CHAPTER - III

SIGNIFICANCE OF COMMUNICATION IN ONLINE AND TRADITIONAL CONTRACT
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3. Introduction

“A technological revolution is transforming society in a profound way. If harnessed and directed properly, Information and Communication Technologies (ICTs) have the potential to improve all aspects of our social, economic and cultural life. ICTs can serve as an engine for development in the 21st century and as an effective instrument to help us achieve all the goals of the Millennium Declaration”

- Kofi Annan

Having adverted to in the first chapter the interpretation of the word commerce and electronic commerce, the potentials and benefits of the modern electronic commerce, challenges of the same have been looked into. Further the nexus between commerce and Law of Contract has been analyzed along with Standard form of Contract and electronic contracts. A brief look into the legislative landscape of electronic commerce has been done. Before looking into the legal intricacies of online contract, contractual formation in the offline world has to be examined which is the background against which the relevant rules for the online contracts are to be established. In the traditional world a contract is said to be concluded when the both parties put their pen to the signature section of a physical document which sets out the agreed terms and conditions. Traditional contract law principles can and should apply to electronic contracts. However, the creation and use of electronic contracts raises, new unique and untested issue of law not easily revolved under traditional rules. To ensure the validity and enforceability of contracts formed electronically, the application of both electronic and traditional contracts should be considered. With the growth of e-commerce there is a rapid advancement in the use of e-contracts. But deployment of electronic contracts poses a lot of challenges at three

levels, namely conceptual, logical and implementation. The issues which arise here is whether doing business in cyber space creates any special contractual problems or whether any security issues persist even if it is valid and binding on the parties. The next major question is which law will be applied to e-contracts compared to that of traditional contracts.

An attempt is made in this chapter to trace inter related bonds between traditional and electronic contracts. Besides this an endeavour is also being made to establish the status of an electronic contract and expose it’s other incidences, so as to highlight the significance of the nascent and emerging online contract, transactions and dealings.

Traditionally, most commercial contracts have had to be on paper and include ‘an inked’ signature to be enforceable. The new electronic contracting laws generally provide that an electronic record in lieu of “writing” and “electronic signature” in lieu of “an inked” signature will be sufficient to form, an enforceable commercial contract. The development of cyber space is revolutionary and new legal theories; new laws are needed to govern electronic contracts. In the present scenario Courts are applying traditional common law principles to cases arising in the e-environment along with cyber laws enacted by the countries. As far as India is concerned Information Technology Act 2000 has been enacted and amended in 2008 to meet the growing requirements and to achieve the main object of the Act.

3.1 Concept of ‘Contract’ – Legal Pre – requisites of a traditional contract

The power and importance of contacts can be hardly overstated. Contracts constitute the legal foundation upon which business is transacted around the globe. A contract can be as informal as buying morning coffee or as complex as a heavily negotiated multiparty multinational corporate acquisition. It is also near to impossible to overstate the impact of the rise of the internet and electronic commerce as the number of people online surpassed the 1.3 billion and of those more than 85% have used the internet to make a purchase. Internet World Survey (IWS) considers that the number of Internet

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users in India is now 150,000,000, to give credit to surveys and field work performed till December 13, 2013. The Law of Contracts is provisionally described as that branch of law which determines the circumstances in which a promise shall be legally binding on the person making it. Section 1 of the American Law Institute’s Restatement of the law of contracts gives the following definition. “A contract is a promise or a set of promises for the breach of which law gives a remedy or the performance of which the law in same way recognizes as a duty.” The Law of contracts finds its genesis in fundamental principles discussed in the Latin phrase “Pacta Sunt Survenda” meaning the agreement must be kept or honoured. Contract in a simple definition can be stated as: A legally binding agreement involving two or more parties that sets forth what the parties will or will not do. The degree of certainty may not and indeed need not, be absolute. The main requirement is sufficient certainty, so that the risks and obligations are ascertainable and thus the parties can engage in a risk or benefit analysis and decide whether or not to proceed with their agreements. In any contract, the parties need to be able to determine several factors, whether or not to proceed with their agreements. In any contract, the parties need to be able to determine several factors, whether these are implicit or explicit. These rules of contracts formation, choice of law, choice of jurisdiction, terms and conditions, enforceability of the agreement, the identities of the contracting parties whether the contract can bind third parties and above all whether a contract has actually been formed. Contracts are vital to the economic systems of countries where private enterprise is encouraged and it should be borne in mind that, that much of wealth of free enterprise nations takes the form of such contracts, as bonds and promissory notes.

Most of the business activities in many countries depend on contract. These countries include promises for buying and selling of goods and services, payment of wages, or exchange of property or to construct buildings and so on so forth. Any agreement that is against public policy and morality is unenforceable. Courts will not honour contracts where incompetent persons are forced to enter into contracts. The law bars minors and mentally incompetent persons from assuming any obligations under a contract.

5 Chris Reed & John Angel. “Computer Law” Oxford University Press, New Delhi, (5th edn.)
The formation of a contract involves two important acts; namely making of an offer and acceptance of the offer. The acts may be verbal or orally done or may be put into writing. Offer manifestation of one’s consent to enter into a contract on specific terms and it should be made with clear intention that it will be legally binding when the same is being accepted by the offeree. The moment an acceptance is given to an offer a contract comes into existence. Therefore it is not easy to recall acceptance once it is made in then proper format. Acceptance is to offer what a lighted matchstick is to a train of gunpowder. There should be an intention also to create contract. Mere intention to create social obligations will not amount to contract.\(^6\) The financial benefit accruing out of a contract is called consideration or ‘quid pro quo’ which means something in return for something. Further a contract without consideration is void.

A contract is said to be discharged after the contractual obligations have been fulfilled. If either party violates the agreement it amounts to breach of contract, which vests in the affected party a right to initiate legal action the other. The remedies sought are usually different kinds of damages like ordinary, special, nominal, vindictive, etc. Besides, Specific Reliefs under the Specific Relief Act, 1963 can also be obtained. While enforcing the contracts, the Courts try to carry out the plain intention of the agreement.

### 3.2 Interpretation of Word Contract under the Indian Contract Act 1872

A contract is defined by Bowel as “A covenant or agreement with a lawful consideration or cause” Blackstone defines “An agreement upon sufficient consideration to do or not to do a particular thing”. Sec. 2(h) of the Indian Contract Act 1872 defines “an agreement enforceable by law is a contract. Sec. 2(e) defines Agreement as every promise and every set of promises forming consideration for each other. Sec.10 of the Act states the requisites for a valid contract- “All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void.”

Hence it is evident that to ensure the validity of a traditional or offline contract the basic essentials offer and acceptance, free consent, competent parties, a lawful consideration,

\(^6\) *Balfour v. Balfour* (1919) 2 KB 571
and lawful object should be present. Apart from these, intention to create legal obligations is necessary. These elements are scrutinized by Courts in view of several overarching Contract Law principles. Foremost among them is consensus-ad-idem or meeting of minds, which is a common understanding in the formation of the contract. Most jurisdictions will also forbid the enforcement of unfair unconscionable or unreasonable contract clauses.

There are several other additional principles that are based on the promise of protection of weaker parties like contracts which are not be enforceable by virtue of one of the parties not having adequate capacity (e.g. Minors or persons of unsound mind) or on the basis that the contract was entered under coercions, undue influence, fraud, mistake. The Courts generally refuse to enforce contracts on the basis of illegality or for public policy reasons too. In *Carlill v. Carbolic Smoke Ball Company* the principle with respect to formation of a contract was highlighted. Here a Pharmaceutical firm had introduced a drug that claimed to cure flu. The company had advertised that the consumers who could not recover in spite of usage of the drug according to the dosages would be rewarded a sum of $100. It was found that few people who used the drug according to the instructions were not cured and hence claimed for the reward sum of $100. The company refuted the claim stating that their advertisement did not have any intention to create a legal binding offer and it was merely an invitation to treat. But the Court of Appeal ruled that the advertisement connotes to be a valid and legally binding offer. It further observed that all the essential requirements of forming a contract were completely satisfied. There is an offer and acceptance, consideration flowing from the party’s usage of product as per instructions and thereby involving undertaking of a risk; parties are competent and the object being lawful one coupled with the intention of the parties to constitute a valid contract, with free consent; a valid contract comes into existence when compliance to the offer takes place. Only in this case it is a general and not a specific offer. A general offer is as good in law as a specific offer.

### 3.3 Historical Perspective of E-Contracts or Online Contracts

The law of contracts has developed over centuries and has had to transform in order to keep pace with economic, political and technological developments. One of the

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7 (1893) 1 QB 256
most significant shifts came with the industrial revolution and the creation of mass markets. Decades ago Information Technology through its innovations in business process re-engineering led the way in breaking down the inefficiencies within companies. Firms face relentless pressure to perform better, faster, cheaper, while maintaining a high level guaranteed results. In this new world of collaborative commerce and collaborative sourcing, a standard business process is simply inadequate. Using e-contracts to build new business relationships and to fulfil e-contracts through the Internet are important trends. E-Contracting is however not a new concept. The history of it can be reviewed for legal and technological aspects. In early 1990’s development of Electronic Data Interchange (EDI) was a significant movement for electronic commerce. EDI was considered as a term that refers solely to electronic transactions and contracts.

In this view e-contracts are not only legally binding agreements between a buyer and seller, but they can also be used across different work flow systems to cross different organizational business process to integrate different web services. Concepts of e-contract under the network environment have certain specific definite characteristics which distinguish it from the concept for traditional paper contracts, though their end objectives are similar.

E-Contract is a contract modelled, specified, executed and deployed by a software system. It is conceptually very similar to traditional (paper based) commercial contracts. Vendors present their products, prices and terms to prospective buyers. Buyers consider their options, negotiate prices and terms, place orders and make payments. Vendors deliver the purchased goods. Because of the ways in which it differs from traditional commerce, electronic commerce raises some new interesting technical and legal challenges. For the recognition of e-contracts following questions needed to be considered.

1. Whether contracts made online can be treated as valid contracts, binding on the parties

2. Would a supplier providing details about goods and services along with the prices available on a website deemed to have made an offer.

3. Whether e-contracts satisfy the legal requirement of reduction of agreements to signed documents.
4. Whether e-contracts interpret, adopt and compile the other legal standards in the context of electronic transactions

These questions are novel in a sense that earlier international instruments did not address these issues. These issues are now being within the ensuing lines requires further analysis.

3.4 Interpretation of the word offer:

An offer is an intimation, by words or conduct, of a willingness to enter into a legally binding contract and which in its terms expressly or impliedly indicates that it is to become binding on the offeror as soon as it has been accepted by an act, forbearance or return promise on the part of the person to whom it is addressed. An offer can also be said as a manifestation of one’s consent to enter into a contract on specific terms and made with a clear intention that it will be legally binding on receiving acceptance by the offeree. An offer or a proposal is a promise or commitment to do or refrain from doing some specified thing in the future. An offer and its acceptance is the universally acknowledged process for the making of an agreement. The proposal is the starting point. Section 2(a) of Indian Contract Act 1872 defines a proposal as “when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.”

A statement of fact made merely to supply information cannot be treated as an offer or acceptance so as to create a valid contract. In Harvey v. Facey, ‘A’ telegraphed ‘B’ ‘Will you sell us Bumper Hall Pen? Telegraph lowest cash price, answer paid.’ ‘B’ replied by telegram, ‘Lowest Price for Bumper Hall Pen £ 900.’ A telegraphed, ‘We agree to buy Bumper Hall Pen for £ 900 as asked by you.’ Bumper Hall Pen was a plot of land, and A claimed that this exchange of telegrams constituted a valid offer and acceptance. The Judicial Committee of the Privy Council pointed out that the first telegram of ‘A’ asked two questions:

9 Carlill v. Carbolic Smoke Ball Company (1893) 1 QB 256
10 (1893) A. C 552
1. As to the willingness of B to sell and

2. As to the lowest price and that the word telegraph was addressed to the second question only.

It was held that no contract had been made, as B in stating the lowest price for the property was not making an offer but supplying information, that the third telegram set above was an offer by A – not less so, because he called it an acceptance and that this offer had never been accepted by ‘B’

The offeror or the person making an offer must have serious intention to become bound by the offer. The terms of offer must be reasonably certain, or definite so that the parties to the contract and the court can ascertain the terms of the contract. The offer must be communicated by the offeror to the offeree, resulting in the offeree’s knowledge of the offer. The communication of an effective offer to an offeree gives the offeree the power to transform the offer into a legally binding contract by way of an acceptance; providing other essentials for a valid contract has been complied with. The offeree, naturally also has the option of rejecting the offer and can also simultaneously make another offer placing any conditions on the offer made, this is called as counter offer. Once a counter offer is made the original offer lapses; here the offeree becomes the offeror who is offering the contract with different terms and conditions.

3.4.1 Invitation to Treat

A person advertising his goods for sale, a bus company’s invitation to take shares, a shopkeeper displaying the products in the shop, a company advertising that it will carry passengers from place A to B, these entire cases amount to invitation to offer and not an offer. A company invites the public to take shares in the company, it is the public who make an offer to the company, and it is for the company to accept or reject the offer. In such instances it has to be looked into whether the statement or act made is an offer capable of acceptance, or whether it is merely an invitation to make an offer, and do business; one that contemplates that further negotiations will take place. A statement or act of this nature, if it is not intended to be binding is known as “invitation to treat.”

If a customer goes to the check out in a supermarket with a basket full of items of food and

drink and the person at the checkout informs that the supermarket does not wish to accept this offer for those items, the customer cannot sue the reason being the products displayed with price labels on the supermarket shelves are deemed by law to constitute invitation to treat and not offers capable of being accepted by the customer; therefore a customer cannot accept an invitation to treat and thereby conclude a contract. To classify any particular act or a statement to be an offer or an invitation to offer depends on intention to be bound rather than upon any prior principle of law; it is not easy to reconcile all the cases or their reasoning. When the intention is not clear the courts will take into account of the surrounding circumstances and consequences of holding an act or statement to be an offer or not.

Invitations to treat are advertisements that promote the sale of products but are not offers in themselves. Classic example is the rule laid down in *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd*\(^{12}\) that mere exposures of goods for sale by a shop keeper indicates to the public that he is willing to treat but it does not amount to an offer per se to sell. Similarly in *Fisher v. Bell*\(^{13}\) it was held that display of an article with a price tag is merely an invitation to treat and in no sense it is an offer for sale and the acceptance of which can constitute a contract.

There are settled principles for valid offline offers such as the Mail Box Rule. This rule describes the principles to fix the time of accepting an offer when acceptance is communicated through post. According to the traditional principles, a contract is concluded when an acceptance is in fact communicated to the offeror. The common law principle of the mail box rule provides that a contract is formed when the letter of acceptance is dispatched in the mail box.\(^{14}\)

### 3.4.2 Revoking an Offer

When the offeree rejects the original offer or makes a counter offer, the original offer made by the offeror lapses. The original offer can also be terminated by the offeror

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\(^{12}\) 1951 2 QB 795

\(^{13}\) [1961] 1 QB 394

\(^{14}\) *Henthorn v. Fraser*, (1892) 2 ch 77, *Adams v. Lindsel*, (1818)106 ER 250 *Court of King’s Bench* Basic Principles of mail box rule – www.statemaster.com (Last accessed on August 29, 2013)
by revoking the offer unless the offer is revocable and this revocation should be accomplished even before the offeree accepts the offer. If the offeree has already accepted the offer then both parties is bound in contract – the offeror cannot revoke the offer at this point. Apart from this an offer will terminate automatically by law under certain circumstances such as when the specific subject matter of the offer is destroyed. An offer may terminate when the offeror or the offeree dies or either becomes incompetent, or a new law is passed that makes the contract illegal.

An offer will also be terminated automatically by law when the period of time specified in the offer has lapsed or if time is not categorically prescribed after a reasonable period of time has passed. The concept of reasonable time depends on the subject matter of the contract business, market conditions and other relevant circumstances.15

3.5 Interpretation of the word acceptance in traditional contracts

Section 2(b) of the Indian Contract Act 1872 defines acceptance as follows:

“When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted, becomes a promise. Thus acceptance is the assent given to a proposal, and it has the effect of converting the proposal into a promise.”

3.5.1 Mode of communication prescribed by the offeror

The offeror may prescribe the method of communication of acceptance. Whether the offeror has prescribed the mode of acceptance depends upon the circumstances of the case. In normal circumstances the observance of mode of acceptance prescribed by the offeror will be sufficient to complete the agreement. If any other method which is equally or even more expeditious and efficacious would constitute a valid acceptance, the answer is yes provided the offeror does not insist that acceptance has to be communicated by a prescribed method only in which case that mode of acceptance will be considered for the

formation of the contract. This was emphasised in *Ellison v. Henshaw*\(^{16}\). Here ‘A’ offered to buy flour from ‘B’ requesting that an acceptance should be sent by the wagon which brought the offer. ‘B’ sent his acceptance by post thinking that this would reach the offeror more quickly. But the letter arrived after the time of wagon. ‘A’ was held not bound by the acceptance. Communication of acceptance should be from a person who has the authority to accept. Information received from an unauthorised person is ineffective as held in *Powell v. Lee*\(^{17}\), wherein it was stated that the information by an unauthorised person is as insufficient as over hearing from behind the door.

### 3.5.2 Mirror Image Rule

One essential requirement of an acceptance is that it should be unequivocal or offer must be accepted exactly as stated by the offeror. This principle of contract law is known as the mirror image rule – the terms of the acceptance must be the same as (mirror) the terms of the offer. If the acceptance is subject to new conditions or if the terms of the acceptance materially change the original offer, the acceptance may be deemed as a counter offer that impliedly rejects the original offer.

### 3.6 Law applicable in the case of Instantaneous Communication

The cardinal rule that posting a letter of acceptance, a contract is concluded at the place where the letter is posted cannot and shall not be extended to communication of acceptance by means of telex or telephone as they are instantaneous communications. If the contracting parties are residents of different jurisdictions, the place of conclusion or formation of contract assumes significance as it will determine the legal system which will govern the transaction. The English courts have developed two rules: the postal rule and receipt rule to determine the moment of acceptance for contracts formed by post and contracts formed by telex. In *Adams v. Lindsey*\(^{18}\), the defendants sent a letter on 2\(^{nd}\) Sep 1817 offering to sell certain quantity of wool to the plaintiffs. The letter added ‘receiving your answer in course of post’. The letter reached the plaintiffs on Sep 5\(^{th}\). On the same evening the plaintiffs wrote an answer agreeing to accept the wool. This was received by

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\(^{16}\) (1819) 4 Wheaton 225

\(^{17}\) 1908, 24 TLR, 606

\(^{18}\) (1818) 106 ER 250, Court of Kings Bench

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the defendants on Sep 9th. The defendants had waited for the acceptance up to the 8th Sep and not having received the same sold the wool to other parties on that date. They were sued for breach of contract. The court held that complete contract arises on the date when the letter of acceptance is posted in due course. This rule was affirmed by the court of appeal in *Household Fire & Accident Insurance Co. v. Grant*19, where the defendant had applied for allotment of 100 shares in the plaintiff company; though the letter of allotment was posted in due time to the defendant it never reached him. Even then Grant was bound by the acceptance.

### 3.6.1 Position in English Law

The law treats post as an agent of both parties then as soon as the letter of acceptance is delivered to the post office the contract is made as complete final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offeror himself as his agent to deliver the offer and to receive the acceptance. By doing so the acceptor has put the letter out of his control and done an extraneous act which clinches the matter and shows beyond doubt each side is bound.

### 3.6.2 Position in Indian Law

The Indian Contract Act adopts a different interpretation by virtue of Section 4 of the Act. According to Section 4 of the Indian Contract Act 1872 the communication of proposal is complete, when it comes to the knowledge of the person to whom it is made and the communication of acceptance is complete, as against the proposer, when the acceptance is put in a course of transmission to him so as to be out of the acceptor and as against the acceptor when it comes to the knowledge of the proposer. Hence it is evident that in order to give finality to the agreement, the offeree has to make up his mind as to final acceptance and also do some external manifestation of the acceptance. The nature or the mode of communication of acceptance varies with the nature of the case depending on the circumstances. ‘Words’ are not the only medium of expression, conduct may often convey as clearly as words a promise or an assent to a proposed promise.20

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19 (1879) LR 4 Ex Div 26(CA)
20 Restatement, Contracts, American Law Institute – Section 21
The only difference between the Indian and English Law is the position of the acceptor. In England when the letter of acceptance is posted the offeror and the acceptor become irrevocably bound, but in Indian Law the acceptor does not become bound by merely posting his acceptance. He becomes bound only when his acceptance “comes to the knowledge of the proposer.” The gap of time between the posting and delivery of the acceptance can be utilised by the acceptor for revoking his acceptance by a speedier communication which will overtake the acceptance.21

3.6.3 Receipt Rule

The courts have used the receipt rule for instances in which the two parties have continuous communications. Say if A & B are two contracting parties over the phone or in person, the offeror must hear the acceptance and only then the contract is created. When instantaneous means of communication appeared, it was initially thought that the mail box rule applies to such communications also. In Carow Towing Co. v. The Ed Mc Williams22, the Canadian court held that telephone can be well equated with a letter and therefore postal rule applies. The acceptance is complete where words are spoken. This position was changed in Entores v. Miles Far East Corporation Ltd.,23 where the offeree had sent his acceptance from Amsterdam by telex to the offeror in London. Lord Denning held that telex is virtually instantaneous form of communication which when used makes mail box rule inapplicable. It was further held that in instantaneous means of communication ‘receipt rule’ applies and contract, in such cases comes into existence where acceptance is received. The rationale behind this rule is that the offeree will always know whether his acceptance has been received and can react immediately to any faults or misunderstanding.24 This rule was confirmed by the House of Lords in Brinkibon Ltd. v. Stahag Stahl and W.G25 with an important observation that although it is a second rule it is not necessarily a universal rule. The rule of instantaneous means of communication

21 Dr. Avatar Singh –“*Contract and Specific Relief Act*”, Eastern Book Company, (15th edn.) P.35
22 (1919) 46 D.L.R 506 (Ex ct)
23 (1955) 2 QB 327
24 Dr. Farooq Ahamed, “*Cyber Law in India*”, New Era Law Publications, New Delhi, (2nd edn. 2005), P. 221
25 (1982) ZWLR 264 HL
laid in Entores was also followed by the Supreme Court of India in *Baghwandas Goverdhanadas Kedia v. Giridharila Parshottamdas & Co.*,26 when offer was made by telephone from Ahmadabad by the Plaintiff to the defendant at Khamgaon, Justice Shah quoted “draftsman of the Indian Contract Act could not have envisaged use of telephone because it had not yet been invented.” The Apex Court confined the operations of Section 4 to the postal communications and laid down that in case of instantaneous means of communication, the contract is concluded where acceptance is received. Essentially the principle is that if both parties are in continuous communication during the acceptance the burden of notification falls on the accepting party (offeree) who has immediate feedback. Even in case of telex or fax where both parties are not necessarily personally involved, the devices communicate with each other and there is feedback. The offeree is thus in the best position to discover a transmission fault and can resend the messages needed. One more crucial point is that with respect to the time of contract formation, the time at which the telex, fax is expected to be read may even be more crucial than the actual time of receipt. In *Schelde Delta Shipping BV v. Astarte Shipping Ltd., (The Pamela)*27 if an acceptance is sent outside the normal business hours, receipt is not effective until the opening of the next business day.

3.7 Communication aspect in online contracts

Having discussed about the postal and receipt rules with respect to traditional or offline contracts, it has to be analysed as to how the same can be made applicable to online contracts. Whether the contract is formed online or offline, the elements of offer and acceptance remains the essential requirement for the formation of the contract. The modus operandi as to how offer is made and communicated, how acceptance is made for the same and how an online contract is formed is being analysed in the ensuing lines. An advantage of electronic commerce is the automation of tasks which previously required human environment. Computers can receive orders online and in some Electronic Data Interchange systems EDI even keep track of inventory and automatically place orders when supplies ran low.

26 AIR 1966 SC 543
27 1995 2 Lloyd’s Rep 249
The most critical question that arises is can a computer accept an offer and create a contract? In English law and certain other legal systems, they have a tradition of attributing the actions of a machine to the person who instructed it to execute a particular routine. A similar case is seen in *Thornton v. Shoe Lane Parking*\(^28\), were the court ruled that a customer, contracted with a car park machine representing the owner and when he fed his money into it and received a claim ticket an act has been committed. Acceptance takes place when the customer put his money into the slot and thus the contract is concluded. In another case *State Farm Mutual Auto Insurance Co., v. Brockhurst*\(^29\) the court ruled that since the computer only operated as programmed by the insurance company, it was bound by the contract formed. Based on these precedents English Courts would probably decide that a web server is an agent of the online business and it can make offer and acceptance in order to create contracts. Web automated contracts, therefore need to be construed to prevent the creation of unwanted contracts.

### 3.7.1 Invitation to treat and offer in an online environment

It is very crucial to decide whether a particular representation is an offer or an invitation to treat, because this will have an impact on when a contract is formed. For what may appear to be like an offer is actually only a precursor to an offer; otherwise called as invitation to offer or invitation to treat. Whereas an offer is a proposed set of terms which is capable of being accepted, an invitation to treat is a call for the other party to make an offer and enter into negotiations as held in *Pharmaceutical Society of Great Britain v. Bootscash Chemists (Southern) Ltd.*\(^30\) As seen in a traditional form of contract an invitation to treat cannot become binding through acceptance. The display of goods for sale either in a shop window or on shelves is considered to be an invitation to treat. Coming to online transactions how this differentiation can be made possible has to be analysed. Advertisements on websites or web advertisements have become the order of the day. Suppliers are using websites to conduct business. Like a bill board it advertises, products and services but unlike a bill board a website can also assist the supplier to

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\(^{28}\) 1971 1 ALL ER 686 CA; (1971 2 QB 163)
\(^{29}\) 453 F 2d 533 (10\(^{th}\) Cir 1972)
\(^{30}\) (1952) 2 QB 795
complete the sale. In doing so, a website can be designed to advertise the features of a product; it can even allow a viewer to examine the product in a restricted form. After examining the product, or the advertising, a viewer may then select the part of the website to enter into a contract to acquire the product or services. The internet in effect fuses the advertising and the shop. The law, in contrast has distinguished between advertising and shop displays. This unique commercial situation has legal ramifications.

3.7.2 Web invitations

A similar principle is likely to apply to electronic mail price list and websites. Websites are the electronic analogue of shop, windows and catalogues, advertising the descriptions of products and their prices. Electronic mail pricelists similarly are analogues to the circulars in conventional commerce. In order to minimise the risk of unfavourable proceeding the websites and electronic mail solicitations should have disclaimers explicitly defining them to be invitations to treat and not offers. These disclaimers will ensure that e-commerce business transactions have the ability to select their customers and manage their supply of goods. The courts have introduced this principle of invitation to treat in order to protect traditional business from supply shortages or limited supplies. It was held in Grainger & Son v. Gough\textsuperscript{31} that the transmission of a price list does not amount to an offer to supply an unlimited quantity of wine described at the price named so that as soon as an order is given there is a binding contract, contract to supply that quantity. If it were so the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry his stock of wine of that description being limited necessarily.

The same argument applies to our electronic commerce also. Online merchants cannot necessarily accurately assess the number of replies which they will receive in response to a solicitation. If the website or electronic mail pricelist were to be considered as an offer, the merchant would potentially have innumerable contracts with people throughout the world all of whom could sue for breach of it, if the merchant failed to

\textsuperscript{31} 1896 A.C 325
deliver the advertised products. For instance a computer company has a total of 10 PCs to sell and the merchant sends out e-mails to all the clients on the 10th of January notifying them of the PC’s and their prices. When 11 of the company’s customers send their acceptance e-mails on the 11th of January, then the question which is crucial here is which customer will be the loser. In the traditional or offline contract if such a situation arises then the first letter to be posted is the one which is deemed to be the successful acceptance even if it happens to arrive later on the desk of the offeror, because once the letter of acceptance is posted, a contract has been concluded. In the online contract, it has not yet been unequivocally determined as to what constitutes the equivalents of posting in a letter box – is it the moment of transmission of the e-mail, the moment it arrives in the addressee’s inbox or at the moment the addressee opens that e-mail. The particular circumstances will usually dictate the answer. To avoid doubt the company should specify in its term and conditions how in the event of competing e-mails of acceptance, it will determine which e-mail has been deemed to arrive first. That apart electronic mail can frequently become garbled due to transmission problems such as incompatible formats, changes in languages or keyboards, SETs or Firewalls etc. The offeror will probably not be held liable for the error if the recipient had reason to suspect a transmission problem. In certain circumstances the offeror could be held liable for inaccuracies if the offeree subsequently accepts the offer and forms a contract; ensuring that the e-mail solicitations are invitations to treat and requiring the customer to make the offer reduces this risk.

After the offer has been made, the offeree accepts and thus creates a contract. In the cyberspace acceptance is a contentious issue because the offeror and the offeree are distanced in time and space. It all depends on how the courts interpret a website or other online advertisement (as either an invitation to treat or as an offer); the response of the customer could be viewed as either an acceptance or an offer respectively. It is assumed that the website is an invitation to treat and that the customer’s response is an offer and thus it is the electronic commerce vendor who accepts and forms the contract. It is very much evident that the basic elements which initiate the process of contract are the proposal, its acceptance and their respective communication to the offeror and offeree.
The other method of concluding an online contract is via a website when one goes onto a website and selects certain items and proceeds to the checkout. Here again whether the display of certain items on a website constitutes an offer or invitation to treat will also be relevant to the websites environment. For any company to run a proper e-commerce operation, it needs to ensure that its terms and conditions are properly adapted to the online environment, that potential clients have sight of the terms and conditions which will govern the contract before conclusion of the contract and that it constructs its site in such a way as clearly to indicate whether the site is an offer capable of acceptance or an invitation to treat which cannot be accepted.

This can be demonstrated with the incidence of booking an online air ticket. When make my trip.com website opens, the departure and arrival columns are flashed relating to air line travel. After filling these the date is to be entered. Then a question is posted relating to time of departure that is desired. If it is to be flexible timing then a particular icon has to be chosen. Next a table of different airlines, seat availability and prices are flashed. This is not an offer. This is only an invitation to treat. When the proposed traveller clicks on the desired airline’s name then the details of credit card numbers are sought. This again has to be executed. Subsequently the despatch button icon is clicked. If the seat still remains unsold it is allotted to the proposed traveller and he can take print out of the ticket. Only if the ticket is allotted it will be charged to his credit card account. Otherwise statement will be flashed “already sold out”, “try other airline or some other date of departure.”

In such incidences of online contracting there is more than one issue involved. Here “make my trip.com” acts only as an agent for the respective principal. The act of the agent binds the principal. So here it is not simply a contract of an airline ticket but a contract of agency also comes into the scenario. In a similar manner rail tickets, bus tickets, pilgrimage tours etc., also take place based on online contracts. If the information giver and agent happen to be considered as a provider of an offer, if the tickets are sold out in few seconds between transfer of information then the agent will be put in a precarious legally charged position, for he will not be able to issue the online ticket and will face action for breaching the contract because the moment the icon is clicked by the proposed traveller, the contract concludes and cannot be recalled by the agent. Whether
the web advertisement and information constitute an invitation to treat or a regular offer will be indicated by the advertiser in the terms and conditions, in simple words such electronic contracts are standard form of contracts.

The acceptance can be by way of click on the word ‘accept’ calling it as click wrap acceptance. In traditional paper based world of contract, courts have generally upheld the practice of incorporating terms by reference where the party relying upon such terms has notified the other party of the terms and such terms are reasonably accessible to the other party. In the online world it is particularly well suited to the practice of incorporating terms by reference as it is quick and easy to insert hyperlinks into text.32 The Supreme Court of Canada recently contemplated the validity of introducing terms via hyperlink in the case of Dell computer Corp v. Union des Consommateurs.33 In upholding the validity of this practice the court emphasized that the terms and conditions must be reasonably accessible and was of the opinion that a hyperlinked document meets that standard.34

On e-commerce websites a user is asked to register where he fills in his personal details including his contact information. The user is also asked to read the terms of service, privacy policy and disclaimers mentioned on the website and then click on ‘I agree’ button it is presumed that he has read and consented to all the terms and conditions mentioned on the website. The clicking on the ‘I agree’ button forms an e-contract known as the click wrap agreement. The click wrap agreements are often used in downloading software and contain provisions to protect the intellectual property contained therein by restraining the licensee firm selling the copy of his software. It also contains provisions that disallow any decompiling of the program for any purpose. This adequately protects the intellectual property of the licensor by providing additional remedies aside from the copyright and other related legislations.35 Click wrap calls for an

33 2007 SCC 34
explicit manifestation of assent by clicking on to the ‘I agree’ icon or ‘I accept the terms and conditions’ icon. They can even decline by clicking the icon ‘I disagree’ or ‘I don’t accept.’ Software Developers generally rely on the use of contracts in the form of click wrap license agreements as a means to protect software from unauthorised use like modification and copying. By granting a license to the purchaser to use the software rather than selling the program outright, the Software Developer is able to retain and have control over his product. Most of click wrap license agreements are non exclusive licenses which mean that the licensor reserves the right to license the same software to other licenses. These agreements usually include provisions such as a ‘Notice of agreement clause’ stating that the using of the software product constitutes an agreement to the license’s terms, a ‘Title Retention Clause’ which in effect, states the user does not own the copy of the program contradicted for but takes possession subject to a perpetual license an ‘Exclusive use clause’ a clause preventing the user from creating unauthorized copies of the software or products for use or otherwise an ‘anti refusal clause’ prohibiting the user from lending or transferring the software to others, in case of software, a clause prohibiting usage in more than one computer specified for that parties, an ‘Anti Reverse Engineering Clause’ prohibiting the user from the already available version, a provision protecting the copy right over the software or product design, a usual limitation or disclaimer of warranties and liabilities with a clause limiting the liability of the vendor, a purchaser’s right to decline the terms of the agreement by returning the software program or the product as the case may be.

Thus it is evident that click wrap agreements are adhesion contracts which do not involve the concept of mutual assents and bargains as provided in the contract theory. They are actually a take it or leave it kind of agreement, in which the user is not made aware of the terms until late in the transaction, which is totally a different concept from traditional or written contract. In offline contracts an offer is made by the offeror stating about the terms and conditions, to the offeree, who in turn gives his acceptance if all the

terms and conditions offered are acceptable. If it is not conducive for the offeree he has every right to reject the offer or place a counter offer. Only when the unequivocal acceptance is given, a contract is formed and binding obligations springs out. But in a click wrap agreement purchaser purchases the product and then he is asked to agree to the terms and conditions at a later stage whereby he is not given any opportunity to negotiate the terms and conditions.

3.8 Enforceability of Click wrap Agreements

The judiciary plays a vital role in interpreting the enforceability of these agreements without deviating from the hallmark principles of the contract law. The United States of America is quite ahead when compared to the rest of the world in deciding on such issues. Since it comprises of many states and each being given the power to enact their laws there is no uniform legislation regarding the validity and enforceability of click wrap agreements, but the cases decided can be used as guidance and besides is the Uniform Information Computer Information Transaction Act (UCITA) which harmonizes the approach to click wrap agreements to a great extent.

In the arena of click wrap agreements the most famous US case was that of Hotmail v. Money Pie38, where the clicking of an ‘I agree’ button at the bottom of a terms and conditions page was considered sufficient. But some forms of click wrap agreements have not been enforced. Both Canadian and US Courts have generally upheld the validity of click wrap agreements. The leading case in Canada is Rudder v. Microsoft39 where the court found that the forum selection clause and the entire click wrap agreement containing this provision was enforceable. The court rejected the plaintiff’s claim that since only a portion of the agreement was on the screen at any one time, the defendant had a duty to bring such a clause to the attention of the user and further stated that this is not materially different from a multipage written document which requires a party to turn the page. Here the agreement included a provision that even if the applicants did not read the agreement before clicking the ‘I agree’ button they would still be bound to all the

39 (1999), 2 CPR, 4th 474 (Ont S.C.J)
terms. The court held that such a click wrap agreement must be afforded the sanctity that must be given to any agreements in writing.

In another US case Caspi v. Microsoft Network LLC,\textsuperscript{40} where a user was required to click their acceptance of the terms and conditions. The court held that contract was binding particularly due to the fact that the user could only proceed after he or she had a chance to review the membership agreement. The same was adopted in Forest v. Verizon Communication Inc.,\textsuperscript{41} the appellants customers argued that Verizon “did not provide adequate notice of the clauses or its significance.” The clause, which was located at the end of the agreement, could only be seen if the user scrolled through the entire agreement where only a small part of the agreement was visible at any one time. However at the beginning of the agreement it stated “PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY” and subscribers could click an ‘Accept’ button below the scroll box. The court stated that “the general rule is that absence of fraud or mistake, one who signs a contract is bound by a contract which he has an opportunity to read whether he does so or not.” The Court made the important observation that “A contract is no less a contract simply because it is entered into via computer.” The dispute in Appliance Zone, LLC v. NexTag\textsuperscript{42}, Inc was between the operator of an online comparison shopping website and one of its merchants. The NexTag website required its merchants to agree to the Next Tag Terms of Service by clicking a box next to the phrase. “I accept the NexTag Terms of Service.” While the opinion does not say so explicitly, it appears that this phrase was hyperlinked to the terms themselves. The terms contained a forum selection clause. The plaintiff argued that it should not be bound to the forum selection clause because the terms were unconscionable. To support its contention that the terms were procedurally unconscionable, the plaintiff argued that the terms were inconspicuous; and that the parties possessed unequal bargaining power. In rejecting the plaintiff’s argument the court noted that the NexTag presentation of terms was typical of the online retail industry. The courts recognized that the terms were clearly labelled and that they were

\textsuperscript{40} 732 A 2d 528 (NJ Super Ct App Div 1999)

\textsuperscript{41} 2002 D.C App. LEXIS. 509

placed in a highly visible portion of the webpage. The court found that all of these websites characteristics gave adequate notice of the terms and therefore the plaintiff was bound by the fundamental rule of contract law that “a person who signs a contract is presumed to know its terms and consents to be bound by them.” In traditional contract law we use the principle ‘non est factum’ meaning mind did not go with the signature. If an earnest error has been made due to misrepresentation by the other party and the signature has been affixed, then the plea of non est factum can be taken which means that the mind did not go with the signature. However if a person knows that the document which is being signed by him has legal consequences, then he cannot take the plea of non est factum.

In Scherillo v. Dun & Badstreet\(^4\) there was a Forum Selection Clause contained in website, website’s terms and conditions that appeared in a scroll box during the website registration process. In order to register for the defendant’s services, a website user was required to check a box below the scroll box that was adjacent to the phrase “I have read and AGREE, to the terms, conditions shown below” and click another box containing the phrase “Complete Registration.” The court held that such a presentation reasonably communicated the choice of forum clause to the website user despite the fact that a user would have to scroll through a text box in order to read the entire contract. The court made a useful analogy to paper contracts, stating that a person who checks the box agreeing to the terms and condition of purchase on an internet site without scrolling down to read all the terms and condition is in the same position as a person who turns to the last page of a paper contract and signs it without reading the terms – namely the clause is still valid.\(^5\) “Ignorantia facit excusat, Ignorantia juris non excusat” meaning ignorance of fact is excusable, ignorance of law is not excusable. In these contracts there is intention to create legal obligation it is not domestic arrangement but one of a commercial nature. As far as the European Union is concerned until recently there is not much clarity with respect to the enforceability of click wrap agreements while in Australia click wrap are enforceable in principle.

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\(^4\) 684 F. Supp 2d 313 (E.D.N.Y 2010)

3.8.1 Issues involved while applying Clickwrap Agreements

In traditional contract there is physical meeting of the contracting parties in person, when they enter into any form of contract for buying or selling of goods or services. While this is not the condition in the cyberspace contracts as everything happens virtually, where they cannot see and are not able to identify the parties. Hence such transactions do not give the same sense of security as offline contracts. Online business dealings are entered into with what is generally in the nature of a faceless icon. It is also difficult to identify if the opposite contracting party is a competent person capable of entering into a contract. These transactions ought to be done with due care and diligence or else the sanctity of contract and time saving ability will be defeated. The element of trust in online transactions are crucial one and it is only on this good faith contracting persons are identified and their businesses are carried on.

There are certain instances when the parties might be offering through a fraudulent website exhibiting wares for sales which when accepted affects the other party. Hence it becomes highly imperative for the parties to a contract to be capable of being identified and their identity be guaranteed by a reliable entity.

Courts in USA have held that click wrap agreement are enforceable if the terms and conditions presented to the user are provided with requisite notice to see these terms. In traditional contract, in Olley v. Marlborough, Mrs Olley was a long staying resident of the Marlborough Court Hotel, Lancaster Gate, London. As usual she left her room key on a rack behind the reception one day, but when she came back it was gone. Inside her room, her fur coat had been stolen. (A witness called Colonel Crerer, who was sitting in the lounge, saw a person go in and come out again with a parcel fifteen minutes later.) The porter had apparently been cleaning a bust of the Duke of Marlborough and failed to notice. Mrs Olley asked to be repaid for the cost of the coat. The Hotel pointed to an exclusion clause on a notice behind a door in the bedroom leading to a washbasin, which said,

45 [1949] 1 KB 532; 1949 1 ALL ER 127, CA
"THE PROPRIETORS WILL NOT HOLD THEMSELVES RESPONSIBLE FOR ARTICLES LOST OR STOLEN, UNLESS HANDED TO THE MANAGERESS FOR SAFE CUSTODY."

Mrs Olley argued that the clause was not incorporated into the contract. It was held that the Hotel had failed to take reasonable care as they were required to do contractually; and that the disclaimer was not part of the contract and the hotel could not rely upon it. It was further noted that the contract for the storage of the coat was formed at the reception desk and there was no way that Mrs Olley could have been aware of the disclaimer at that point and so it could not be part of the contract.

Hence it is once again affirmed that there is no dilution to the principles of contract whether it is online or offline, the modus operandi alone differs. In Specht V Netscape\(^{46}\) it was found that click wrap license was enforceable because to view the terms of the license agreement, the user was required to scroll to the bottom of the webpage. The court stated “plaintiffs might have been aware that an unexplored portion of the Netscape webpage remained below the download button does not mean that they reasonably should have concluded that this portion contained a notice of the licensing terms.” The court further concluded that where a user was urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.

3.8.2 Legal Recognition of Click wrap Agreement – Indian Scenario

In the Indian Contract Act 1872, Section 13 states that two or more persons are said to consent when they agree upon the same thing in the same sense. “Consensus ad idem,” but this meeting of minds is however absent in case of click wrap since these are more of standard form of contracts where only option to the other side is either accept in toto or reject in toto. Due to the complicated lengthy details in such agreements, the user generally does not take the pain to read the terms mentioned in there and assents to them without any meeting of minds.

\(^{46}\) No:01 7860 (L) (2d Cir., October 1, 2002)
In India we don’t have any judicial history on the enforceability of clickwrap agreements, though Information Technology Act 2000 contains some provisions about electronic records, their attribution acknowledgment and despatch. Under such circumstances the best option is to look into the foreign decisions on the subject matter as there is no clear law in this area as on date. The validity of click wrap license agreements are decided by courts in USA. In *Compuserve v. Patterson,*\(^\text{47}\) a case relating to non mass market click wrap license agreement, Compuserve the plaintiff was a computer information service headquartered in Columbus, Ohio. It contracted with individual subscribers, such as Patterson, the defendant to provide access to computing and information services via the Internet. Patterson a resident of Houston, Texas subscribed to CompuServe and placed items of shareware on CompuServe’s system for others to use and purchase. He later entered into a Shareware Registration Agreement (SRA), an online agreement, under which CompuServe was entitled to a percentage of the fee when a user paid a shareware licensing fee. The SRA referred to two documents which are CompuServe Service Agreement and Rules of Operation. Both expressly provided that the agreements would be governed and construed under Ohio law. Subsequently, CompuServe began to market a similar product by using software which infringed Patterson’s trademark used in his shareware program. When Patterson complained, CompuServe sought from an Ohio court a declaratory judgment that it was not infringing on any of Patterson’s trademark. The Appellate Court held that Patterson’s contacts with Ohio were sufficient for the Ohio court to exercise personal jurisdiction over the non-resident. The Court further reasoned that Patterson manifested assent to the SRA, which by its terms was to be governed by Ohio law, by typing ‘Agree’ at various points in the agreement. A click wrap contract was thus held enforceable. The enforceability of mass-market click wrap agreements was considered for the first time in *Hotmail v. Van $ Money Pie.*\(^\text{48}\) Hotmail, the plaintiff is a Silicon Valley company that provides free electronic mail on the World Wide Web. Hotmail allows its over ten million registered subscribers to exchange e-mail messages over the internet with any other e-mail users.

\(^{47}\) 89 F. 3d 1257 (6th Cir. 1998)  
who have an internet e-mail address throughout the world. To become a hot mail subscriber one must agree to abide by the Service Agreement. (Terms of Service) which specifically prohibits subscribers from using Hotmail’s services to send unsolicited commercial bulk e-mail or “spam” or, to send obscene or pornographic messages. Hotmail can terminate the account of any Hotmail subscriber who violates the Terms of Service. In 1997 Hotmail found out that the defendant, Van$Money Pie Inc., created Hotmail’s accounts to facilitate sending “spam” e-mails to thousands of users including Hotmail’s domain name and its mark. The spam messages advertised pornography, bulk e-mailing software and “get-rich-quick” schemes. The Hotmail’s account served as a drop box for collecting unopened responses to the spam messages and receiving bounced back e-mails sent to nonexistent or incorrect email addresses. Hotmail sued the defendant for having breached the terms of the service which he had agreed to abide by and claimed that the defendant’s actions had damaged the reputation and goodwill of Hotmail. The US District Court granted an Injunction prohibiting the defendant from “Spamming” via Hotmail’s email services.

Here though the validity of an online agreement is not directly dealt with, the decision implies the validity of a click wrap license agreement. Another case relation to click wrap contracts is Caspi v. the Microsoft Network LL.C et al49. This case was a class action. Subscribers to online computer service, the plaintiff brought action against the Microsoft Network (MSN), an Internet Service Provider (ISP) and the defendant, to recover for the way it rolled over service into more expensive plans. The issue of the case is whether a forum selection clause contained in an online subscriber agreement is enforceable. From the facts, it is discernable that before becoming an MSN member, a prospective subscriber is prompted by MSN software to view multiple computer screens of information, including a membership agreement which contains the above clause. MSN’s membership agreement appears on the computer screen in a scrollable window next to blocks providing the choices “I agree” and “I Don’t Agree” and prospective members assent to the terms of the agreement by clicking on “I agree” using a computer

mouse. Registration may proceed only after the potential subscriber has had an opportunity to view and has assented to the membership agreement, including MSN’s forum selection clause review, and a subscriber has clicked on “I Agree”. The Supreme Court, Appellate Division, by affirming the trial court’s decision, held the application of MSN’s forum selection clause at Washington did not contravene public policy and would not inconvenience a trial.

There have been many such decisions in US wherein the validity of click wrap license has been analysed by the court and most cases where their validity is called in question the contracts have been held to be valid and enforceable. As held in *Feldman v. Google Inc and Real Networks, Inc.*, *In Bragg v. Linden Research, Inc* court held certain terms of the second life click wrap agreement, unconscionable and therefore unenforceable. Further in *I. Lan Systems, Inc v. Netscout Service Level Corporation* the federal district court held that a click wrap contract is fully valid and enforceable. I.Lan purchased the software from Net scout and rendered network monitoring services. According to the terms of contract signed between Net scout and I.Lan., I.Lan was authorised to resell its software to the consumer. What was not allowed therein was to rent the software under the click wrap agreements. The contract was enforceable on the basis that by clicking on I agree button, I.Lan had given its unconditional consent to be bound by the terms of the click wrap agreement. In *Brower v. Gateway 2000, Inc* the court held that the arbitration clause of Gateway 2000 Inc, was unconscionable as it was excessively costly to pursue ICC arbitration process by the plaintiff.

In *Comb v. Pay Pal Inc* the court held that Pay Pal’s click wrap agreement was excessively one sided and was highly unconscionable. Pay Pal’s click wrap agreement provided that Pay Pal could freeze its customer accounts and keep with it amounts that in

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50 2007 U.S. District LEXIS 22996, the court upheld an arbitration clause in a click wrap agreement
52 NO. 06 – 4925 (E D Pa 30th May 2007)
54 676 NY S 2d @ 574-575 (N.Y App. Div 1998)
55 218 F Supp 2d 1165 (N.D Cal 2002) at 1172177
its sole discretion envisaged disputed amounts. Also Pay Pal could take such an action without notice to its customers.  

3.9 Interpretations of the term browse wrap contracts

Browse wrap terms do not call for an explicit manifestation of assent and those terms are usually accessible through a hyperlink. In most cases it is not viewable because it is not mandatory for any user to read and agree to the terms and conditions before conducting further transactions. In fact a user is assumed to have agreed to the terms and conditions of a browse wrap agreement by merely browsing the associated websites, regardless of whether the terms and conditions are actually reviewed by him. These agreements are also referred to as ‘web wrap’ agreements. With these agreements users can use the website without any affirmative act of assent to the terms of agreements. Both click wrap and browse wrap are devised from ‘shrink wrap’ a term used to describe paper terms included in the box containing a purchased product. Generally, in all e-commerce websites the terms and conditions are prominently displayed on the website and it draws the attention of the user to read the same at the earliest. Clear assent is depicted in a click wrap agreement wherein even before a user clicks on the ‘I agree’ button asking whether to confirm and if he has read and agreed to the terms and conditions. Clicking on the ‘I agree’ button clearly describes the user’s intention to create legal relations. With respect to the consideration aspects online payments is affected through net banking or use of credit cards, debit cards or online service providers or so on. The browse wrap cases involved one business to business contract and one business to consumer contract. In PDC Laboratories Inc. v. Hach Co. the plaintiff had purchased agar plates from the defendant through defendant’s website. The online Terms and Conditions of sale contained a clause limiting warranties and remedies. When the plaintiff found that agar plates were defective, it sued defendant and claimed it was not bound by warranty disclaimer and remedy limitation because they were not sufficiently

56 Dickens Robert.L “Finding common ground in the world of e-contracts the consistency of legal reasoning in clickwrap”, 19th Nov ’06 http://law.bepress.com (Last accessed on November 01, 2013)
conspicuous and therefore procedurally unconscionable. In *Hines v. Overstock.com Incom* 59 While the website did not require that the plaintiff click a box to accept the terms, the terms were hyperlinked on three pages of the order process in underlined, blue, contrasting text and the last page of the order process directed the buyer to review terms, add any comments and submit order. This sentence was followed by a hyperlink to the terms. In finding whether the terms were adequately communicated to the plaintiff the court would rely both on the Uniform Commercial Code definition of conspicuous and the decision in *Hubbert v. Dell*. 60 A term is conspicuous under the UCC if it is presented in a manner that a reasonable person against which it is to operate ought to have noticed it; 61 because hyperlink to the terms appeared on several pages of the ordering process in blue contracting text, the presentation of the terms satisfied the UCC definition of conspicuous. They also satisfied the test for conspicuousness, which held that terms were sufficiently conspicuous when a contrasting hyperlink to the terms appeared on every page of the ordering process. The plaintiff argued that because it was not required to click a box assenting to the terms, it should not bind them, the court rejected this argument, stating that the acceptance requirements in click wrap cases are inapplicable to cases involving only hyperlinked terms 62 without explicitly saying so, the court recognized that whether terms are presented as click wrap terms or browse wrap terms, it has no bearing on enforceability; rather the relevant inquiry is whether the terms were reasonably communicated to the website user. 63 In offline or traditional contracts the same principle is only applied. Lord Denning M.R pointed out in *Thornton v. Shoe Lane Parking Ltd* 64 “No customer in a thousand ever read the conditions, if he had to do so he would have missed the train or his boat.”

In *L’ Estrange v. F.Graucob Ltd.*, 65 where L’ Estrange signed an agreement without reading it under which she purchased a cigarette vending machine. The agreement excluded

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59 668 F. Supp. 2d 362 (E.D.N.Y 2009)
60 835N.E 2d 113 (111. App. 2005)
61 UCC S 2-401 (2000)
64 (1971) 2 Q.B. 163
65 (1934) ALL ER Rep 16; (1934) 2KB 394

68
liability for all kinds of defect in the machine. The machine was totally defective. The court found that the supplier had made no effort to bring the sweeping exemption term to the notice of Mrs L’Estrange so the court held: “where a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound and it is wholly immaterial whether he had read the document or not.” The situation would have been different if the plaintiff had not signed. Thus in these ‘Contracts of Adhesion,’ individual has no choice, but to accept. He cannot negotiate but has to merely adhere. Therefore in order to protect the individuals who are in a weaker position from exploitation the courts have evolved different modes of protection.66

In Henderson v. Stevenson67 House of Lords observed that the plaintiff could not be said to have accepted a term which he has not seen of which he knew nothing and which he is not in any ostensibly connected with; that which is printed and written upon the face of the contract presented to him. The result would have been reversed had such words “for conditions see back” had been printed on the face of the ticket to draw the passengers attention to the place where the conditions were printed. A notice will be regarded as sufficient only if it will convey to the minds of people in general that ticket contains conditions. This was clearly emphasised in the subsequent case of Parker v. South Easter Rail Co.,68 Mellish LJ pointed out that if the plaintiff “knew there was writing, but he did not know or believe that the writing contained conditions, nevertheless he would be bound,” for there was reasonable notice that the writing contained conditions.

The notice should be contemporaneous with the contract; it should be given either before or at the time of contract not after the formation of contract. This was emphasised in Olley v. Marlbourough Court Ltd.,69 court held that the notice was not part of the agreement and hence the hotelier was held liable. From the above discussions it is very evident that the contractual principles and mode of enforceability remains the same both in an online contract and in offline or traditional contracts.

66 Dr. Avthar Singh – “Principles of Merchantile Law” – Eastern Book Company (edn. 1985) P.18
67 (1875) 32 LT 709;
68 (1877) 2 CPD 416; (1874-80) ALL ER Rep 166
69 (1949) 1KB 532 (1949) 1 ALL ER 127 CA
The other browse wrap case, *Hines v. Overstock.com Inc*\(^{70}\) can be described as pure browse wrap case because the only notice to a website user that she would be bound to the terms and conditions appeared in the first line of the terms and conditions themselves. The overstock.com terms and conditions stated that entering this site will constitute your acceptance of these terms and conditions. The court found that the plaintiff did not have adequate notice of the terms; it held that she was not bound by the arbitration clause contained in the terms. Hines case provides a good lesson on how to present website terms and conditions. The plaintiff claimed that she visited the overstock.com website to buy a vacuum; she was never made aware of the terms. Indeed the link to the terms was on the bottom of the web page in small print between a link to the privacy policy and the overstock.com trade mark. At no time in the ordering process was it necessary for a buyer to scroll down to the end of the web page. In *PDC v. Hach*\(^{71}\), the court as in Hines case focussed on notice. The court stressed that in determining the validity of browse wrap terms, the main inquiry is whether the website user “has actual or constructive notice of a sites terms and conditions prior to the using of the site.” Hence these rules reflect that the general contract rule regarding both paper and electronic standard forms the terms must be reasonably communicated.

### 3.9.1 Enforceability of Browse Wrap Agreements

The US and Canadian Courts have shown less consistency in their enforcement of Browse wrap agreements. The primary issue in these cases is whether the requisite consent can be implied by the conduct of the browser. In general the courts have looked at the sufficiency of notice and whether consent is reasonable to imply on the basis of conduct.\(^{72}\) *Kanitz v. Rogers Cable Inc.*,\(^{73}\) is a Canadian case dealing with a unilateral amendment of an online service agreement. The customers of the telecommunication company, Roger had agreed to a ‘click wrap’ agreement which included a term allowing

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\(^{70}\) 668F. Supp. 2d 362 (E.D.N.Y. 2009) Pg 366

\(^{71}\) 1:09-cv-01110-MMM-BGC

\(^{72}\) Charles Morgan, “I click, You click, We all click... But do we have a contract”; A case comment on *Aspencer.com v. Payystems* (2005) 4: 2 Canadian Journal of Law and Technology 109-118. Available at http://cjlt.dal.ca/vol.4no.2/pdf.articles/morgan.pdf (Last accessed on April 25, 2013)

\(^{73}\) (2002) 58 OR (3d) 299 (ont.sup.ct)
Rogers to change or amend the agreement at any time, providing that any such amendment would be posted on the Rogers websites. Subsequently Rogers amended the agreement to include the provisions that all disputes would be settled by arbitration. The court in Kanitz concluded that the notice of the amendment was made in accordance with the terms of the agreement; and that the effect of the amending provision was to place an obligation on the user to check the website from time to time. The court accepted the proposition that the service after the posting of the notice and the amendments constituted the requisite consent and acceptance of the unilateral amendment.

In *Aspencer.com Inc. v. Pay Systems Corporation*, a Quebec Court in the year 2005 came to the opposite conclusion where the home page of Paysystems Corporation included a statement that “Your continued use of my Paysystems services is subject to the current version of my Paysystems Agreement. This agreement was last updated in Dec 18 2003. Please click here to review.” The court found that the plaintiffs continued use of the website could not be interpreted as acceptance of the amendment to the agreement requiring arbitration. In *Register.Com Inc v. Verio.Inc* the US court upheld the enforceability of the terms and conditions of a “WHO IS” database search web service, which stated “by submitting this query; you agree to abide by these terms.” The court noted that the terms of use in this case were clearly posted on Register.com’s website; and that the defendants conduct in performing a search inquiry constituted agreement to the terms.

In *Specht v. Netscape Communications* the issue was similar to that in Kanitz as the court had to consider the enforceability of an arbitration clause in Netscape’s end user license agreement. The issue was whether or not the terms of the license posted on Netscape’s website were binding on a user who downloaded the software. Users were asked to review and agree to the terms of the agreement available via a hypertext link. Prior to downloading and using the software however they could proceed to download the software without providing their express agreement. The court denied the enforceability of

74 2005)JQ no 1573
75 126F. Supp. 2d 238 (SDNY, Dec 12 @ www.icann.org 2000) aff’d 2004 WL 103400 (2nd cir 2004)
76 206. F. 3d 17 (S.D.N.Y 2001); aff’d; 306 F. 3d 17 (2nd Cir 2002)
the arbitration clause and concluded that the bare act of downloading did not unambiguously manifest assent, therefore the terms were held to be unenforceable.

3.10 Interpretation of Shrink wrap Agreement

These comprise of agreements where in the product which is purchased bears the terms and conditions and is displayed on a box in which the product is sold. When a user opens the box or uses the product or fails to return the product to the point of sale, it is deemed that the user has given his consent and duly accepted the terms there in.

3.10.1 Enforceability of shrink wrap agreements

These agreements have been highly criticised by the courts and they may not enforce a contract if it is of the view that such a contract is unconscionable at the time it was made. In *ProCD Inc v. Zeidenberg* the purchaser had bought and opened the packages of multiple copies of the product and could not prove ignorance of the contract. The court held that a shrink wrap license is valid and enforceable. “The purchaser had no choice because the software splashed the license on the screen and would not let him proceed without indicating acceptance.” The court found that Seidenberg had the opportunity to reject the terms of the contract and return the software.

Whereas in case of shrink wrap agreement a consumer may not be able to read the terms of the agreements before opening contained in a box, in case of a click wrap agreement the consumer is able to read the terms of the agreements and decide whether to proceed to buy the product or not. For this reason shrink wrap agreements are also known as contracts of adhesion. In *Hill v. Gateway* the court held that a company that included an arbitration clause within the terms of sale which were shipped with the computer was binding on the consumer, if the product was not returned within 30 days.

From the above discussions it is clear that for a click wrap agreement to be valid one must ensure that the terms and conditions are placed prominently on the website and a user must unconditionally agree to proceed to avail the services on a website. In case he does not choose to proceed he must be given an option to reject the terms. The terms

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77  86F 3d 1447 (7th Cir 1996)
78  2000 Inc 105F 3d 1147, 1148-50 (7th Cir, 1997)
should ensure that the customer verifies his capacity to contract and accepts the terms to form a valid contract.  

In *Forrest v. Verizon Communications, Inc.*, 80 a question was raised as to the inclusion of a notice of a forum selection clause in a click wrap agreement between the plaintiff Forrest and the defendant Verizon, the Court stated that “the use of a ‘scroll box’ in the electronic version displays only part of the agreement at any one time (is not) inimical to the provision of adequate notice.” Though, only a small portion of the click wrap text was visible in the scroll box at one time the entire text of the agreement was approximately thirteen pages when it was printed out. The court suggested that the plaintiff could have taken a printed copy to review before acceptance of agreement because the forum provision clause of the agreement was included in a final portion of the text and was, thus only visible in the scroll box after scrolling through most of the agreement.

In *De John v. The TV Corporation International et al*, 81 the adequacy of the notice of the terms of a click wrap agreement was discussed. The plaintiff alleged that the click wrap service agreement failed to provide adequate notice of its terms, since the terms could only be read after following a link to a separate page. The court rejected this argument on the ground that as De John was able to review the terms of the agreement by selecting the link and hence his allegation is not valid.

In the case of *Pollster v. Gig mania Ltd.*, 82 the plaintiff, Pollster made three allegations against the defendant Gig mania Ltd a) common law misappropriation b) unfair competition and c) breach of contract of license agreement. While the first two claims related to copyright misuse the third claim involves the inclusion of notice. The defendant, Gig mania Ltd., brought a motion to dismiss the complaint on the contention that the breach of contract fails as a matter of law because Pollster cannot allege the required element of mutual consent in a contract. The notice of agreement was a browse wrap agreement which is presumed to be assented to by the mere browsing of

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81 245 F. Supp. 2d 913 (C.D. Ill. 2003) @ http://lgsulaw.gsu.edu/ (Last accessed on July 29, 2013)

the website. The court decided that even without obvious notice of the contract terms, a contract is formed.

The court hesitates to declare the invalidity and unenforceability of the browse wrap license agreement. Taking into consideration the examples provided by the Seventh Circuit for instance in the case *ProCD v. Zeidenberg*\(^\text{83}\) in which it was held that people sometimes enter into a contract by using a service without first seeing the terms, the browse wrap license agreement may thus be arguably valid and enforceable.

The enforceability of click wrap agreement was asserted in *Moore v. Microsoft Corp*\(^\text{84}\) wherein the court held that the End User License Agreement ("EULA") contained in the defendant; Microsoft’s software program was a valid binding contract between the parties.

In the case of *Ticketmaster Corp v. Tickets.Com, Inc*\(^\text{85}\) a US district court in the Central District of California refused to enforce the plaintiff’s browse wrap agreement because the defendant had not assented to be bound by its terms and conditions. In the European Union till recently the enforceability of both shrink wrap and click wrap agreements are rather not clear. In most part shrink wrap licenses have been met with condemnation and have not been upheld although they are still widely used and very few cases are brought on this matter. In UK, in the Scottish case *Beta Computers v. Adobe systems*\(^\text{86}\) the court ruled that a shrink wrap agreement per se was enforceable. In this case the defendant ordered software from the claimant over the phone when the same arrived, the outside of the packaging featured a message stating that by opening the software the user was agreeing to the terms, unfortunately the terms and conditions were within the software case. The defendant was not wishing to be bound by a set of unknown terms and hence returned the software to the claimant, but the claimant then issued a claim against the defendant for the price of the software. The Judge in this case referred to the US case

\(^{83}\) Ibid 77  
\(^{84}\) 293 A.D.2d 587 (N.Y. 2002) @ http: llgsulaw.gsu.edu (Last accessed on July 29, 2013)  
\(^{86}\) 1996 SLT 604
of ProCD\textsuperscript{87} and found that shrink wrap agreements were acceptable per se but in this circumstance the emphasis was on the return of the software. However English Courts were of the view that the consumer was not privy to before agreeing to the contract. Analysing the situation in \textit{Thornton v. Shoelane Parking}\textsuperscript{88}, UK courts are taking into consideration in respect of shrink wrap agreements that the contract is completed at the stage of purchase of software (etc) and that the terms are being added afterwards hence they are not enforceable.

Looking into the various contract cases whether entered in the online medium or offline, it has to be remembered that the basic contractual principles should remain the same throughout with no deviations from the original law. At no point of time it should be reduced or diluted by the fact that now contracts are being formed electronically. This is being emphasised even during the use of emails to reach agreements. In \textit{Querard v. Country Wide Home Loans Inc.}\textsuperscript{89} were several emails between the parties concerning a refinancing of a mortgage during a softening of the market. The court found that combined emails when read together contained sufficient terms either explicitly or that could “be implied from the industry custom and the terms of the parties existing loan agreements.” The key to the result was reading the emails together. The court wrote “while the final April 8 email considered by it did not include all of the essential terms taking the exchange of emails as a whole, the critical terms were stated explicitly.” The opinion also discussed briefly whether the emails would have satisfied the statute of Frauds as applied by the Uniform Electronic Transactions Act, but the court by passed the question when it found that the agreement need not have to be in writing. In another email case \textit{Carimati di Carimate v. Ginsglobal Index Funds}\textsuperscript{90} a case similar to the previous Queried case in that it required a court to determine that emails could be read as a whole in connection with an earlier document in order to constitute a contract. The earlier document was a Memorandum of Understanding (MoU) concerning a marketing joint venture. The MoU was then modified in a series of emails, whose alleged

\begin{flushright}
\textsuperscript{87} \textit{ProCD v. Zeidenberg}, 86F 3d 1447 (7th Cir 1996)  \\
\textsuperscript{88} (1971) 2QB 16  \\
\textsuperscript{89} No A124262, 2010 Cal. App. Unpub. LEXIS 3404 (2010) \\
\textsuperscript{90} No. CV 09-2373 AHM (RZx), 2009 U.S Dist LEXIS 96641 (C.D Cal 2009)
\end{flushright}
breach led to the litigation, the defendant contended that the modifications were not complete as to essential terms and therefore could not be a contract. Defendant buttressed that argument by observing that the parties contemplated entering into a new agreement. The court rejected those arguments. It held that the “equal sharing agreement embodied in the MoU and later emails contain the elements essential to create an enforceable contract.” Looking into these two cases reminds that care has to be taken when using emails. They can be read together to create a contract. That is standard contract law, though parties are less careful in their choice of language while using electronic means rather than a paper communication, and they might be quite surprised at the outcome. It’s like E-mailer beware!\textsuperscript{91}

### 3.11 Legislative Landscape with respect to Electronic Commerce – E contracting

The increasing use and reliance of electronic means of communication in electronic commerce, the legislators around the world have sought to adapt legal and evidentiary rules developed by reference to paper documents to modern technologies. In an attempt to avoid the creation of barriers to international electronic commerce through conflicting domestic standards, international harmonization of rules relating to electronic means of communication is essential. The most recent advancement of such harmonization is found in the convention on the ‘Use of Electronic Communications in International Contracts’ adopted on 23\textsuperscript{rd} Nov 2005 by the United Nations General Assembly\textsuperscript{92} which seeks to promote the use and reliance of electronic communications by providing greater legal certainty and sanctity to such communications. In 1996 a Model Law on Electronic Commerce (MLEC) was adopted, for providing a legal basis for commercial use of electronic communications. The main basic principle being non-discrimination between electronic and traditional form of communication, where it is specific that electronic communications may not be denied legal effect solely because they are done in electronic medium.

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\textsuperscript{91} Juliet M. Moringiello and William L. Reynolds, Electronic Contracting cases \url{http://ssrn.com/abstract=1628688} pg 11 (Last accessed on June 24, 2013)  
\textsuperscript{92} General Assembly Resolution A/RES/p.60 (Last accessed on June 22, 2013)
Computer information contracts are hardly imaginable without standard terms. One of the first attempts to provide standard terms was UNCITRAL’s model law for EDI Contracting.\textsuperscript{93} The model law validates electronic contracting practices and eliminates common law legal assumptions concerning transactions on paper. Its features include:

1. Validation of intent to contract – the model law makes it clear that trade data messages may be used to conclude contracts.

2. Guidelines for establishing offer and acceptance.

3. Modification of definitions ‘writing,’ ‘signature,’ ‘original.’

4. Standards for use as evidence – as the model law provides a liberal rule for admission of trade data law, provides a liberal rule for admission of trade data messages leaving questions of integrity and reliability to the judge or jury.

The first generation of electronic contracting was EDI where it was used for purpose of contracts, where documents were transferred electronically, instead of the use of paper documents.\textsuperscript{94} In the absence of appropriate statutory revisions to accommodate electronic commercial practices, parties doing business electronically execute trading partner agreements or interchange agreements.\textsuperscript{95} EDI generally involves dealing between sizable commercial entities. Unlike internet, it provides a closed, secured environment in which known contracting parties transact business. The legal framework for the interchange is based upon standardized trading agreements, rules and standards.\textsuperscript{96} The three major concerns for international electronic contracting are authenticity, enforceability and confidentiality. Authenticity involves the verification of the person that one is dealing with electronically. Enforceability includes the legal scope of the license granted or the warranty given under a national law.\textsuperscript{97}

\textsuperscript{93} UN.Doc.A/ON 9/406/1994 (Last accessed on March 09, 2013)
\textsuperscript{95} Amelia H.Boss & Jane Kaufman “Winn Electronic Data Interchange Agreements” ICC (1993)
\textsuperscript{96} ABA Model Electronic Data Interchange Trading Partner Agreement, Business Lawyer 45 (1990)
As a global organization, the United Nations Commission on International Trade Law (UNCITRAL) was chosen in late 1980s to propose uniform private law standards for electronic commerce. In furtherance of this effort was the UNCITRAL Model Law on Electronic Commerce in 1996 which was followed five years later by the UNCITRAL Model Law on Electronic Signatures. The two instruments more in particular UNCITRAL law on E-commerce has been very successful and represent a broadly accepted basis for international legal harmonization. Since 2002 UNCITRAL Working Group IV (Electronic Commerce) prepared a new convention on the use of Electronic Communications in International contacts that was finalized by the working group in October 2004 and approved by the UNCITRAL at its 38th session, held in Vienna, Austria, July 2005. Building upon the earlier Model laws, the conventions objective, as spelt out in the sixth paragraph of its preamble is to remove obstacles to the use of electronic communications in International Trade Laws conventions and treaties, most of which were negotiated long before the development of new technology such as email, electronic data interchange and the internet.

On 23rd November 2005 this convention – United Convention on the use of Electronic Communications in International Contracts, 2005 was adopted by the General Assembly and it deals with increasing ‘legal certainty and commercial predictability where electronic communications are used in relation to international contracts.’ It has laid down guidelines for determining a party’s location on the internet the time and place of despatch and receipt of electronic messages, e contracting through automated systems and parameters for functional equivalence between electronic records and paper based documents. Before going into the main provisions of this convention, a discussion on

99 A copy of the text and list of states and territories that have enacted the UNCITRAL Model Law on Electronic Signatures found at http://www.uncitral.org/uncitral/enuncitral-texts/electronic-commerce/2001/model-signatures.html (Last accessed on February 04, 2014)
the UNCITRAL Model Law of E Commerce and U.N’s Convention on contract for
International Sale of Goods 1980 must be looked into. Article 18(2) of this convention
elucidates the rules relating to communication. In this chapter it has been discussed in
length that under conventional common law principles of contract law, a legally binding
contact is formed when an offer is given its assent in the manner required by the terms of
offer. In *Dunlop v. Higgins*\(^{102}\) it was held an acceptance communicated through post is
complete when the letter is posted. This principle holds good even if the letter never
reaches the intended recipient as laid down in *Household Fire and Accident Insurance
Co. Ltd., v. Grant.*\(^{103}\) This is commonly called as the postal rule or mail box rule.
Acceptance is however affected by instant forms of communication only when a receipt
is generated known as the receipt rule. In *Entores Ltd, v. Miles Far East Corpn*\(^{104}\) the
court ruled contract was made when acceptance was read and at the place where it was
received. In Indian law postal rule states a contract is formed when a written acceptance
has been posted. This view was accepted by Supreme Court in India in *Bhagwan Dass v.
Giridhari Lal & Co.*\(^{105}\) In *Kanhialal v. Dinesh Chandra*\(^{106}\) the court held that a contract
effected by a telephonic conversation the contract will not be complete till acceptance of
the offer by the offeree and is clearly heard by the offeror. The United Nations
Convention on contracts for International Sale of Goods, 1980 which is also applicable to
India elucidated ‘communication rules’ in Art 18(2) as under:

‘An acceptance of an offer becomes effective at the moment the indication or
assent reaches the offeror. An acceptance is not effective if the indication of assent does
not reach the offeror within the time as fixed or if no time is fixed, within reasonable time
due account being taken of the circumstances of the transaction, including to rapidity of
the means of communication employed by the offeror.’\(^{107}\) The principle is also adopted
by UNIDROIT Principles of International Commercial Contracts which provides that an

\(^{102}\) (1848)1HL Cas 381  
\(^{103}\) 1879 4 Ex D216 (CA)  
\(^{104}\) (1955) 2 QB 327  
\(^{105}\) AIR 1966 SC 543; (1966) 1 SCR 656  
\(^{106}\) AIR 1959 MP 234  
\(^{107}\) Karnika Seth, “*Computers International New Technology Law 2012*” LexisNexis, Butterworths
offer is effective as soon as it reaches the offeree. ‘Reaches’ means when it is given at that persons place of business. This rule finds its application in cases where fax, telex or computer is used as a means to communicate an offer.

3.12 UNCITRAL Model Law on Electronic Commerce


3.12.1 E-Mail Contracting

All electronic communications are instantaneous. Jurists differ as to whether the postal rule will apply to e-mail messages and often adopt the view that the general postal rule is inapplicable and receipt rules apply to e-mail communications. Few are of the view that emails are not instantaneous and therefore postal rule should apply on the emails.

Article 15 of UNCITRAL Model Law explains principles to clarify when and at which place the dispatch and receipt of an email message can be considered to take place. It is stated as a time when a message enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator. In case the recipient has designated a particular email address as the information system for receipt of a message; the receipt occurs when the data message enters the designated information system. Where there is a designated information system but a message is sent to another information system, and then receipt occurs when it is retrieved by the addressee.

UNCITRAL Model Law and the relevant provisions of the UN Convention on Electronic Communications are analysed together in ensuing lines. Article 1 of the convention applies to the use of electronic communications in connection with the

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formation or performance of a contract between parties whose place of business are in
different states Article 9 of the convention reiterates the basic rules contained in Articles
6, 7, 8 of the UNCITRAL Model Law concerning the criteria for establishing functional
equivalence between electronic communications and paper documents. Article 8 of the
convention affirms the principles contained in Article 11 of the UNCITRAL Model Law
that contracts should not be denied validity or enforceability solely because they result
from the exchange of electronic communications (Article 8). However the convention is
not venturing into determining when offers and acceptances become effective for
purposes of contract formation. With respect to the timing of dispatch and receipt of data
message, Article 15 of UNCITRAL Model Law correlative provision in Article 10 of the
convention, here the aim is to facilitate the operation of various legal systems, by aligning
the formulation of the relevant rules with the general elements commonly used to define
dispatch and receipt under the domestic law. Under the convention dispatch occurs when
an electronic communication leaves an information system under the contract of the
originator, whereas ‘receipt’ occurs when an electronic communication becomes capable
of being retrieved by the addressee, which is presumed to happen when the electronic
communication reaches the addressee’s electronic address. The convention has brought a
distinction between delivery of communications to specifically designated electronic
addresses and delivery of communications to an address not specifically designated.
In the first instance a communication is being received when it reaches the addressee’s
electronic address. In all other cases where the communication is not delivered to a
designated electronic communication address, receipt under the convention only occurs
when

1. The electronic communication becomes capable of being retrieved by the
   addressee.

2. The addressee actually becomes aware that the communication was sent to that
   particular address.

   It is presumed that electronic communications are to be despatched and received at
the parties’ place of business. Article 20 offers flexibility by allowing States to add specific
conventions to the list of International Instruments to which they would apply the provisions
of the convention. The declarations in para 4 of Article 20 would exclude the application of the convention to the use of electronic communications in respect of all contracts to which another international convention applies says Jose Angelo Estrella Faria.\textsuperscript{111}

### 3.13 Legislative Measures in India towards E-Contracts

The Information Technology Act, 2000 is enacted based on the UNCITRAL Model E-Commerce. The preamble of the IT Act 2000 clearly aims to grant legal recognition to electronic records and states that the requirement in writing or typewritten or printed form will be considered as fulfilled if the information is made available in an electronic form and accessible for use for a subsequent reference.\textsuperscript{112} In section 5 of the IT Act 2000 wherever a requirement of signature is mentioned, it will be deemed to be satisfied if a matter is authenticated by means of an electronic signature.\textsuperscript{113} Section 11 of the IT Act attributes about the dispatch and receipt of electronic goods. By virtue of the 2008 amendment Section 10A grants legal recognition to e-contracts. The section provides that where offer and acceptance take place electronica1y, such contract will not be declared unenforceable only for the reason that the medium of operation is electronic for the purpose of entering into a contract.

In \textit{Shaktibhog Foods Ltd. v. Kola Shipping Co.}\textsuperscript{114} the court considered an appeal against an order referring disputes to arbitration in London under English Arbitration Act 1996. The court took the view that emails exchanged between parties clearly indicated the existence of charter party between parties and that according to section 7 of the Act existence of arbitration agreement can be determined from a document signed by parties, letters, telex or other means of agreement.

Section 11 of the Information Technology Act 2000 provides that an electronic record is attributed to the originator if it was sent by the originator himself or by a person duly authorised by the originator or by an information system programmed by the

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\textsuperscript{111} Senior Legal Officer, U.N office of Legal Affairs, International Trade Division, UNCITRAL, Secretariat, Vienna, Austria (ICLQ Vol.55 July 2006 pp. 689-694)

\textsuperscript{112} Section 4 Information Technology Act 2000

\textsuperscript{113} The term electronic signature is substituted by the word Digital Signature by Act 10 of 2009-Sec2

\textsuperscript{114} 2009 (2) SCC 134
originator to send a message automatically. To give an illustration, if say a person ‘A’ has a Gmail address ‘A@gmail.com’ and he sends an email to ‘B.’ Here ‘A’ is the originator of the email, say for instance if he instructs his wife, son, secretary or any other person ‘C’ to send a mail to ‘B’ on his behalf it will be attributed that ‘A’ is the originator. Say for instance ‘A’ sets an auto response in his email as he is travelling on business and on receiving an email from ‘B’ a auto response from ‘A’s’ email account is sent to ‘B’, ‘A’ will still be called as the originator of the email sent to ‘B’ as auto response. It is in this particular area where few cumbersome issues are being faced. As said in the illustration under the instructions of ‘A’ if ‘C’ has sent the email, ‘A’ is bound by the contents of the mail and the person on the other hand ‘B’ is not aware if it was sent by ‘A’ himself or by his representative. General presumption is ‘A’ has sent it. Say for instance ‘C’ has sent the mail without receiving any instructions from ‘A’ even then ‘A’ is bound by the email as far as ‘B’ on the other side is concerned. With respect to traditional or online contract you are contracting with the person whom you are seeing before you. Here again mistakes might happen as in Phillips v. Brooks. The principles of law pertaining to mistake vitiating consent of the contracting parties are:

1. Where both are under a mistake as a matter of fact essential to an agreement rendering the agreement is void.

2. Mistake of fact covers mistake as to law not in force in India but a mistake as to law in force in India does not make a contract voidable.

3. Where only one of the parties to a contract is under a mistake as to a matter of fact contract is not voidable.

If the above rules are applied to ecommerce; many situations will not be covered. These rules if applied rigidly may also prove to be oppressive for one party and windfall for another. UK Argos advertised a 21 inch television set carrying a company price of £299 on its website but by mistake the price was shown only as £2.99. The mistake was

115 (1919) 2 K.B. 243
116 Section 20 of the Indian Contract Act 1872
117 Section 21 of the Indian Contract Act 1872
118 Section 22 of the Indian Contract Act 1872
noticed only after £ 1 million orders were taken. One buyer alone had placed an order for 1700 sets.\textsuperscript{119} It is quite possible that a party may be liable for a breach of contract which can be attributed to him technically but which was concluded without his knowledge or authority. Many of these situations would arise without any negligence or carelessness on the part of the either party to the contract. The magnitude of the problem can be well realized by the fact that insurance cover in the market place is also being considered as one of the options for allocation or risk.\textsuperscript{120} In order to avoid such mistakes to surf European Commission’s e-commerce Directive imposes a duty on the merchant to make available appropriate means that are effective and accessible to the purchaser to enable him to identify and correct handling errors and accidental transaction before the conclusion of the contract.\textsuperscript{121}

With respect to the Indian scenario it has already been stated that Information Technology Act has adopted the theory of appearance by applying principles of attribution. This has been discussed in Section 11 of the Act. This rule of attribution incorporated in the Act is rigid and is bound to cause inconvenience under certain situations. This principle of attribution has been borrowed from Article 13 of the UNCITRAL Model Law, but most surprisingly the mitigating factors provided in the Model Law which make attribution principles inapplicable in certain situations have not been incorporated in the Indian Information Technology Act.

The Model Law has maintained a balance by protecting legitimate interests of both the originator as well as addressee and prevents unjust enrichment of one at the expense of the other by incorporating ‘deeming and assuming clauses’. The above approach of Model Law has been adopted in many jurisdictions. The Information Technology Act makes the originator strictly liable for transmission errors caused even without the fault of the originator and even in circumstances were addressee was notified or the addressee knew or had reason to believe that the message is not that of the

\textsuperscript{120} Nicol.C.C “Electronic Commerce-A New Zeal and Perspective” The EDI Law Review – 6
\textsuperscript{121} Com (1999) 427 Final
originator. This rule is bound to cause hardship to the innocent originators and its impracticability is likely to come once electronic commerce takes firm roots in India.\textsuperscript{122}

Since electronic communication takes place often between pre-programmed devices very rapidly and at a distance, mistakes might be difficult to notice and correct. The treaty regulates consequences of a contractual mistake in Article 14, the treatment of electronic mistake is express is verbis limited to transactions concluded via later active websites and not through passive websites, emails, chat or EDI. Secondly a person who made an input error has the right of withdrawal from it and he can exercise the right of withdrawal, but he must promptly notify the other party. The condition for the exercise of the right of withdrawal is that he or she has not been benefitted from the transaction say for example downloading a piece of software from a website and then trying to return it. The legal uncertainty is that no time limit has been set for the exercise of the right of withdrawal.

All electronic commerce laws require that an electronic substitute for handwriting signatures must possess certain attributes. In ECC, the method used must possess the following 3 attributes to be functionally equivalent to a handwritten signature. It must identify the party whose signature is required; it must either be as reliable as appropriate for the purpose of electronic communication or be proven in fact to have fulfilled the requirement of identifying the party and indicate the party’s intent.

3.13.1 Acknowledgment of Receipt of Electronic Record under IT Act 2000

Section 12 of the Act elucidates the receipt rule and provides that when the originator has not specified that an acknowledgment of receipt is required in a particular format or method, an acknowledgment can be given through any communication by the addressee automated or otherwise or by any conduct of the addressee that reasonably indicates to the sender of a message that the electronic record has been received. In case the originator mandatorily requires a receipt of acknowledgment then unless such acknowledgment is received, the electronic record shall not be deemed to be sent by the originator. In case the originator does not mandate a receipt of such acknowledgment and

\textsuperscript{122} Dr. Farooq Ahamed – \textit{“Cyber Law in India (Law on Internet)”} New Era Law Publications, New Delhi, \textit{(2}\textsuperscript{nd edn. 2005)}
the acknowledgment is not received within the time specified or within a reasonable time the originator is required to give notice to the addressee requesting acknowledgment within reasonable time. In case still no acknowledgment is received, he may after giving notice to the addressee treat the electronic record as never been sent.

Section 13 of the IT Act further provides that in case the addressee has not designated any computer resource, receipt occurs when the electronic record “enters computer resource of the addressee.” With respect to place of dispatch Section 13(3) indicates that dispatch takes place where originator has his place of business and is received at the place where the addressee has his place of business. This is a deeming provision which disregards location of a computer resource in cyberspace to grant certainty and uniformity regarding parameter to decide place of dispatch and receipt. This is duly explained in Section 13(4). In case the originator or the addressee has more than one place of business, the principal place of business shall be the place of business, their place of residence shall be deemed to be the place of business. In Indian Company Law, for any body corporate, the ‘usual place of residence’ indicates where it is registered.


The IT Act 2000 is not a complete code for electronic transactions. The Contract Act, 1872 is still the basic law governing contract formation including contracts formed electronically. However these two Acts are supplementary to each other and the IT Act not only acts as a gap filler to provide solutions to the issues generated by the introduction of electronic means of communication which are not covered by the Contract Act, but in certain cases fundamental principles laid down in the Contract Act have been modified. The knowledge element necessary for determining the time of communication of an offer in postal communications is irrelevant in electronic communications. It can be suggested that the communication of offer is complete at the time when it enters into the computer resources within the meaning of section 13 of the IT Act and not when the acknowledgment has been sent. This interpretation will bring the rule of communication of offer at par with the rule relating to communication of acceptance electronically; will avoid any possible confusion which may arise by different
construction. The provisions relating to revocation of offer provided in Sec 5 of the Contract Act applies *mutatis mutandis* meaning “having changed what should be changed” to offers made electronically. The offeror will be free to revoke his offer at any time before its communication of acceptance is complete as against the offeror and this legal position in Section 5 of the Contract Act has not been changed by the IT Act. These provisions reflect the principles enunciated by the UNCITRAL Model Law of e-commerce. The provisions under Section 11 of the IT Act 2000 reflect the provisions under Article 11(1) of the Model Law. The IT Act 2000 provides principles of attribution of electronic records to the originator as if it was sent by the originator or by a duly authorised person or automated response.¹²³

According to the traditional principles of Indian Contract Law, the acceptance may be expressed in writing or oral or may be implied by the conduct of the parties. Time of acceptance is determined based on when the contract is physically signed by the parties. Time of acceptance is determined based on when the contract is physically signed by the parties. As per Section 4 of the Indian Contract Act 1872 an acceptance is complete as against the offeror when it is put in course of transmission. As regards the offeree the communication of acceptance is complete only when it reaches within the knowledge of the offeror. In the electronic media various means of communicating acceptance or offer could be used by the parties including electronic mails, messenger services etc., The IT Act 2000 provides in Section 12 that acceptance will be binding on the receipt of an acknowledgment of an electronic record on the offeree, when the acceptance moves out of the control of the offeree and shall be binding on the offeror on receiving the acceptance. Sec 12 and 12(2) of IT Act provides about the acknowledgment of receipt, where it is stated that communication of any form shall suffice to signify that the electronic record has been duly received. Further if any particular method is stipulated then the same has to be followed else the electronic record shall not be binding till the receipt is so acknowledged.

¹²³ Section 11 of the IT Act 2000, Model Law Art 11(1) recognizes that the parties may convey offer and acceptance through data messages.
Section 5 of the Indian Contract Act 1872 says an offer may be revoked at any time before the acceptance becomes binding on the offeror. The IT Act 2000 provides that the offeror shall be bound by acceptance when he receives it. Therefore there cannot be a valid acceptance if an offer to revoke enters the system of offeree even before the offeror has received an acceptance. Therefore revocation shall be binding on the offeree. According to Indian Contract Act 1872 a revocation of acceptance shall be made only till the acceptance becomes binding on the offeree but it cannot be made later than this period. In contrast with the Contract Act, IT Act 2000 states that an acceptance would be binding on the offeree as soon as the acceptance enters an information system outside the control of the offeree. The time and place of communication are by far the most important parameters to decide the stage as to when a contract is being formed. As per the Indian Contract Act 1872, as far as postal rule is concerned different views still exist. One theory states that a contract is complete the moment the offeree makes a declaration that he has accepted the offer. Another theory propagates a rule that a contract is formed when a letter is dispatched which contains acceptance of the offer. Yet another theory advocates that communicating acceptance is required to be received by the offeror.

According to postal rule when offer and acceptance are posted by letters a contract is formed at the place where such letter of acceptance is posted from. Indian Courts have followed Entores case decision for receipt rule and same was reiterated in Bagwan Dass case. According to the IT Act 2000 the receipt of an electronic record is based on the time when such records enter the computer resource designated by the addressee. If no designation is made, receipt occurs when the electronic record enters computer resource of the addressee. It is clear that despatch of the electronic record occurs at the time when such records enter the information systems outside the control of the originator unless the parties specify otherwise.

3.14 Conclusion

In order to establish the validity, acceptability, recognition and enforcement of electronic contracts, communication of offer, acceptance and formation of contract under

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Contract Law, in traditional law of contract principles pertaining to the Indian Contract Act 1872 has been analysed. Further electronic or online contract formation different agreements as to how the contract is being formed, the intricacies involved in each have been adverted to. The subject matter of electronic commerce is a global issue and common international rules and regulations must be enacted.

In pursuance of achieving the goal by ensuring legal recognition for a data message, admissibility of evidential weight of electronic messages, formation and validity of e-contracts recognition of electronic documents, time and place of despatch of electronic communications, offer and acceptance in the electronic environment has been discussed. United Nations Commission on International Trade Law – UNCITRAL drafted the UNCITRAL Model Laws on Electronic Commerce in 1996 and Electronic Signature in 2001. In order to regulate the above said aspects the convention named Use of Electronic Communication in International Contracts has been drafted. This new convention contains provisions that could be broadly categorised as those important in evidencing electronic communications in court proceedings (Articles 8 - 10) and those relating to electronic contracting (Articles 11 - 14) these have enhanced the legal certainty of online contracts by creating a presumption as to the non binding character of web based catalogues. It offers useful definition of parties place of business, specifies time and place of electronic communication. It has some shortcomings. Certain norms are vague and an average online merchant would find it difficult to manage. Having a broader scope than traditional commercial conventions, it nevertheless excludes fundamental areas of e-commerce where a uniform international regulation is really necessary. Flexibility of e-contracting is seriously undermined by the lack of electronic trade usages that have emerged in electronic commerce. The fact that the internet users could not participate in the drafting process and express their opinion on UNCITRAL’s website is against the spirit and the fundamental value of the internet community, which continues to be developed through open sharing of information, Global Internet regulations should be framed only after consultation with the users.125

Though every convention has its own shortcomings the major benefits of the same has to be looked into. In that way UN convention on Use of Electronic Communication in Electronic Contract has laid a giant step forward in International regulation of Electronic commerce. Most of the states have ratified the same and have enacted rules governing electronic commerce, in India the IT Act 2000 has been brought in line with the UNCITRAL Model Law. Many legal issues that have been answered are within the provisions of the Indian Contract Act 1872, yet there are lacunaes. There is a need either to amend the Indian Contract Act 1872 or enact a new legislation which will act as a complete code for electronic contracts. It has to been seen that IT Act 2000 does not form a complete code and where provisions of Indian Contract Act 1872 do not cover, the provisions of IT Act 2000 is invoked. There are certain principles in contract act which have been changed by the IT Act 2000 either expressly or by implications.

Many issues raised by e-commerce await judicial resolution. It is here the judiciary should bear in mind that e-commerce is essentially international in character, interpretation of the Indian Contract Act 1872 and IT Act 2000 has to be expounded in harmony with each other. There should not be any difference between contracts formed electronically and those formed by other means. The law should no longer treat electronic contracts with wonder, scepticism or concern and electronic contracts should no longer be a separate concern.