into a term of the offer made by the customer to the retailer, in which case only the ‘acceptance’ described in the clause would amount to a valid acceptance of the offer. If this is true, then the widespread use of such clauses should mean that in many online transactions the offer and acceptance analysis will be relatively straightforward.

3.7 ELEMENT OF INTENT

The law of contracts requires an element of intent. But, the Information Technology Act 2000 of India (hereinafter referred to as the ‘IT Act’) does not make any direct reference to this requirement. Similarly, the Electronic Commerce Directive (the ‘E-Commerce Directive’) also does not make any direct mention to ‘the intention to sign (contract)’ in relation to an e-commerce transaction. However, it imposes an information obligation, in order to help consumers reach intent. By fulfilling the technical steps to conclude a contract, the consumer indicates his intent to enter into a contract.108

On the contrary, the Uniform Electronic Transactions Act 1999 (hereinafter referred to as the ‘UETA’) is more explicit and focuses on the party’s intention to be bound and to sign. Section 7(d) states, ‘If a law requires a signature, an electronic signature satisfies the law.’ And, electronic signature is defined as ‘an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record’.109

107 Taken from Donald Nolan, supra, n 30, at 85 Amazon.co.uk, ‘Conditions of Use and Sale’ http://www.amazon.co.uk.


109 UETA§ 2(8).
In nearly all legal systems, a contract is created through the exchange of proposals and their acceptances. Nonetheless, the E-Commerce Directive introduces a third step in contract formation, i.e. 'confirmation'. According to Art 11 of the Directive, 'In cases where the recipient of the service places his order through technological means, the service provider has to acknowledge the receipt of the recipient’s order without undue delay and by electronic means.' Therefore, a contract is concluded in B2C\textsuperscript{110} transactions only when the recipient of the service has received an electronic acknowledgement of the recipient’s order from the service provider. Art 11 is applicable only in situations where the service provider makes the initial offer, not in situations where the customer is the one who makes the offer.\textsuperscript{111} Moreover, the 'acknowledgment requirement' does not apply in contracts 'concluded exclusively by exchange of electronic mail or by equivalent individual communications.'\textsuperscript{112}

The underlying principle behind requiring an 'acknowledgement of the receipt of the acceptance' is to provide protection from inadvertent, or unintentional, or accidental contracts. The objective is to give the consumer a second opportunity to check whether he might have ordered a product that he did not want. It would also give a seller the chance to establish whether there were sufficient stocks available and whether the product has been offered at the right price. However, the requirement of 'confirmation' seems to duplicate the functions provided in Art.10 (1) of the Directive, which requires that a service provider should make available to customers the identification and technical means to handle error.\textsuperscript{113} Hence, according to Art 11, if a service provider fails to send a confirmation to the consumer requesting acknowledgment, no contract is formed.

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\textsuperscript{110} B2C: It is business-to-consumer transactions conducted via the internet.


\textsuperscript{112} Council Directive 2000/31, Art. 11(3) clearly states, 'Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.'

Formation of a contract under the Uniform Computer Information Transactions Act (hereinafter referred to as the ‘UCITA’), too, requires exchange of an offer and its acceptance.\(^\text{114}\)

### 3.8 TYPES OF ELECTRONIC CONTRACTS

Broadly, e-contracts may be classified into following three types. While the shrink-wrap transaction has been around for some time and actually exists in a paper environment, the other two types of transactions (click-wrap and browse-wrap) are unique to electronic commerce:

1. **Click-wrap Agreements**
2. **Shrink-wrap Agreements**
3. **Browse-wrap/Web-wrap Contracts**

#### 3.8.1 Click-Wrap Agreements

In click-wrap agreements\(^\text{115}\), a party after going through the terms and conditions provided in the website or programme has to, normally, indicate his assent to the same, by way of clicking on an ‘I Agree’ icon or decline the same by clicking ‘I Disagree’. This type of acceptance is usually done before receiving the merchandise. These sorts of contracts are extensively used on the internet, whether it be granting of a permission to access a site or downloading of any software or selling something via a website. This may be called the creation of contracts by conduct.

A click-wrap agreement is predominantly found as part of the installation process of software packages. It is also known as ‘click-through’ agreement or ‘click-wrap’ license. Click-wrap agreements are those electronic contracts that are deployed when a product is distributed by means other than disks, such as, when software is downloaded over the internet. Upon installation or first use, a window containing the terms of the license opens for the user to read. The user is offered with a choice of clicking on either ‘I agree’ or ‘I do not agree’. By clicking to any of these choices, the he accepts or declines the terms. If he does not agree, the process is terminated.

\(^{114}\) Part-2 of the UCITA deals with the formation and terms of a contract. Sub-Part A (Ss 201-207) deals with the formation of a contract, Sub-Part B (Ss 208-211) deals with the terms of records, and Sub-Part C (Ss 212-215) deals with the electronic contracts generally.

\(^{115}\) See Click-Wrap Agreements held enforceable; downloaded from <http://www.philipnizer.com>.
Contrasting shrink-wrap agreements, these agreements do not require a court to consider whether the user had adequate notice of the terms, since they are displayed at the very start of the contract formation process.\textsuperscript{116} Click-wrap agreements can further be of the following kinds:

1. **Type and Click:** In this case, the user must type 'I accept' or other specified words in an on-screen box and then click a 'Submit' or similar button. This demonstrates acceptance of the terms of the contract. A user cannot proceed to download or view the target information without observing these steps.

2. **Icon Clicking:** In this case, the user must click on an 'OK' or 'I agree' button on a dialog box or pop-up window. A user may signify rejection by clicking 'Cancel' or closing the window.

### 3.8.2 Shrink-Wrap Agreements

The sale of software in stores, by mail and over the internet has resulted in quite a few specialized forms of licensing agreements. For instance, software sold in stores is commonly packaged in a box or other container, and then wrapped in clear plastic wrap. Through the clear plastic wrap on the box, the purchaser can see the warning that states the use of the software is subject to the terms of a license agreement contained inside, an agreement that cannot be read before purchase of the software. The license agreement generally explains that if the buyer does not wish to enter into a contract by purchasing the software, he must return the product prior to opening the sealed package containing the CD on which the software resides. If the software is returned with the sealed package unopened, a refund will be obtained. Opening the sealed package containing the CD, however, signifies acceptance of the terms of the license and will, by and large, prevent the purchaser from obtaining a refund. These licenses have come to be known as 'shrink wrap licenses'.

Shrink-Wrap Agreements\textsuperscript{117} have derived their name from the 'shrink-wrap' packaging that usually contains the goods (such as CD Rom of software). The terms

\textsuperscript{116} However, the user may have to scroll down the window to read all of the terms

and conditions of accessing the particular software are printed on the shrink-wrap cover of the CD and the vendee after going through the same tears the cover to access the CD Rom. At times, supplementary terms are also imposed in such licenses which appear on the screen only when the CD is loaded to the computer. The packaging contains a notice that by tearing open the shrink-wrap, the user assents to the software terms enclosed within. The user always has the option of returning the software if the new terms are not to his liking for a full refund. In the context of software applications, a usual shrink-wrap agreement is a software license that dictates a seller’s terms to a buyer, and includes a conspicuous notice of agreement, title retention in the seller, restrictions on transfer and modification, prohibition of reverse engineering, and limited copying provisions.

3.8.3 Browse-wrap/ Web-wrap Contracts
In browse-wrap contracts, the internet users, if they bother to look, will find a ‘terms or conditions’ hyperlink somewhere on web pages that proposes to sell goods and services. According to these terms and conditions, using the site for buying the goods or services offered (or just visiting the site) constitutes acceptance of the conditions contained therein. On account of the internet’s capacity to replace conventional commerce, these kinds of contracts (mainly web-browse and click-wrap) are very common. Some critics contend that browse-wrap terms are not enforceable because they do not satisfy the basic elements of contract formation, however one may argue that the browse-wrap terms satisfy the elements of an implied contract by the consumer’s actions.

3.9 Conclusion
While the proliferation of electronic commerce raises some interesting questions about the precise mechanics of contract formation by e-mail and through websites, the offer and acceptance model is likely to prove sufficiently flexible to accommodate these new forms of communication without much complexity. By reasoning from first principles, and by analogy with the rules of governing older means of communication, the courts should prove well able to deal with the issues posed by offer and acceptance in the electronic era of information technology. Concluding this section, the principles may be summarized as follows:
There is no real problem as to whether or not general contractual principles apply to the e-contracts. Fundamental principles of contract law continue to prevail in contracts made on the internet. Nevertheless, not all principles will or can apply in the same manner that they apply to traditional paper-based and oral contracts.

Website advertisement is in principle like a billboard outside a shop or an advertisement in a newspaper or periodical. The reach of and potential response(s) to such an advertisement are however drastically different. Placing an advertisement on the internet is basically advertising or holding out to the world at large. A viewer from any part of the world may want to get into a contract to purchase a product as advertised. Websites frequently provide a service where online purchases may be made. In fact, the internet conveniently integrates into a single screen traditional advertising, catalogues, shop displays/ windows and physical shopping.

Historically, the common law has recognized an anomaly in the contractual features in relation to a display of goods for sale. The display of goods is not an offer, but is said to be an invitation to treat. The prospective buyer has to make an offer to purchase which is then accepted by the vendor. While this is the general principle for shop displays, it is open to a vendor to offer by way of an advertisement the mechanics of a unilateral or bilateral contract. This is, in essence, a matter of language and intention, objectively ascertained. Just like any normal contract, the internet merchants have to be cautious how they present an advertisement, as this determines whether the advertisement will be construed as an invitation to treat or a unilateral contract. Loose language may result in unintentionally or unconsciously establishing contractual liability to a much wider range of purchasers than what resources permit.

The known availability of stock could be an important distinguishing factor between a physical sale and an internet transaction. In a physical sale, the merchant can immediately reject an offer to purchase a product that has been advertised; or else, he may be inundated with offers he cannot justify. Indeed, this seems to be the underlying rationale for the unique legal characteristics attributed to an invitation to
If stock of a product is exhausted, a prospective purchaser cannot sue for specific performance or damages, for he has merely made an offer that has not been accepted by the merchant.

In an internet sale, a prospective purchaser is unable to view the physical stock available. The web merchant, except when he qualifies his offer appropriately, by making it subject to the availability of stock or some other condition precedent, could be seen as making an offer to sell an infinite supply of goods. A prospective buyer is entitled to rely on the terms of the web advertisement. The law may not imply a condition precedent as to the availability of stock simply to bail out an internet merchant from a bad bargain, a fortiori in the sale of information and probably services, as the same constraints as to availability and supply may not usually apply to such sales.

It is incumbent on the web merchant to shield himself, as he has both the means to do so and knowledge relating to the availability of any product that is being marketed. As most web merchants have automated software responses, they need to make sure that such automated responses correctly reflect their intentions from an objective perspective.

Different rules may apply to e-mail transactions and to the transactions over the worldwide web. While, taking into consideration, the appropriate rule to apply, it stands to reason that as between sender and receiver, the party who selects the means of communication should bear the consequences of any unexpected events. An e-mail, while bearing some similarity to a postal communication, is, as has been seen previously, in some aspects fundamentally different. In addition, unlike a fax or a telephone call, it is not ‘that’ instantaneous. An e-mail is processed through servers, routers and internet service providers.

As soon as an offer is sent over the internet, the sender loses control over the route and delivery time of the message. In that sense, it is analogous to ordinary posting. Notwithstanding some real differences with posting, it could be argued cogently that the postal rule should apply to e-mail acceptances; in other words, that the

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118 See, Grainger & Son v Gough [1896] AC 325 at 333–334, Esso Petroleum Ltd v Commissioners of Customs & Excise [1976] 1 All ER 117 at 126
acceptance is made the instant the acceptance is sent. There are, however, some sound reasons to argue against such a rule in favour of the recipient rule. It must be borne in mind that while the common law jurisdictions continue to wrestle over this vexed issue, most civil law jurisdictions lean towards the recipient rule. In support of the latter it could be argued that unlike a posting, e-mail communication takes place in a relatively short time frame. The recipient rule is, for that reason, more convenient and relevant in the context of both instantaneous or near or virtually instantaneous communications. Notwithstanding rare failure, most e-mails arrive sooner rather than later. It may thus be concluded that contracts concluded through e-mail communications should also be subject to the same offer and acceptance rules as in the case of telephone or telex, i.e. the ‘receipt/recipient rule’.

The applicable rules in relation to transactions over the worldwide web seem to be clearer and less controversial. Transactions over websites are almost always instantaneous and/or interactive. The sender usually receives a prompt response. The recipient rule seems to be the logical default rule. Application of such a rule may, though, result in contracts being formed outside the jurisdiction if not properly drafted. Web merchants must ensure that they either contract out of the receipt rule, or expressly insert salient terms within the contract to deal with issues such as a choice of law, jurisdiction and other essential terms relating to the passing of risk and payment. Failure to do so could also bring about calamitous repercussions. Merchants might find their contracts formed in foreign jurisdictions and, therefore, subject to foreign laws.

Occurrence of mistakes is inevitable in the course of electronic transmissions. This may result from human interphasing, machine-error or a combination of such factors. Examples of such mistakes could include (a) human error (b) programming of software errors and (c) transmission problems in the communication systems. Computer glitches may cause transmission failures, garbled information or even change the nature of the information transmitted.120 Such errors can be magnified more or less instantaneously and may be harder to detect than if made in a face to face transaction or through physical document exchanges. The question is as to who

120 Chwee Kin Keong case is a paradigm example of an error on the human side
bear the risk of such mistakes. It is axiomatic that general contractual principles apply, but the contractual permutations will obviously be sometimes more complex and spread over a greater magnitude of transactions. The financial consequences could also be substantial. The court has to be cautious and should adopt a pragmatic and judicious stance in resolving such issues.

The amalgam of factors a court will have to consider in risk allocation ought to include:\textsuperscript{121}

i. the need to observe the principle of upholding rather than destroying contracts,

ii. the need to facilitate the transacting of electronic commerce, and

iii. the need to reach commercially sensible solutions while respecting traditional principles applicable to instances of genuine error or mistake.

It is important that the law be perceived as embodying rationality and fairness while respecting the commercial imperative of certainty.

\textsuperscript{121} Chwee Km Keong \textit{v} Digilandmall \textit{com Pte Ltd} [2004] 2 SLR 594; [2004] SGHC 71, at [103].