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The Time of Online Contract Formation

Master thesis
20 points

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E-commerce law

Autumn 2007

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Summary

Generally, the time of contract formation is when the acceptance becomes binding and effective. This point in time may vary widely under different jurisdiction's national laws. Further, the special characteristics of the Internet may complicate the issue of the time of *online* contract formation. The purpose of this thesis is to shed light on whether there is a requirement of a uniform rule, defining the exact moment of when an online contract is formed. If so, is it practically possible to adopt a uniform rule, applicable to international as well as domestic online contracting?

The common view is that the law that governs online contracting should not differ too much from the law that governs traditional contracting. However, traditional contract laws may not regulate online contracting in a satisfactory way, and certain issues may therefore require special regulation. One issue is when an online contract is deemed to have been formed. The trend, and also the approach taken by several nations around the world, is to put in place a regulatory framework that enables electronic contracting.

Both Australia and Sweden have chosen a light-touch approach in regulating electronic contracting. Importantly, Australia has adopted rules that regulate the time of dispatch and receipt of an online offer and acceptance. No such rules have been adopted in Sweden. In both countries, strong reliance lies on traditional contract law, rules and principles. This approach may be sufficient when regulating online contracting domestically. However, one of my concerns is, that due to the international and borderless nature of the Internet, it may be clumsy to rely on national contract laws that may differ between nations.

The major difference in determining the time of online contract formation under Australian and Swedish law, stems from the application of the *principle of promise* and the *principle of contract*. In Australia, the *principle of contract* has forced the appearance of the postal acceptance rule, under which a contract is formed when an acceptance is dispatched. In Sweden, there is no such rule, and an acceptance must have reached the offeror to become effective.

This thesis argue that there is a need for an international uniform rule on the time of online contract formation that will apply to international as well as domestic online contracting. Ultimately, such rule should be supplemented with rules on the effectiveness of an online offer.

One problem is that it would be extremely hard to agree upon such rule on an international level. For example, throughout the drafting of the UNEDIC it was constantly pointed out that the Convention should focus on specific issues in electronic contracting and the provisions of the CISG should not be repeated. It was argued that including a rule on the time of contract

formation in the UNECIC would make the Convention less attractive for countries to sign. Another issue is the strong desire of technology neutral laws. Along with new technological developments rules that solely regulate online contracts will perhaps become dated within the next decade. Because of the strong influence of interests of national sovereignty and of the desire of technology neutral laws, it may not be a feasible to bring about a uniform rule on the time of online contract formation. Having said that, this thesis argues that a need of such rule still exists.

Preface

The writing of this thesis is the closing chapter of an era in my life; the time that I have spent as a student in Lund - Sweden, in Tilburg - the Netherlands and in Sydney - Australia. I shall forever remember this time, the knowledge I have gained and the people I have met.

I would like to thank my wonderful family and my friends, for always giving me lots of support, love and joy. I would also like to thank my supervisor Patrik Lindskoug.

Christina Fränngård, Sydney, November 2007

Abbreviations

ACT	Australian Capital Territory
B2B	Business-to-business
B2C	Business-to-consumer
CISG	<i>United Nations Convention on the International Sale of Goods 1980</i>
CISG-AC	CISG-Advisory Council
Cth	Commonwealth of Australia
e-commerce	Electronic commerce
EDI	Electronic Data Interchange
ETA	<i>Electronic Transactions Act 1999 (Cth)</i>
EU	European Union
ICC	International Chamber of Commerce
ISP	Internet Service Provider
MLEC	<i>Model Law on Electronic Commerce 1996</i>
NSW	New South Wales
NT	Northern Territory
Qld	Queensland
SA	South Australia
SFS	Svensk författningssamling (Swedish statutes)
Tas	Tasmania
UNCITRAL	United Nations Commission on International Trade Law
UNECIC	<i>United Nations Convention on the Use of Electronic Communications in International Contracts 2005</i>
Vic	Victoria
WA	Western Australia

1 Introduction

1.1 Background

The Internet is rapidly becoming the operational infrastructure of the world and is facilitating communication between businesses all over the planet. As a result, online contracting is frequently being conducted between businesses, either in the same or in vastly different jurisdictions.¹

In most legal systems, traditional contract law contains a variety of rules governing the process of contract formation. Generally, the process comprises the exchange of an offer and a corresponding acceptance. However, due to the characteristics of the Internet as a global web of linked networks and computers, issues may arise in online contracting that may not be sufficiently covered by traditional contract law. Special regulation may therefore be required on a national level as well as internationally.

One issue is when an online contract is deemed to have been formed. It has been argued, for a contract to exist, the instant when it is formed must be a definite and identifiable moment. It is not enough to suggest that it happens somewhere in cyberspace.² One reason for why the time of contract formation may be critical is that sometimes it is possible to revoke an offer, at any time before a contract is formed.

1.2 Purpose and issues

The purpose of this thesis is to shed light on whether there is a requirement of a uniform rule, defining the exact moment of when an online contract is formed. If so, is it practically possible to adopt a uniform rule, applicable to international as well as domestic online contracting?

As a starting point, it is necessary to determine whether existing laws regulate the issue in a satisfactory way. To emphasise that national rules and principles determining the time of online contract formation may differ between jurisdictions, the law of two jurisdictions, namely Australia and Sweden, will be studied in detail. Hence, the focus is on the issues of when an online offer is considered effectively *submitted* and *accepted*, under Australian and Swedish law respectively.

An example of uniform provisions determining the effectiveness of an offer and acceptance and the time of contract formation in international contracting, are the provisions included in the *United Nations Convention*

¹ Barber S, *The Concise E-Commerce Update*, Autumn Intensive, Seminar papers, The College of Law, 2007, p 1.

² Reed C & Angel J, *Computer Law*, Oxford University Press, 5th edition, 2003, p 333.

on *International Sales of goods*³ (CISG). However, to what extent is the CISG applicable to online contracting? The *United Nations Convention on the use of electronic communications in International contracts*⁴ (UNECIC) has been adopted but not yet entered into force. What impact will the UNECIC possibly have on the issues?

1.3 Method and material

This thesis provides a legal dogmatic method using sources such as legal texts, legal preparatory work, case law, legal doctrines and other commentary. The study will also employ a comparative legal method. A comparison shall be drawn between Australian law and Swedish law.

Considering the emergent topic of this thesis, a variety of material such as official websites, articles by legal experts and prominent professors, have been used. With the exception of some legal preparatory work and some case law dating back to the 19th century, most of the sources are contemporary or date back to the turn of the current century.

When describing Swedish contract law, the 10th edition of *Avtalsrätt I*⁵ is referred to. More recent versions of this textbook are available but due to the location of the writer, it has been impossible to come across a later version. That aside however, this resource is mainly referred to when describing fundamental areas of Swedish contract law and should not therefore cloud the integrity of this thesis.

Resources have been partially documented in Swedish and partially in English. As this document is narrated in English, a dilemma arose when translating from one language to the other. For example when comparing the Australian legal system against the Swedish legal system, inconsistencies in legal terms and definitions proved to be a laborious task. It was not possible to find exact translations for various terms and for the purpose of this thesis, a number of terms have been translated as follows:

<i>Come to the attention of</i>	Ta del av
<i>Invitation to treat</i>	Uppfordran att avge anbud
<i>Offeree</i>	Anbudstagare
<i>Offeror</i>	Anbudsgivare
<i>Principle of contract</i>	Kontraktsprincip
<i>Principle of promise</i>	Löftesprincip
<i>Reaches</i>	Tillhanda/ Komma fram
<i>Time for acceptance</i>	Acceptfrist

³ Available at:
<http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html>.

⁴ Available at:
<http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html>.

⁵ Adlercreutz A, *Avtalsrätt I*, Juristförlaget i Lund, 10:e upplagan, 1995.

1.4 Delimitations

In online contracting issues may arise on everything from identity management and security, to jurisdiction. The topic of this thesis is delimited to the time of online contract formation, thus an extensive number of related legal issues will not be covered. Those issues not embraced in this thesis include:

- An offer and an acceptance are two fundamental elements that are necessary for a binding contract to exist. Other criteria that may be required such as consideration, intention to be bound, genuine consent, legal capacity or privity will not be discussed in this thesis.
- Generally, contract laws are non-mandatory and those privy to the agreement are free to agree on the terms and conditions of their contract, such as jurisdiction and applicable law. If there is not any explicit agreement as to which legal framework governs the contract, conflict of law rules will help determine the applicable law. Due to the nature of the Internet as a global network, it may be possible that an international online contract has multiple legal jurisdictions and applicable laws. Such issues are excluded from the purpose of this thesis.
- Online contracts can be formed in a number of different ways but this thesis will only address contract formation via e-mail correspondence and websites. Methods of contract formation via chat rooms, instant messengers, and third generation of mobile communications technologies, are excluded.
- Notwithstanding that Electronic Data Interchange (EDI) has been used in business-to-business⁶ (B2B) e-commerce for several years; contracting via EDI is excluded. EDI communication is exchanged via a direct link between the parties and not through an open network. Moreover, EDI is normally based upon several prior agreements between the users and also between the user and the network provider, which is why legal uncertainties are less common.⁷
- Consumer⁸ contracts may encompass additional issues which is why this thesis is delimited to only address issues in B2B contracting.
- The CISG and the UNECIC are two of many international instruments that provide or will provide, for legal harmonisation in

⁶ As supposed to business to consumer (B2C) e-commerce. B2B and B2C are two ways of characterizing electronic commerce, see Barber S, 2007, p 3.

⁷ Pacini P, Andrews C & Hillison W, *Contracting in Cyberspace*, The CPA Journal, March 2002, 72, 3, p 66.

⁸ A consumer may be defined as a person who is not acting in the course of a business.

the area of online contracting. An international Convention is a classical solution to achieve legal certainty in international transactions⁹ - which is one reason for studying provisions of the two Conventions. This thesis will not attempt to conclude whether soft law, a treaty or a model law is the best solution to achieve harmonisation and legal certainty.

Finally, this thesis is of a legal nature thus any technical perspectives will only be provided where it is necessary to understand the surrounding legal issue.

1.5 Disposition

To begin with, this thesis provides a short overview of the characteristics of online contracting, as well as the regulative approaches and the law applicable to online contracts, in Australia and Sweden respectively.

The following chapter presents the Australian and the Swedish legal provisions that may influence the of online contract formation. The forth chapter presents the provisions under International Private law, such as the CISG and the UNECIC, that may have an impact on when an international online contract is deemed to be formed.

The last chapter conveys a conclusive analysis where my findings and conclusions of this thesis are presented.

⁹ Diedrich F, *A Law of the Internet? Attempts to Regulate Electronic Commerce*, Journal of Information, Law and Technology, 31 October 2000.

2 Online Contracting

2.1 Introduction

*'In the childhood of the Internet, many anticipated an open cyberspace where anybody could participate and no one would know who was acting at the other end of the line. Cyberspace was furthermore thought to be a lawless paradise where no legislator or national state could reach out to regulate or punish certain behaviour.'*¹⁰

There is a debate as to what law should govern Internet activities, consisting of two main lines. Some are of the opinion that traditional rules and principles are applicable since all online interactions take place in one or more physical location and have effects in the off line world. Others believe that new regulations should be adopted to recognise a significant border between the online world and the off line world. Then it would no longer be necessary to ask where in the geographical world an online transaction takes place.¹¹

In essence, an online contract does not differ from a traditional contract. One may liken online contracting to a modern dimension of traditional contracting. A key factor to remember is that the Internet is a tool of communication or a medium, which can be used for online contracting and thus far, the law has developed rules to deal with new tools of communication, such as the telex or facsimile.¹²

2.2 Characteristics

Online contracting involves two major characteristics: *speed* and *automation*. Further, particular issues may arise due to its electronic form; the nature of the Internet as a global web of linked networks and computers; and the fact that a mere click on a mouse can create contractual relations.¹³ There are two major ways of forming an online contract: via e-mail correspondence and via a website.

¹⁰ Ramberg C, *Contracting on the Internet – Trends and Challenges for Law*, 21 January 2003, <http://www.itkommissionen.se/dynamaster/file_archive/030121/466037b2b9a3d9b9a080eade42a848bc/4.1 ICT in Commerce and Work - Christina Ramberg.pdf>.

¹¹ See for example Johnson D R & Post D G, *Law and Borders-The Rise of Law in Cyberspace*, 48 *Stanford Law Review* 1367, 1996. <http://www.cli.org/X0025_LBFIN.html>.

¹² Lim Y F, *Cyberspace law Commentaries and Materials*, 2nd Ed, Oxford, 2007, p 71.

¹³ Christensen S, *Formation of Contract by Email – Is it Just the Same as the Post?*, *Queensland University of Technology Law & Justice Journal*, 2001, p 26.

2.2.1 Contracting via e-mail correspondence

One way of forming an online contract is by the exchange of documents via e-mail. At first glance, it might appear similar to the exchange of documents through traditional methods, such as the mail. One may draw parallels to the text of an e-mail message to a digital letter. However, on a technical level, the processing of e-mail correspondence is different from the processing of traditional mail.

The complexity of e-mail processing through servers, routers and Internet Service Providers (ISPs), can be explained as follows:

- The process of sending an e-mail starts when the sender is connecting to its ISP and clicking the send-button.
- From the ISP the e-mail then enters the worldwide network and bounces back and forth between several servers before it reaches the intended receiver's ISP.
- The process ends when the receiver logs on to its ISP and downloads the e-mail.¹⁴

This is only one example of how the structure of processing an e-mail may look like. The communication may also be exchanged directly between computers or via a shared server.

The several stages in the process are of importance when deciding the time of contract formation. Another technicality is that an e-mail message is split into multiple pieces which all take different paths across the Internet to the receiver's computer.¹⁵ What may complicate the process further, is that the offer and acceptance may be exchanged entirely by e-mail, or by a combination of e-mails, websites, paper documents and oral discussions.

2.2.2 Contracting via a website

Another way of forming an online contract is when one party is completing an online order form and viewing the terms and conditions of the contract on the other party's website. The buyer is transmitting the form online and agreeing to the terms and conditions by clicking on a button on the website. This is often referred to as a click-wrap contract.¹⁶ However, is a website owner contractually bound as soon as the order is received?

Categorizing websites into different types may be helpful when resolving the issue. Three different types of websites have been distinguished, namely:

¹⁴ Ibid p 32.

¹⁵ Lim Y F, 2007, p 71.

¹⁶ Ibid p 72.

- *Non-interactive* websites that provide information (only) and any contact with the website owner is through other means of communication;
- *Interactive* websites where a person can log onto a site, choose an item for sale, and enter their payment details; and lastly
- *Automated interactive* websites that work in the same way as interactive sites with the difference that they are operated totally by a computer.¹⁷

It may be especially complicated to determine the time of contract formation if the website is totally computerized. The offer and the acceptance are then exchanged within the same information system and it may also result in no actual time difference between the making of the offer and the acceptance.

2.3 Applicable law

Electronic contracting has been regulated on international as well as regional and national levels. The main goal of such legislation is to remove barriers with regard to the use of electronic communications in commerce. It also intends to promote growth, establish predictability and instill trust between parties conducting business online.¹⁸ Generally, such legislation consists of default rules that parties may derogate from since the principles of freedom of contract and of party autonomy are considered superior.

2.3.1 Australia

In Australia, the *Electronic Transactions Act 1999* (Cth)¹⁹ (ETA) has been adopted by the Commonwealth²⁰ Parliament. By enacting the ETA, the Federal Government was indicating the importance of the Internet to everyday transactions. The purpose of the legislation was to establish a foundation for the creation of a national legislative framework facilitating e-commerce. The ETA provides businesses and individuals with the option of using electronic communications when dealing with Commonwealth departments and agencies.

The legislation is based on two principles: *functional equivalence* and *technology neutrality*.²¹ Functional equivalence means that a paper based transaction and an electronic transaction must be treated equally by the law. Technology neutrality means that the law will not discriminate between

¹⁷ Christensen S, 2001, p 28.

¹⁸ Lawrence A & Saurajen K, *The law of E-commerce 1*, Lexis Nexis, Butterworths, Australia, 2003, p 60013.

¹⁹ Available at:

<http://scaleplus.law.gov.au/html/pasteact/3/3328/top.htm><http://www.comlaw.gov.au>.

²⁰ Note that in this thesis the term 'Commonwealth' refers to the Australian Federal Government. The 'Commonwealth of Australia' is the official name of the country, which was formed in 1901 when the Australian colonies federated.

²¹ OZNetLaw, *Fact sheets - Electronic Transactions Act*, <http://www.oznetlaw.net/facts.asp?action=content&categoryid=225>.

different forms of technology. This is evident in the wide definition of electronic communication, which includes communication via fax, e-mail, EDI and other forms of data exchange.²²

In order to achieve national uniformity, the Attorney General's Department developed a uniform model law for adoption in all Australian jurisdictions.²³ As a result all states and territories, have passed electronic transactions laws that mirror and complement the Commonwealth's ETA, and that allow businesses and individuals to deal with many state and territory departments electronically.²⁴ In addition, those laws cover private sector transactions.²⁵

However, even with this framework, a court will have to rely on the principles of traditional contract law in order to pass judgment upon a dispute regarding online contract formation.²⁶ Australian traditional contract law is based on the inherited English common law with some areas specifically modified in state and territory statutory law. Common law is judge made law which is based on the doctrine of precedent.²⁷ Judges constantly refine existing principles, and in most cases, those principles are believed to be able to adapt to an electronic environment and will therefore apply to online contract formation.²⁸

The ETA finds its origin in the UNCITRAL's *Model Law on Electronic Commerce*²⁹ (the MLEC) and includes provisions on the time of dispatch and receipt of electronic communication.³⁰ Applied in combination with traditional contract law, the ETA³¹ may assist when determining the time of online contract formation.

²² Section 5(1) ETA.

²³ Australian Government, Attorney-Generals Department, *Australia's legal framework for electronic commerce*, <http://www.ag.gov.au/www/agd/agd.nsf/Page/e-commerce_Australiaslegalframeworkforelectroniccommerce>.

²⁴ See *Electronic Transactions Act 2001 (ACT)*, *Electronic Transactions Act 2000 (NSW)*, *Electronic Transactions Act 2001 (NT)*, *Electronic Transactions Act 2001 (Qld)*, *Electronic Transactions Act 2000 (SA)*, *Electronic Transactions Act 2000 (Tas)*, *Electronic Transactions Act 2000 (VIC)* and *Electronic Transactions Act 2003 (WA)*.

²⁵ Australian Government, Department of Communication, Information Technology and the Arts, *What laws apply to e-business?*, <http://www.dcita.gov.au/communications_and_technology/publications_and_reports/2002/july/trusting_the_internet_-_a_small_business_guide_to_e-security/what_laws_apply_to_e-business>.

²⁶ Christensen S, 2001, p 22.

²⁷ Gillies P, *Business Law*, Federation Press, 11th Ed, 2003, p 14f.

²⁸ Christensen S, 2001, p 22.

²⁹ Available at:

<http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html>

³⁰ Section 14 ETA.

³¹ All further references in this thesis to the Commonwealth *Electronic transactions Act* (ETA) should be read as including a reference to the States and Territories mirror legislation.

2.3.2 Sweden

Sweden has not established a legal framework solely to regulate online contracting.³² Several legislative initiatives have dealt with issues regarding the validity and recognition of electronic documents. One of them was the establishment of the IT committee in 1994, and its task was to consider certain legal matters concerning IT and elaborate on such legislation that may be necessary in relation to the use of electronic documents in administrative procedures and business life.³³ The IT committee found that most of the issues arising in online contracting might be solved within the existing framework of contract law, since this is commonly kept and limited to general principles appropriate for agreements of various types.³⁴

In 2003 a report was made by the Swedish Ministry of Finance and the Government Offices dealing with the question of legal recognition of electronic documents.³⁵ The report concluded that legislation should be as technology neutral and long term aimed as possible, and avoided the recommendation of an explicit rule, stipulating the legal effectiveness of electronic documents.³⁶

The main legislative Swedish Act regulating contract formation is the *Contracts Act (SFS 1915:218)*. The IT committee suggested that the Act should apply directly or analogous to electronic contracting. However, the Act was created in 1915, and even though it may be applicable, difficulties may arise when applying the Act to online contract formation.

Regulation of B2B online contracting in the EU is centred on the *E-commerce Directive*³⁷. The Directive aims to create a technology neutral, flexible and light-touch legal framework and is addressing those issues fundamental to effective e-commerce transactions.³⁸ In addition it aims to remove obstacles to the functioning of the EU internal market, thus the framework is based on EU internal market principles and human rights

³² Bryme J, Eskils M & Ödling E, *Benchmarking of existing national legal e-business practices*, 19 September 2006,

<<http://ec.europa.eu/enterprise/ict/policy/legal/2006-bm-cr/sweden.pdf>>, p 6.

³³ The IT committee, *Elektronisk dokumenthantering*, SOU 1996:40, March 1996, <<http://www.regeringen.se/sb/d/108/a/1341>>.

³⁴ *Ibid* p 119f.

³⁵ The Ministry of Finance and the Government Offices, *FORMEL – Formkrav och elektronisk kommunikation*, Ds 2003:29.

³⁶ *Ibid* p 43.

³⁷ Full title: *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)*. A copy of the Directive is available at: <http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf>.

³⁸ EUROPA, *Legal aspects of electronic commerce ("Directive on electronic commerce")*, <<http://europa.eu/scadplus/leg/en/lvb/l24204.htm>>.

protection.³⁹ Even though the international perspective of e-commerce was pointed out there seem to have been no influences from the CISG or the MLEC when adopting the Directive.⁴⁰

The Directive contains a few provisions on contract formation.⁴¹ As a Member State of the EU, Sweden was required to implement the Directive and thus ensure that any prohibitions or restrictions to the use of electronic contracts were abolished.⁴² The Directive was implemented through the *Act on e-commerce and information society services (SFS 2002:562)*⁴³ (*E-commerce Act*). Some contracts are exempted from the scope of the Directive such as contracts that transfer or create real estate property rights or contracts falling within the scope of the law of succession and family law.⁴⁴ The exemption was not specifically implemented in Sweden since there are only a few form requirements under Swedish private law and they were deemed to be in harmony with the Directive.

Other provisions that set requirements on behalf of a website owner, prior to the conclusion of an online contract, were implemented.⁴⁵ In accordance with the Directive the *E-commerce Act* also places an obligation on the service provider, to acknowledge the receipt of an order made through electronic means.⁴⁶ If solely e-mail correspondence is being used the provision does not apply. The acknowledgement has to be made immediately and by electronic means, which may include e-mail correspondence.

The *E-commerce Act* does not contain any provisions on the time of dispatch and receipt of electronic communication. The Act states in regards to the order and the acknowledgement of receipt of an order, that they are deemed to be received when the parties to whom they are addressed are able to access them.⁴⁷ However, it is difficult to know when there is ability to access an electronic message.

Parties in B2B contracting can agree to abolish those requirements.⁴⁸ Moreover, the Swedish provisions are solely placing obligations on the service provider and non-compliance of the provisions may result in an

³⁹ Kierkegaard S M, *E-Contract Formation: U.S. and EU Perspectives*, 3 Shidler J. L. Com. & Tech. 12, 14 February 2007,

<<http://www.lctjournal.washington.edu/Vol3/a012Kierkegaard.html>>.

⁴⁰ Hultmark-Ramberg C, *The E-Commerce Directive and Formation of Contract in a Comparative Perspective*, Global Jurist Advances, Vol. 1, Issue 2, 2001, p 2.

⁴¹ Articles 9-11 *E-commerce Directive*.

⁴² Article 9(1) *E-commerce Directive*.

⁴³ *Act on e-commerce and information society services (SFS 2002:562)*, (*Lag (2002:562) om elektronisk handel och andra informationssamhällets tjänster*), <<http://www.riksdagen.se/webbnav/index.aspx?nid=3911&bet=2002:562>>, (Swedish only).

⁴⁴ Article 9(2) *E-commerce Directive*.

⁴⁵ Sections 10 and 11 *E-commerce Act*.

⁴⁶ Section 12 *E-commerce Act*.

⁴⁷ Section 12 *E-commerce Act*.

⁴⁸ Section 14 *E-commerce Act*.

obligation to pay a market disturbance fine.⁴⁹ Therefore, it is doubtful how the provisions will affect Swedish contract law.

⁴⁹ Section 15 *E-commerce Act*.

3 When is an Online Contract Formed?

3.1 Background

In most legal systems an offer and a corresponding acceptance are two of the fundamental elements of a legally enforceable contract, and traditional contract law assumes that most contracts will be formed by the exchange of an offer and an acceptance.⁵⁰ In some situations it may be impossible or highly artificial to require those elements to exist. Nevertheless it is a useful analytical tool in resolving issues on contract formation.⁵¹

It has been suggested that it is not possible to decide upon a time of contract formation, covering all types of contractual situations.⁵² Generally, a contract is deemed to be formed when the acceptance becomes binding and effective. This point in time may vary; depending on what method is being used to communicate the acceptance, and also depending on which party is deemed to be making the offer. Rules on contract formation often distinguish between methods of communications that are instantaneous and non-instantaneous. Sometimes the rules differ between communications exchanged between parties present at the same place or at a distance, or communications that are expressed orally or in writing.⁵³

Uncertainty regarding the moment of when a contract is formed is unlikely to occur when the acceptance is communicated face-to-face or orally. The *information theory* applies, under which the acceptance becomes effective when it comes to the attention of the offeror. Most likely, both parties will be aware of the point in time when this occurs.⁵⁴

When offer and acceptance are exchanged between parties at a distance, in writing or in digital form, via instantaneous or non-instantaneous means of communication, the point in time when the acceptance becomes effective may be difficult to determine. Different legal systems apply a number of diverse theories to resolve the issue, including:

- The *reception theory*; under which a contract is formed when the acceptance reaches the offeror; and

⁵⁰ See Carter J W & Harland D J, *Cases and materials on contract law in Australia*, 3rd Ed, Butterworths, 1998, p 27 and Adlercreutz A, *Avtalsrätt I*, Juristförlaget i Lund, 10:e upplagan, 1995, p 45.

⁵¹ Carter J W & Harland D J, 1998, p 27f.

⁵² Adlercreutz A, 1995 p 304.

⁵³ UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts*, 2005, <http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf>, para 172.

⁵⁴ *Ibid* para 174.

- The *postal acceptance rule*; under which a contract is formed when the acceptance of an offer is dispatched by the offeree.⁵⁵

Having said that, it is not established if and how those theories apply to online communication. Depending on whether an acceptance is made via e-mail correspondence or a website, and on how those communications are classified, will impact at what point in time the acceptance becomes effective, hence, the time of online contract formation.

Whether a website owner is deemed to make an offer or a mere invitation to treat, or whether the party placing an order, is considered to make or accept an offer is another significant factor, impacting the time of contract formation.

This chapter will present how to determine the effectiveness of an online offer and acceptance, according to Australian and Swedish law respectively.

3.2 Submission of an online offer

3.2.1 Australia

3.2.1.1 Traditional contracting

An offer can generally be described as a proposed set of terms, from one person to another, which indicates the willingness to enter into a contract.⁵⁶ It may be expressed in different forms, such as in a letter, a newspaper, a fax, and even by conduct, as long as it properly communicates the basis on which the offeror is prepared to contract.⁵⁷

There must have been an intention on behalf of the offeror, to give rise to legal relations when the offer is accepted. Otherwise a valid offer cannot exist. The intention must be highly apparent, and the offer itself must be clear enough, to allow a contract to be formed upon acceptance.⁵⁸ A court will objectively determine the requirement of such intention. The important thing is not a party's real intention, but how a reasonable person would view the situation. Subjective intention may be relevant if it is understood or known by the other party.⁵⁹

One of the main reasons why it may be important to determine the precise time of contract formation is that under common law, the offeror may

⁵⁵ Ibid and Adlercreutz A, 1995, p 305.

⁵⁶ Carter J W & Harland D J, 1998, p 28.

⁵⁷ NetLaw, *Fact sheets - Online Contracts*,

<<http://www.oznetlaw.net/facts.asp?action=content&categoryid=232>>.

⁵⁸ The classical principles are illustrated in the case of *Carlill v. Carbolic Smoke Ball Company* [1983] 1 QB 256.

⁵⁹ This is emphasised in *Smith v. Hughes* (1871) LR 6 QB 597.

revoke an offer at any time before a contract is formed.⁶⁰ That is a feature of the *principle of contract*, which is manifesting the view that the offeror should not be unilaterally bound by the offer and only be bound when the acceptance has become effective.⁶¹

A revocation of an offer must be communicated to the offeree, although not necessarily by the offeror.⁶² Actual communication of revocation is necessary and the postal acceptance rule will not apply to the notice of revocation of an offer.⁶³ Instead the offeree must have received the notice of revocation for it to become effective.⁶⁴

Distinguishing between an offer, an invitation to treat and an advertisement, will impact when a contract is deemed to have been formed. As opposed to an offer, which is a proposed set of terms that can form the basis of a contract, an invitation to treat may be described as an indication of a person's willingness to negotiate a contract. An invitation to treat (or an invitation to make an offer) cannot become binding through acceptance.⁶⁵ Instead, a party who responds to an invitation to treat becomes the offeror.

At common law, the courts have taken a consistent approach to identify invitations to treat. The display of goods for sale, either in a shop window or on the shelves in a store, is ordinarily treated as an invitation to treat.⁶⁶ Advertisements are carriers of information and are generally regarded as invitations to treat and the same applies for catalogues and price lists. In a paper based environment the ultimate conclusion will depend on what language that is being used.⁶⁷

3.2.1.2 Via e-mail correspondence

It has been upheld in Australian Courts that e-mail correspondence can be used to create a binding contractual relationship.⁶⁸ Further, the ETA provides for contracting via electronic means. An offer made via e-mail correspondence will be effective if the criteria for a valid offer under traditional law are fulfilled. In a commercial environment, there is a presumption that the parties intend to create legal relations thus, that requirement would be presumed to be fulfilled in B2B online contracting.⁶⁹

⁶⁰ But this is not possible if the offeror has, for a consideration, promised not to withdraw the offer for a certain time.

⁶¹ *Great Northern Railway Co v Witham* (1873) LR 9 CP 16.

⁶² *Dickinson v Dodds* (1876) 2 Ch D 463. See also Carter J W & Harland D J, 1998, p 71.

⁶³ See further chapter 3.3.1.1.1. According to the postal rule the acceptance becomes effective when it is posted.

⁶⁴ As illustrated in *Byrne & Co v Leon van Tienhoven & Co* (1880) 5 CPD 344.

⁶⁵ Carter J W & Harland D J, 1998, p 28.

⁶⁶ *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401.

⁶⁷ Christenson S, 2001, p 27.

⁶⁸ *Ford v La Forrest* [2001] QSC 261.

⁶⁹ OZ NetLaw, *Fact sheets - Online Contracts*, <<http://www.oznetlaw.net/facts.asp?action=content&categoryid=232>>.

Some contracts, for example, those involving the conveyance of land and consumer credit transactions must be in a particular form or be signed in a certain way to be enforceable. Therefore those types of contracts are excluded from the scope of the ETA.⁷⁰

Communications can be transmitted via the Internet very quickly. The period of time between e-mail communications that are being sent can be as little as a few seconds or even fractions of a second. Therefore, when an offer is revoked via e-mail correspondence, it may be difficult to determine if the offer was revoked *before* the acceptance became effective. The offeree must have received the notice of revocation before the acceptance becomes effective.

Importantly, the ETA contains default provisions on the time of dispatch and receipt of electronic communication, which will apply if the parties have not agreed otherwise. According to the ETA, the time of receipt of electronic communication is when the communication *enters the information system* that the addressee has *designated* for receiving such communication.⁷¹ An information system is defined as a system for generating, sending, receiving, storing or otherwise processing electronic communications.⁷²

The concept of *entry into an information system* is intended to refer to the point in time when an electronic communication becomes available for processing within the information system that it has entered. An electronic communication is not intended to meet the receipt requirement if it has merely reached the addressee's system but failed to enter it.⁷³

Depending on what structure that underlies the communication process, the point in time when the communication enters the system may be as follows:⁷⁴

- If the addressee has an e-mail account with an ISP this will be when the ISP receives the e-mail;
- If the addressee is a business or organisation with a direct Internet connection and an internal mail server, it will be when their mail server receives the e-mail;
- If the addressee has a direct connection and no mail server, the e-mail is received when it arrives at the individual computer; or

⁷⁰ Connolly C & Ravindra P, *Fantastic Beasts and Where to Find Them - A Guide to Exemptions in the Electronic Transactions Act (ETA) in Australia*, September 2004, <http://www.galexia.com/public/research/articles/research_articles-art30.html>.

⁷¹ Section 14(3) ETA.

⁷² Section 5(1) ETA.

⁷³ The Parliament of The Commonwealth of Australia, House of Representatives, *Electronic Transactions Bill 1999 - Explanatory Memorandum*, <<http://www.aph.gov.au/parlinfo/billsnet/1e99131.pdf>>, p 36.

⁷⁴ Note that this interpretation is made for New Zealand's *Electronic Transactions Act 2002*. However, the New Zealand Act adopts the same rules as those that apply in Australia and those contained in the MLEC.

- If the addressee access their e-mails by logging on to a website, the e-mail is received when it enters the e-mail system, even if the system for some reason blocks their access to the e-mail.⁷⁵

As it is expected that a person who has *designated* an information system will regularly check that information system for messages, the communication is deemed to have come to the attention of the addressee as soon as it enters the designated system.⁷⁶

Although if the addressee has not designated any system, the time of receipt is when the electronic communication actually comes to the attention of the addressee.⁷⁷ It does not mean that the addressee must read the communication before it is considered received. An addressee who actually knows, or should reasonably know in the circumstances, of the existence of the communication, should be considered to have received the communication. Therefore, an addressee who is aware that the communication is in their e-mail box but refuses to read it should be considered to have received the communication.⁷⁸

Even when applying these provisions, issues may arise when an offer is revoked via e-mail correspondence. Whether a contract is formed or not, when a notice of revocation has been sent immediately before an acceptance, may then be determined by proof of the exact time of each message, derived from the system logs.⁷⁹ Applying the traditional rules on revocation of an offer may however not be a practical solution.⁸⁰ It benefits an eager offeree who immediately wants to respond to an offer and make revocation practically impossible. If the *postal acceptance rule*⁸¹ is applied to contracting via e-mail communication, this will give the offeror who wishes to revoke an offer even less time to do so.

3.2.1.3 Via a website

A display of information on a website may be interpreted as an offer or an invitation to treat. This will impact which party is deemed to be submitting an offer, hence the time of contract formation. Even though a website advertises a special offer to sell a product, this may not be regarded as an

⁷⁵ HowToLaw.co.nz, *How to: The Electronic Transactions Act 2002*, website, accessed on 3 September 2007, <<http://www.howtolaw.co.nz/html/ml284.asp>>.

⁷⁶ The Parliament of The Commonwealth of Australia, House of Representatives, *Electronic Transactions Bill 1999 - Explanatory Memorandum*, <<http://www.aph.gov.au/parlinfo/billsnet/1e99131.pdf>>, p 36.

⁷⁷ Section 14(3) ETA.

⁷⁸ The Parliament of The Commonwealth of Australia, House of Representatives, *Electronic Transactions Bill 1999 - Explanatory Memorandum*, <<http://www.aph.gov.au/parlinfo/billsnet/1e99131.pdf>>, p 36.

⁷⁹ Akindeowo O, *Information Technology law in Australia*, LBC Information Services, 1st Ed, 1999, p 37.

⁸⁰ Ibid.

⁸¹ See further chapter 3.3.1.1.1. According to the postal rule the communication (the acceptance) becomes effective when it is posted.

offer in a legal sense.⁸² The issue will be decided by reference to common law only, and the courts will look at the intention of the assumed offeror and the appearance of the web site.⁸³ If the wording of the web site encourages formation of a contract, the crucial question is whether the seller intended to be bound by any response or wanted to commence negotiations. It is unlikely that any general rule could be developed for different types of websites and each situation should be decided on a case-by-case basis.⁸⁴

It has been suggested that it is relevant if a website is classified as non-interactive, automated interactive or interactive.⁸⁵ Advertisements on a non-interactive website will differ little from a conventional advertisement. Through the non-interactive nature of the website the implied intention of the owner would be to commence negotiations.⁸⁶

If a website is deemed an interactive automatic website, it may be possible to draw analogies with offering goods in a vending machine.⁸⁷ Such website may be treated different to an invitation to treat. One of the reasons for treating goods on display as an invitation to treat is that the shop owner has to be able to negotiate and if he runs out of stock be able to turn down an offer.⁸⁸ The treatment of interactive websites can therefore depend on whether it is a supply of digitalised products, such as software, which cannot run out. Interactive websites will also commonly display the terms of any agreement entered into on the website and the buyer indicates their acceptance of the terms at the time of ordering. It is therefore possible to argue that such site constitutes an offer. By providing the terms, the seller indicates the terms on which he will be bound.

As a general principle for vending machines, the offer is made when the machine holds it out as being ready to receive money.⁸⁹ A transaction conducted via an interactive website is more complex than one in a vending machine. In a vending machine the money is usually paid before making a selection and on a website the purchaser will usually need to accept the terms of the contract before being able to proceed with the transaction. In the absence of any decided cases on the issue, the terms and conditions displayed on a website should make clear to the user, whether an invitation to treat or an offer is at made.⁹⁰

⁸² Quirk P & Forder J, *Electronic Commerce and the Law*, John Wiley & Sons Australia 2nd Ed, 2003, p 62.

⁸³ OZ NetLaw, *Fact sheets - Online Contracts*, <<http://www.oznetlaw.net/facts.asp?action=content&categoryid=232>>.

⁸⁴ Christensen S, 2001, p 29.

⁸⁵ Christensen, S, 2001, p 27.

⁸⁶ *Ibid.*

⁸⁷ *Ibid* p 28.

⁸⁸ *Esso Petroleum Ltd v Commissioners of Customs & Excise* [1976] 1 All ER 117.

⁸⁹ *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163.

⁹⁰ Fitzgerald B, Fitzgerald A, Middleton G, Lim Y & Beale T, *Internet and E-commerce law*, Thomson Lawbook Co, 2007, p 489.

3.2.2 Sweden

3.2.2.1 Traditional contracting

The Swedish *Contracts Act (SFS 1915:218)* is built on the model of offer and acceptance. The first chapter of the Act presents a plausible model of how a contract is formed, based on the use of methods of communication such as letters and telegrams.⁹¹ The Act does not uphold any formal definition of the concept of an offer. Moreover, the Act is based on the *principle of autonomy of will* and the parties are free to agree otherwise. The Act does also not apply if else derives from commercial practice or by custom.⁹²

In the early 1900, when the *Contracts Act* was created, the *principle of promise*, as oppose to the *principle of contract* that applies in Australia, was considered to have an important bearing on contracting. The first chapter of the Act is dominated by the principle of promise.⁹³ A feature of the principle is that the offeror is unilaterally bound by the offer even if an intention to be bound is not explicitly stated in the offer. The decision to legislate on the principle of promise was motivated by the importance of giving the offeree some time to consider whether to accept the offer or not.⁹⁴

The principle of promise limits the possibility to revoke an offer and an offer may only be revoked if the revocation reaches the addressee before or at the same time, as the offer comes to the attention of the addressee.⁹⁵ Once an offer has come to the attention of the addressee, it becomes effective, and should be irrevocable.⁹⁶ The idea is that before the offer comes to the attention of the offeree, no will to be bound by its terms can exist on behalf of the offeree.

Reaches is understood as the point when the notice of revocation is delivered and is available for the offeror.⁹⁷ There is no requirement that it must come to the attention of the offeror. This approach creates certainty since it is objectively determined and the offeror is not able to influence the time of receipt.⁹⁸ A disadvantage by the principle of promise is that it may be hard to objectively judge whether the offer has actually come to the attention of the offeree.

⁹¹ Adlercreutz A, 1995, p 45.

⁹² Section 1(2) *Contracts Act* (Sweden).

⁹³ Section 1(1) *Contracts Act* (Sweden).

⁹⁴ Adlercreutz A, 1995, p 48.

⁹⁵ Section 7 *Contracts Act* (Sweden).

⁹⁶ Adlercreutz A, 1995, p 50.

⁹⁷ This interpretation is provided for in the preparatory work of the Act, and discussed in Adlercreutz A, 1995, p 53.

⁹⁸ Adlercreutz A, 1995, p 53.

An offer is binding for the offering party during the time for acceptance, which may either be stated in the offer or determined by law.⁹⁹ Under Swedish law a distinction is made between communicating orally or in writing, rather than methods of instantaneous and non-instantaneous communication. As a general rule an oral offer has to be accepted immediately, if no time for acceptance is given.¹⁰⁰ If the time for acceptance, other than one submitted orally, is not fixed in the offer, the *Contracts Act* stipulates that the time for acceptance includes the time it takes to communicate the offer and the acceptance, and reasonable time for consideration.¹⁰¹ The time it takes to transmit the offer will add up as time for consideration. In practice, the time for consideration is therefore significantly shortened when an offer is made electronically.¹⁰²

The *Contracts Act* stipulates that an offer that is precise enough to constitute an offer but lacks the binding character, constitutes an invitation to treat.¹⁰³ Moreover, if the intention of the offeror is to give rise to a legally binding contract directly upon acceptance, an offer is made. If there are any surrounding circumstances that imply the opposite, an offer cannot exist in a legal sense. If an offer is made on the basis of an invitation to treat, the party who made the invitation is deemed to have accepted the offer if no acknowledgement is made to show the opposite.¹⁰⁴ Thus, a business may be bound by an offer made on the basis of an invitation to treat by being passive, even though no acceptance is made.

3.2.2.2 Via e-mail correspondence

The common opinion is that the *Contracts Act* will apply even if an offer is submitted electronically.¹⁰⁵ Thus, an offer submitted via e-mail correspondence may constitute a binding offer. Issues may however arise when determining if an online offer is binding and effective. Sweden has no legislation to rely on when determining the time of receipt and dispatch of electronic communication.

As previously mentioned, under the *principle of promise*, the possibility to revoke an offer is limited. A notice of revocation has to reach the offeree, before or at the same time as the offer comes to the attention of the offeree, to become effective. Therefore, when an offer is made via e-mail correspondence this principle may seem unfeasible. There is barely any faster means of communication than e-mail. If the offeree reads the e-mail containing the offer as soon as it is delivered, there will be no possibility for the offeror to revoke the offer. It has been suggested that instead of strictly applying the principle of promise to e-mail communication, there should be a possibility to revoke an offer, as long as the offeree has not commenced in

⁹⁹ Section 2 and 3 *Contracts Act* (Sweden).

¹⁰⁰ Section 3(2) *Contracts Act* (Sweden).

¹⁰¹ Section 3 *Contracts Act* (Sweden).

¹⁰² Hultmark C, 1998, p 47.

¹⁰³ Section 9(1) *Contracts Act* (Sweden).

¹⁰⁴ Section 9(2) *Contracts Act* (Sweden).

¹⁰⁵ Bryme J, Eskils M & Ödling E, 2006, p 7.

processing the offer and will suffer economical loss if the offer is revoked.¹⁰⁶

3.2.2.3 Via a website

Likewise to under Australian law, it may be difficult to determine if goods and services offered through a website actually constitutes a binding offer or is a mere invitation to treat. The most important element to analyse is whether there is an intention to give raise to a legally binding contract. The principle of promise may make it even more important to determine the status of a display of information on a website, since the person making the offer will be bound by it during the time for acceptance.

A case brought before the National Board for Consumer Complaints indicates that an offer which has been addressed from a business to the public on a website does not constitute a binding and valid offer. Such offer should merely be regarded as an invitation to treat. For the formation of a contract the businessman will have to accept or verify the consumers offer.¹⁰⁷

The opinion of the Board has been confirmed in a case brought before the Market court.¹⁰⁸ A number of persons had been invoiced by a telecommunications company, for certain services provided on a number of websites. The persons had connected to the websites in question and had been invoiced for services which they had not explicitly ordered. They had not confirmed any order by stating their names, or by leaving any other personal information. In spite hereof, the company sent out invoices and claimed payment for the services provided on the websites. The court came to same conclusion as the Board, in that sense that a contract, regardless of its conclusion on the Internet or not, can only be valid and binding if there is proof supporting that the parties in any way accepted the agreement by manifesting their will to be bound.

The *E-commerce Directive* does not address the issue on invitations to treat; instead the issue was left to the individual Member States to regulate. However, the issue is not regulated in the *E-commerce Act*. It has been argued that it is touched upon in Article 11 of the Directive.¹⁰⁹ The Article opens for such speculation, since it uses the wording *where the recipient of the service places his order through technological means*. This would suggest that the website visitor places an order, and does not accept the

¹⁰⁶ Hultmark C, 1998, p 63.

¹⁰⁷ The National Board for Consumer Complaints, *Avtal om elleverans no 2001- 4889*, 30 May 2002, <<http://www.arn.se/netacgi/brs.pl?d=REFE&l=20&p=1&u=/referat.htm&r=1&f=G&Sect8=PLSCRIPT&s1=&s2=&s3=&s4=2001-4889&s5=&s6=>>>, (Summary).

¹⁰⁸ The Market Court, *Case no. 2004:18 Dnr B 7/03*, 22 July 2004, <<http://www.marknadsdomstolen.se/avgoranden2004/Dom04-18.pdf>>.

¹⁰⁹ Hörnle J, *The European Union Takes Initiative in the Field of E-Commerce*, *Journal of Information, Law and Technology*, 31 October 2000, <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_3/hornle>.

website's offer.¹¹⁰ It has also been suggested that if order buttons are marked *place order* instead of *purchase* that is more likely to be considered a mere invitation to treat.¹¹¹ This would be in line with existing contractual principles in Sweden. In some Member States, for example in France, a display of goods or an advertisement may be deemed to be an offer.¹¹² The fact that the party who is visiting the website is making an offer, could also have unwanted consequences. If the offer is being processed automatically, there will be little or no chance to revoke the offer.

Moreover, the *E-commerce Act* contains a provision on the time of receipt of an order. The provision states that an order is deemed to be received when the addressee is able to access it.¹¹³ Assuming the website is an invitation to treat and the website visitor is making an offer, the point in time when an electronic offer is deemed to be received is decided. However, the mere receipt of an offer has no consequences under traditional contract law. To be effective in accordance with traditional contract law, an offer has to *come to the attention* of the offeree.

3.3 Online acceptance

3.3.1 Australia

3.3.1.1 Traditional contracting

Australian traditional contract law does not lay down any particular method for acceptance. The offer may state the method under which acceptance has to be made. In most situations, an acceptance has to comply with the method set out in the offer in order to be valid. When the offeree uses a method of communication that is timelier than the one required by the offer, the acceptance may not be effective. If a court is of the view that the stated method refers to a general category of means of communication, the acceptance may be effective, but only if a mode that is not less advantageous for the offeror, is used.¹¹⁴

If no method is stated, the offeree should generally use the same or an equally convenient method, as adopted for submitting the offer. An acceptance must be unqualified in its terms and there cannot be any discrepancy between what is offered and what is accepted.¹¹⁵ If the acceptance does not reflect the offer, then it is said not to be an acceptance but at counter-offer instead.¹¹⁶

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Adlercreutz A, 1995, p 52, footnote 10.

¹¹³ Section 12 *E-commerce Act*.

¹¹⁴ See *Tinn v Hoffman & Co* (1873) 29 LT 271 and *Quenerduaine v Cole* (1883) WR 185.

¹¹⁵ Carter J W & Harland D J, 1998, p 45.

¹¹⁶ See *Grainger v Vindin* (1865) 4 SCR (NSW) 32 and *Davies v Smith* (1938) 12 ALJ 260.

As for the timing of the contract formation, the general rule is that an acceptance becomes effective when it is communicated to the offeror and a contract is concluded when the acceptance is received. In addition to the general rule, there is the postal acceptance rule, under which the acceptance is effective when it is posted and hence that is the time of contract formation.

3.3.1.1.1 The postal acceptance rule

The postal acceptance rule (the postal rule) was established in praxis during the 19th century.¹¹⁷ It was introduced due to the extraordinary effects the combination of the general rule and the principle of contract would have for the offeree, when the post was used as a method of giving acceptance. The extraordinary effects being that an acceptance must be communicated before a contract is formed and the offer may be revoked until the acceptance is communicated.

According to the postal rule, an acceptance is effective when it is posted and a contract is deemed to have been formed even if the acceptance never reaches the offeror, under the condition that it is sent off in a correct manner. It is only a presumption that the time of contract formation will be where the acceptance was posted and the offeror may stipulate in the offer that a contract will be formed when the acceptance is communicated.

One disadvantage of the postal rule is that the offeror most likely does not know when the contract is formed and that he is no longer able to revoke the offer.¹¹⁸ According to case law, there are reasons for the maintenance of the postal rule in modern society. One justification is the legal certainty enshrined to the offeree.

However nowadays, fewer transactions are conducted through the post since businesses prefer faster means of communication such as facsimiles, telexes and e-mail. The case law considering communication via facsimile and telexes states that the starting point should be that an acceptance should be communicated in accordance with the general rule and any departure needs to be justified by the particular circumstances. There are several Australian decisions and precedents classifying communication into either instantaneous or non-instantaneous communication; when instantaneous communication is used communication of the acceptance is required in accordance with the general rule; and when non-instantaneous communication is used, an acceptance may be subject to the postal rule.

The praxis has not developed further the past 20 years, notwithstanding the applicability of the rule has not been extended to communication by telexes.

¹¹⁷ See *Adams v Lindsell* [1818] 1 B & Ald 681, and *Henthorn v Fraser* [1892] 2 Ch 27.

¹¹⁸ Adlercreutz A, 1995, p 310.

¹¹⁹ Such communication has been considered instantaneous and the parties are considered to be negotiating in each other's presence.¹²⁰

3.3.1.2 Via e-mail correspondence

The ETA contains provisions on the time of receipt and dispatch of electronic communications, which may provide legal certainty in determining the time of online contract formation. Nevertheless, whether the general rule or the postal rule applies to an acceptance made via e-mail correspondence will still have to be determined according to common law principles. Due to the great variation in today's electronic communication, it has been suggested that no rule can cover all circumstances.¹²¹ Instead every situation must be looked upon by reference to the intentions of the parties and by business practice and by a judgment on where the risks should lie.¹²²

The time of contract formation when offer and acceptance are exchanged via e-mail correspondence may depend on whether the communication is deemed instantaneous or non-instantaneous and whether the postal rule is applicable or not, which has not yet been judicially settled.¹²³

The complexity of e-mail processing through servers, routers and ISPs is a reason for not classifying e-mails strictly as a form of instantaneous communication. One argument in favour of applying the postal rule to an acceptance made via e-mail correspondence is that an e-mail may pass through several intermediaries, before it is delivered to its addressee. Hence there may be gaps in time between dispatch and receipt.

An other argument in favour of applying the postal rule would be that e-mail could be described as an electronic version of the postal system. Service and network providers assist when the e-mail is transmitted and the message is entrusted to a third party just like when the post is being used. Moreover difficulties in the transmission like delays, failure and computer hacking may result in e-mails never reaching its recipients. If the postal rule applies to an acceptance made via e-mail correspondence, it would when the e-mail enters a single information system outside the control of the offeree.¹²⁴

A strong argument against the postal rule is the fact that the rule was developed in a time area when communication via post could take several weeks, and some certainty in doing business was required. Even though e-mail may be considered non-instantaneous, it is possible to know within a short period of time whether the other party receives the message. It has also been argued that e-mail correspondence should be treated as instantaneous

¹¹⁹ Christensen S, 2001, p 30.

¹²⁰ *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327.

¹²¹ *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-Gesellschaft mbH* [1983] 2 AC 34 and Christenson S, 2001, p 31.

¹²² *Ibid.*

¹²³ Lim Y F, 2007, p 75.

¹²⁴ Section 14(1) ETA.

communication.¹²⁵ If e-mail correspondence is deemed to be instantaneous, the general rule of acceptance will be applicable hence; the time of contract formation would be when the offeror's ISP receives the e-mail containing the acceptance.¹²⁶

3.3.1.3 Via a website

The first thing to consider when determining when an acceptance is made based on information on a website, is whether the display of information actually constitutes an invitation to treat or an offer. This will have to be determined according to common law principles. As previously mentioned, it is suggested that no rule can cover all circumstances.¹²⁷

Assuming the display of information on a website is an invitation to treat the website visitor makes an offer in relation to the goods or services displayed. This is likely to be the case when a website is classified as a non-interactive website.¹²⁸ The web site owner may then communicate acceptance by other methods for example by posting a letter or sending an e-mail, which hence may affect the time of contract formation.¹²⁹ Depending on what means of communication is used, it may either be when the website owner sends off the acceptance or when it is received by the website visitor.

Similar applies for an interactive website and the time of contract formation will be affected by the classification of the display of information. A website owner of an interactive site always has a possibility to clearly express whether an offer or a mere invitation to treat is made, hence also affect when a contract is formed.

Communication via an automated interactive website may be considered instantaneous because of the automatic nature of such communication. There is no real difference in time between the sending of an offer and an acceptance. Furthermore, a reason for not applying the postal rule in relation to click-wrap contracts is that the line of communication is constantly verified by a built in mechanism that maintains constant communication between computers and servers.¹³⁰ This means that an acceptance via a website would then be effective when it is received.¹³¹ The ETA does not provide a rule on the time of dispatch for the case that communication is exchanged within the same information system.

¹²⁵ See Al Ibrahim M, Ababneh A & Tahat H, *The Postal Acceptance Rule in the Digital Age*, Journal of International Commercial Law and Technology, Vol. 2, Issue 1, 2007, <<http://www.jiclt.com/index.php/JICLT/article/viewFile/33/20>>, p 2.

¹²⁶ Section 14(2) ETA.

¹²⁷ Christenson S, 2001, p 31.

¹²⁸ For *non-interactive website*, see chapter 2.2.2.

¹²⁹ OZ NetLaw, *Fact sheets - Online Contracts*, <<http://www.oznetlaw.net/facts.asp?action=content&categoryid=232>>.

¹³⁰ Lim Y F, 2007, p 75.

¹³¹ Al Ibrahim M, Ababneh A & Tahat H, 2007, p 2.

3.3.2 Sweden

3.3.2.1 Traditional contracting

Under Swedish law the time of contract formation is when the acceptance *reaches* the offeror. There is no requirement that it must *come to the attention* of the offeror. The acceptance must have reached the offeror within the time for acceptance.¹³² If the acceptance does not meet this essential requirement it is considered to be a refusal of the offer, in combination with a new offer.¹³³

Since the time of contract formation is when the acceptance reaches the offeror, determining when an acceptance has reached its addressee is a fundamental issue. Traditionally, *reached* is understood as the point in time when the acceptance is *delivered* and is *available* for the offeror, for example in its mailbox.¹³⁴ An acceptance has to reach the offeror within its office hours, otherwise it is deemed to be received the following day.¹³⁵

3.3.2.2 Via e-mail correspondence

The general opinion is that an electronic acceptance should not be treated differently than an acceptance made by any other means. Nevertheless, uncertainty may arise when determining the time for acceptance, that is, when an electronic acceptance reaches the offeror. Especially, since under Swedish law, there is no rule providing the answer as to when electronic communication is received or reaches the addressee.

Most likely communicating via an instant chat would be likened to communicating orally.¹³⁶ However, communicating via e-mail correspondence would probably be likened to written communication, despite it is of ‘instant nature’. Hence, an acceptance via e-mail correspondence has to reach the offeror within the time for acceptance.

According to the IT-committee, an acceptance made via e-mail correspondence is deemed to be effective when the message reaches the offeror’s electronic address.¹³⁷ It should not be relevant when the offeror is downloading and reading the messages, but the message has to be sent to the right e-mail address. Although the IT-committee further suggested that if technical problems occur the time should instead be when it is possible for the addressee to actually read the message.¹³⁸ But is it enough that the e-mail has reached the addressee’s server, or should it have come further in the process, to become effective?

¹³² See Section 3 *Contracts Act* (Sweden).

¹³³ Section 6 *Contracts Act* (Sweden).

¹³⁴ This interpretation is provided for in the Bill of the Act and discussed in Adlercreutz A, 1995, p 53.

¹³⁵ Hultmark C, 1998, p 51.

¹³⁶ Hultmark C, 1998, p 45.

¹³⁷ The IT committee, *Elektronisk dokumenthantering*, SOU 1996:40, March 1996, <<http://www.regeringen.se/sb/d/108/a/1341>>, p 125.

¹³⁸ *Ibid.*

In the area of public administration law, a few different approaches as to when an electronic document is deemed to have been received have been presented:¹³⁹

- One approach is that an electronic document is received when it is available for the authority. This means that a document may be deemed to have been received, when the authority is technically in possession of it. This approach is criticised since a document would have to be deemed to be received even if no one knows it exists.¹⁴⁰
- A second approach would be that an electronic document is received when someone is actually reading the document on a computer screen, or in printed form. This approach would create uncertainty since the authority would be able to decide the time of receipt by postponing the time of disposal.¹⁴¹
- A third approach suggests that the document is received when it has reached a certain stage of the process which every incoming document goes through and is kept at a place which from the authority's point of view is where received documents are being kept.

The Government Interoperability Board has in its guidance on incoming documents chosen to adhere to the third approach.¹⁴² The second approach is however explicitly rejected in the guidance and looked upon as a misunderstanding. Many documents are being processed automatically and the processing starts before anyone reads the document manually. Thus such approach would not be possible since a document has to be deemed to have been received before it can be processed.¹⁴³

More recently, the doctrine has supported the third approach, considering the computerised administration and the increasing amount of electronic documents that are being processed automatically.¹⁴⁴

3.3.2.3 Via a website

Regarding the timing of a contract formed via a website, the primary thing to determine is whether a proposal on a website constitutes a valid offer or a mere invitation to treat. As previously mentioned, under Swedish law, a display of information on a website, is most likely to be deemed to be a

¹³⁹ See Furberg, P, *Inkommande handlingar - en IT-anpassad tolkning*, Svensk Jurist Tidning, häfte 3, 2005, p 275 and 24-timmarsdelegationen (Upprättad inom Setterwalls Advokatbyrå i Göteborg), *E-tjänster - juridiska lösningar för kommuner och landsting*, 2005, p 9.

¹⁴⁰ Furberg P, 2005, p 275.

¹⁴¹ Ibid p 277.

¹⁴² E-nämnden, *Vägledning för hantering av inkommande elektroniska handlingar 05:02*, 11 May 2005, p 9 and p 15.

¹⁴³ Ibid p 16.

¹⁴⁴ Furberg P, 2005, p 278 and 281.

mere invitation to treat. Moreover, the wording of the *E-commerce Directive* may indicate such interpretation.¹⁴⁵ The owner of a website will then be the party who makes the acceptance. However, the ultimate conclusion will still depend on the intention of the parties.

An acceptance by the website owner may be sent via e-mail correspondence, as well as directly via the website. The time of contract formation will, in accordance with traditional rules, be when the acceptance reaches the offeror.

Interestingly, the draft Article 11 of the *E-commerce Directive*, included an attempt to define the moment when a contract would be concluded via a website.¹⁴⁶ The Article presented a complex process of contract formation in four stages, comprising of offer, acceptance, acknowledgement of acceptance and confirmation of the acknowledgement.¹⁴⁷ The time of contract formation would have been at stage four. The Article would only apply in case that a website visitor accepted an offer. In practice, the acknowledgement of the acceptance, following an order, would appear on the website, whereby the website visitor, by clicking a box, would confirm the receipt of the acknowledgement.¹⁴⁸ The proposal was however turned down as burdensome for service providers. Due to difficulties of harmonising the exact moment of contract formation, the final provision is silent on the issue of the time of contract formation.

Instead, the final provision contains an obligation on behalf of the service provider to acknowledge the receipt of an order. Therefore, when a contract is concluded via a website, the *E-commerce Directive* may introduce a third step in addition to the process of offer and acceptance. However, the legal character of the stage is uncertain and it was left to the discretion of the Member States to decide how to implement it.

When the provision was implemented in Sweden, it was given the same wording as the provision in the Directive.¹⁴⁹ If a website visitor is deemed to be accepting an offer, a contract is already concluded when the acknowledgement of the receipt has to be sent. Under Swedish law, a display of information is, however, likely to be considered a mere invitation to treat. In the preparatory work of the *E-commerce Act*, it was clearly pointed out, that an acknowledgement of an order is not a determining factor

¹⁴⁵ Hörnle J, 2000.

¹⁴⁶ Ibid.

¹⁴⁷ See Committee on Legal Affairs and Citizens' Rights, *Report on the proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (COM(98)0586 - C4-0020/99 - 98/0325(COD))*, 23 April 1999, <http://europa.eu.int/ISPO/ecommerce/epreports/EP229_868_en.pdf>, Amendment 42, p 21.

¹⁴⁸ Dickie J, *Internet and Electronic Commerce Law in the European Union*, p 28 (Note, this is a secondary source as referred to in Henriksson A, *Implementeringen av artikel 11, om beställning, i e-handelsdirektivet till svensk rätt*, 2000, <<http://www.handels.gu.se/epc/archive/00003162/01/200079.pdf>>, footnote 28.).

¹⁴⁹ Section 12 *E-commerce Act*.

for the time of contract formation.¹⁵⁰ This interpretation may therefore suggest that a contract is concluded when the offer is accepted, in accordance with traditional contract law.

Other interpretations may be made, where the order and the acknowledgement of receipt of an order, may influence the time of contract formation.¹⁵¹ Thus, the provision in the *E-commerce Act* on when such communications are deemed to be received, may be of legal importance.¹⁵² Depending on whether a placement of an order is classified as an offer or an acceptance, would then impact whether the order or the acknowledgement of receipt of an order, equals the acceptance. In both scenarios, a contract is concluded when the addressee is able to access the communication. However, the Act is failing to regulate the exact time of when an electronic communication is deemed accessible.

¹⁵⁰ Regeringens Proposition, *Lag om elektronisk handel och andra informationssamhällets tjänster, m.m. Prop. 2001/02:150*, <http://www.riksdagen.se/Webbnav/index.aspx?nid=37&dok_id=GP03150&rm=2001/02&bet=150>.

¹⁵¹ Hultmark-Ramberg C, 2001, p 16.

¹⁵² Ibid.

4 International Online Contracting

4.1 Introduction

Different regimes for determining when an acceptance becomes effective, apply to some extent in Australia and Sweden. Hence, the time of when a contract is formed by traditional means as well as online may sometimes differ. In international contracting, the parties often decide upon the law applicable to the contract. Typically they choose a legal framework that they are familiar with. If no decision is made the law applicable to the contract may turn out to be a set of laws, different to what the parties would have assumed. This is not a new phenomenon, however, due to the borderless nature of the Internet, the issue may be even more noticeable in e-commerce. The lack of harmonization between legal systems is by businesses across the globe, considered an obstacle that may hamper the development of e-commerce.¹⁵³

The United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 with its main task to remove obstacles in international private law created by disparities in national laws.¹⁵⁴ Works by UNCITRAL in the area of contracting include the *Convention on Contracts for the International Sale of Goods 1980*¹⁵⁵ (CISG) and the *Convention on the Use of Electronic Communications in International Contracts 2005*¹⁵⁶ (UNECIC).

This chapter will present the provisions of the two Conventions that may impact the effectiveness of an online offer and acceptance.

4.2 The CISG

The CISG is regarded as one of the most important and successful international Conventions within the framework of international private

¹⁵³ See the Appendix of the Ad Hoc ICC Expert Group, *Report on draft UNCITRAL convention on electronic contracting*, 5 December 2001, <http://www.iccwbo.org/home/e_business/uncitral_convention_report.asp>.

¹⁵⁴ UNCITRAL, *Origin, Mandate and Composition of UNCITRAL*, <<http://www.uncitral.org/uncitral/en/about/origin.html>>.

¹⁵⁵ Available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html>.

¹⁵⁶ Available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html>.

law.¹⁵⁷ The CISG applies to contracts of sale of goods between parties whose places of business are in different states, under the condition that the states are contracting states, or if the rules of private international law lead to the application of the law of a contracting state.¹⁵⁸ The CISG excludes a few different types of contracts, including consumer contracts.¹⁵⁹

Both Australia and Sweden have ratified the CISG.¹⁶⁰ In Australia the CISG was implemented by uniform state legislation, each entitled the *Sale of Goods (Vienna Convention) Act*. In Sweden, it was implemented by the *Act on International Sales of Goods (SFS 1987:822)*.

Part II of the Convention provides rules on contract formation. However, upon ratification, Sweden, along with Denmark, Norway and Finland, declared that Part II of the CISG should not bind them as countries. The reason given by Sweden, not to adapt Part II was the divergence between the rules of the Convention and Swedish law, regarding the possibility to revoke an offer. Presumably, the desire to avoid having double regimes also contributed to the decision.¹⁶¹

Having said that, it has been argued, that having a different regime than the CISG, creates uncertainty not only for local businesses but also for businesses trading within the Nordic countries.¹⁶² This has been acknowledged and has caused business in the Nordic countries to take action via the International Chamber of Commerce (ICC), to urge their Governments to ratify the CISG fully. Further, it has been discussed whether the Nordic countries should update their contract laws to coincide with the CISG, which has however been deemed a too demanding task.¹⁶³ One consequence of not having adopted Part II is that the binding effect of offer and acceptance cannot be determined without first deciding the law applicable law the contract.¹⁶⁴

¹⁵⁷ Jacobs M S, Cutbush-Sabine K & Bambagiotti P, *The CISG in Australia-to-date: An illusive quest for global harmonisation?*, Mealey's International Arbitration Report, August 2002, <<http://www.cisg.law.pace.edu/cisg/biblio/jacobs2.html>>.

¹⁵⁸ Article 1 CISG.

¹⁵⁹ Article 2 CISG.

¹⁶⁰ UNCITRAL, *Status 1980 - United Nations Convention on Contracts for the International Sale of Good*,

<http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

¹⁶¹ Ramberg J, *The New Swedish Sales Law*, Roma, 1997,

<<http://w3.uniroma1.it/idc/centro/publications/28ramberg.pdf>>, p 3.

¹⁶² ICC, *Commercial Law and Practice - Strong Nordic business support for UN convention*, 4 February 2005, <<http://www.iccwbo.org/policy/law/iccgc/index.html>>.

¹⁶³ Ramberg J, 1997, p 3.

¹⁶⁴ Ibid p 4.

4.2.1 The applicability of the CISG to online contracts

The applicability of CISG to contracting by electronic means has been elaborated upon by the CISG-Advisory Council (the CISG-AC).¹⁶⁵ The CISG was drafted long before electronic communications beyond telegrams and telexes were considered. Nevertheless, due to the purpose of Article 11, which is that there no form requirements of writing should be required for the formation of a contract, the CISG enables parties to conclude contracts electronically.¹⁶⁶ A few Articles in the CISG contain the term writing, which in a traditional world refers to documents written on a durable medium.¹⁶⁷ Article 13 specifically stipulates that writing includes telegram and telex and will also be fulfilled by other electronic documents if it is possible to retrieve and perceive the message.¹⁶⁸ The parties may agree otherwise and if they have not, there should be a presumption that electronic communication is included in the term writing.

It has been argued that the CISG and its underlying principles are sufficiently robust and flexible to deal with changes and the challenges posed by online contracting.¹⁶⁹ The CISG has been identified as an acceptable framework for online contracts dealing with the sale of goods.¹⁷⁰

It should be noted that the CISG is only applicable for the sale of goods but not for service providing.¹⁷¹ That is why the subject matter for an online contract may impact whether the CISG applies or not.

A contract for the sale of physical goods such as a book or a CD is covered by the CISG whilst if a digitised computer program is being purchased the CISG may not apply. A licence is often required when software is purchased which may therefore be described as a purchase of the rights to use the program. Thus, it is difficult to determine whether such purchase classifies as goods or services.

¹⁶⁵ CISG-AC Opinion no 1, *Electronic Communications under CISG*, Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden, 15 August 2003, <<http://cisgw3.law.pace.edu/cisg/CISG-AC-op1.html>>.

¹⁶⁶ Ibid.

¹⁶⁷ See Articles 11, 12, 13, 21, 29 and 96 CISG.

¹⁶⁸ CISG-AC Opinion no 1, 2003.

¹⁶⁹ Eiselen S, *E-Commerce and the CISG: Formation, Formalities and Validity*, The Vindobona Journal of International Commercial Law & Arbitration, 305-318, 2002, <<http://cisgw3.law.pace.edu/cisg/biblio/eiselen6.html>>, p 309.

¹⁷⁰ UNCITRAL, Working Group on Electronic Commerce, Note by the Secretariat, *Legal Aspects of Electronic Commerce, Possible Future Work in the Field of Electronic Contracting: An Analysis of the United Nations Convention on Contracts for the International Sale of Goods*, 1, 9 February 2001, <<http://daccessdds.un.org/doc/UNDOC/LTD/V01/807/70/PDF/V0180770.pdf?OpenElement>>.

¹⁷¹ Article 2 CISG.

One view is that a standard computer program may be considered goods no matter in what medium they are stored. However, a system written specifically for a particular customer may on the other hand be considered as providing a service.¹⁷² It has been suggested that since there is no provision of the CISG limiting the scope solely to tangibles the CISG may apply to the sale of software.¹⁷³ Nevertheless, a court may not be willing to make such a wide interpretation. To avoid legal uncertainty parties of an international software transaction should expressly chose to opt in or out of the CISG.¹⁷⁴

4.2.2 Invitation to treat

In a rather conventional way the CISG defines a proposal as an invitation to treat if the proposal is not addressed to one or more specific persons and if the person who is making the proposal does not clearly indicate the opposite.¹⁷⁵ It is therefore unlikely that an advertisement or proposal on a website will be considered an offer under the CISG if the website owner does not clearly state that an offer is made and that an acceptance will be made by the visitor of the website if an order is placed.

4.2.3 Submission of an offer

The CISG contains detailed rules regarding the making and the status of an offer. An offer is defined in a rather universal way as a sufficiently definite proposal addressed to one or more specific persons, that indicates the intention of the offeror, to be bound in case of acceptance.¹⁷⁶ Sufficiently definite is defined as indicating the goods and making it possible to determine the quantity and the price of the same. An offer becomes *effective* at the point in time when it *reaches* the offeree.¹⁷⁷

For the purpose of contract formation reaches is defined as when an offer or acceptance is either made orally to the addressee, or by any other means delivered to the addressee personally.¹⁷⁸ Alternatively, it can be delivered to the addressee's place of business, and if no such place exists to his habitual residence. A message sent to the e-mail address or the web address designated by the recipient, should meet the requirements for validity posed by the CISG.¹⁷⁹ For electronic communication the CISG-AC has declared

¹⁷² Reed C, 2003, footnote 80, p 351f.

¹⁷³ Diedrich F, *The CISG and Computer Software Revisited*, 6 The Vindobona Journal of International Commercial Law and Arbitration 2, supplement 55-57, 2002, <http://www.maa.net/vindobonajournal/vj_documents/vj_6_2_e_supplement_diedrich.pdf> p 74.

¹⁷⁴ Ibid p 75.

¹⁷⁵ Article 14(2) CISG.

¹⁷⁶ Article 14(1) CISG.

¹⁷⁷ Article 15(1) CISG.

¹⁷⁸ Article 24 CISG.

¹⁷⁹ Eiselen S, 2002, p 308.

that the term reaches would correspond to the point in time when the communication enters the receiver's server.¹⁸⁰

As previously mentioned the reason for Sweden and the other Nordic countries not to adopt Part II of the CISG was the divergence between the provisions on the revocability of an offer. The CISG compromises between the *principle of promise* and the *principle of contract*.¹⁸¹ The general rule is that an offer may be revoked even if it is irrevocable if the withdrawal reaches the offeree before or at the same time as the offer.¹⁸² An offer is deemed irrevocable by stating a fixed time for acceptance or otherwise.¹⁸³ Nor may an offer be revoked if it was reasonable for the acceptor to rely on the offer as being irrevocable and the acceptor has acted in reliance on the offer.¹⁸⁴ Hence the difference is that under Swedish law the withdrawal has to reach the offeree before or at the same time as the offer comes to the attention of the offeree.¹⁸⁵ The advantage of the provision in the CISG is that it is not necessary to show whether the offer has come to the attention of the offeree or not, something that may be exclusively known by the offeree.

In terms of electronic communication, a notice of revocation has to enter the offeree's server before or at the same time as the offer. The problem in applying this rule to online contracting is of course that there is in practice hardly any means of faster communication than e-mail or website communication. Another issue is whether it is enough that the withdrawal has entered the offeree's server for it to take effect. In that case it would have to be presumed that it is read as soon as it is located on the server. The fact that hindrance to read the message may occur due to technical problems may be disregarded, since it is something that can be controlled by the offeree who therefore is the carrier of the risk.¹⁸⁶

If an offer is not deemed irrevocable it may be revoked if the withdrawal reaches the acceptor before an acceptance is dispatched.¹⁸⁷ When applying this rule to an online acceptance means that the offer is revoked if the withdrawal enters the offeree's server before the acceptance has left the same server. Thus, in practice this could occur at the same time. In any case, a prerequisite is that the offeree has consented to receive electronic communication of that type to the address.¹⁸⁸ Explicit consent is not necessary and contract interpretation, as well as practices and usages, may help in determining the existence of such consent.¹⁸⁹

¹⁸⁰ CISG-AC opinion, 2003.

¹⁸¹ Adlercreutz A, 1995, p 322.

¹⁸² Article 15(2) CISG.

¹⁸³ Article 16(2)(a) CISG.

¹⁸⁴ Article 16(2)(b) CISG.

¹⁸⁵ Section 7 *Contracts Act* (Sweden).

¹⁸⁶ CISG-AC opinion, 2003.

¹⁸⁷ Article 16(1) CISG.

¹⁸⁸ CISG-AC opinion, 2003.

¹⁸⁹ Article 8 and 9 CISG.

4.2.4 Acceptance

An acceptance is defined in a rather uncontroversial way, as a statement (or other conduct) made by the offeree, that indicates assent to an offer.¹⁹⁰ To become effective, the acceptance must *reach* the offeror within the time for acceptance.¹⁹¹ The time for acceptance is either fixed in the offer or else it should comprise reasonable time. In the case of an acceptance containing terms in conflict with the offer, the acceptance is to be understood as a rejection of the offer and, at the same time, as a new offer.¹⁹² However, the general provision is limited and non-material changes or additions do not prevent the declaration's classification as an acceptance.¹⁹³ Examples of material alterations are changes of the price, payment, quality and quantity of the goods.¹⁹⁴ Such changes lead to the acceptance constituting a new offer.

According to the CISG-AC opinion, an electronic acceptance, reaches, the offeror when the acceptance enters the server of the offeror.¹⁹⁵ It is not necessary that the offeror has read the acceptance but it must be available for him to read.¹⁹⁶ For different reasons an online acceptance may in practice not be effective when it reaches the offeror's server.¹⁹⁷

4.2.5 The time of contract formation

The most interesting provision of Part II of the CISG, is perhaps the rule on the time of contract formation. Article 23 states that a contract is concluded when an acceptance becomes effective in accordance with the Convention. Hence, the CISG provides a uniform rule for contract formation. Read together with Article 24 and the CISG-AC opinion, the time of online contract formation would be when the acceptance enters the offeror's server.

4.3 The UNECIC

The *Convention on the Use of Electronic Communications in International Contracts 2005*¹⁹⁸ (UNECIC), was adopted by the United Nations General Assembly in 2005 to meet the desire for a harmonisation and greater predictability in e-commerce law. The UNECIC sets out rules applying

¹⁹⁰ Article 16(1) CISG.

¹⁹¹ Article 18(2) CISG.

¹⁹² Article 19(1) CISG.

¹⁹³ Article 19(2) CISG.

¹⁹⁴ Article 19(3) CISG.

¹⁹⁵ See chapter 4.2.3.

¹⁹⁶ CISG-AC opinion, 2003.

¹⁹⁷ See chapter 4.2.3.

¹⁹⁸ Available at:

<http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html>.

when negotiating and forming international electronic contracts,¹⁹⁹ with a few types of contracts excluded, consumer contracts being one of them.²⁰⁰

UNCITRAL's Working Group on Electronic Commerce has previously released the MLEC. The model law was solely recommendations, offering national legislators a set of internationally acceptable rules designed to remove legal obstacles to the use of electronic communications. However, because of the non-binding character the sought after harmonisation of e-commerce law was not accomplished.

The UNECIC does not aim to change domestic law, but to mediate between contradictory electronic contracting laws and is designed to be implemented in both civil law and common law systems.²⁰¹ Even though the UNECIC only applies to international contracts, it is possible that states signatory to the Convention will amend their domestic legislation applicable to online contracts, to align them with the rules of the UNECIC and to avoid a duality of regimes.²⁰² If a country does not ratify the Convention, it may still influence the contract formation, particularly where the other contracting party is from a country that has ratified the Convention. Thus, the UNECIC is likely to establish a new international standard for e-commerce legislation.²⁰³ However, when signing the Convention, states may make declarations to limit the scope of the application, which may decrease the level of harmonisation.²⁰⁴

The UNECIC is open for signature by the Member States of the United Nations until January 2008.²⁰⁵ Until today's date 15 countries have signed the Convention: Central African Republic, China, Colombia, Iran, Lebanon, Madagascar, Montenegro, Panama, Paraguay, the Philippines, Senegal, Sierra Leone, Singapore, Sri Lanka and The Russian Federation.²⁰⁶ No instruments of ratification have been deposited and thus far, it is not clear when the UNECIC will entry into force.²⁰⁷

¹⁹⁹ Article 1(1) UNECIC.

²⁰⁰ Article 2(1)(a) UNECIC.

²⁰¹ Luddy Jr W J & Schroth P W, *The New UNCITRAL E-Commerce Convention in the Mosaic of Developing Global Legal Infrastructure*, Academy of Legal Studies in Business, 8-12 August 2006, <http://www.alsb.org/proceedings/copyright/UNCITRAL_William_Luddy_Peter_Schroth.pdf>, p 2.

²⁰² Connolly C & Ravindra P, *First UN Convention on E-Commerce Finalised*, Computer Law & Science Report, February 2006, <http://www.galexia.com/public/research/articles/research_articles-art39.html>.

²⁰³ Ibid.

²⁰⁴ Article 19 UNECIC.

²⁰⁵ According to UN Treaty practice, the signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.

²⁰⁶ UNCITRAL, *Colombia and Montenegro sign the United Nations Convention on the Use of Electronic Communications in International Contracts*, 27 September 2007, <<http://www.unis.unvienna.org/unis/pressrels/2007/unis1113.html>>.

²⁰⁷ See Article 23 UNECIC.

There is a debate between EU Member States and the European Commission about who should sign the UNEDIC. It allows regional organisations to sign and this has prevented individual countries to sign while the debate is ongoing.²⁰⁸

4.3.1 Invitation to treat

To clarify the issue on to what extent parties who are offering goods or services over the Internet are bound by such offers, the UNEDIC includes a rule on invitations to treat.²⁰⁹ On adoption, the general opinion of the Working Group was that the situation in an online environment should not be treated differently from a paper-based environment.²¹⁰ The final version of the UNEDIC stipulates that a company that advertises goods or services on the Internet should be considered as inviting those who accessed the website, to make offers.²¹¹

The draft provided a presumption whereby a party offering goods or services via a website using *interactive* applications that enables negotiation and immediate processing, should be regarded as making a binding offer, unless the opposite is clearly indicated.²¹² An argument in favour of the presumption was that it would enhance legal certainty. Parties acting upon offers made through such systems may assume that they are firm offers and at the time of placing an order, a binding contract is concluded.

An opposite view was that such presumption might be difficult to apply. Serious consequences may arise if a company holding a limited stock of the goods offered is forced to fulfil all purchase orders received from a potentially unlimited number of buyers.²¹³ However, the presumption was not included in the final version since it would not reflect the prevailing practice.²¹⁴ Further, it was argued due to the potentially unlimited reach of the Internet, caution should be taken in establishing the legal value for such offers. Instead, the final version includes a presumption that making an offer using such system is considered an invitation to make offers, unless it is clearly indicated that a contract is concluded upon acceptance of the proposal.²¹⁵

²⁰⁸ Article 17 UNEDIC.

²⁰⁹ Article 11 UNEDIC.

²¹⁰ UNCITRAL, *Report of the Working Group on Electronic Commerce on its thirty-ninth session*, 21 March 2002, <<http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0252726>>, para 77.

²¹¹ UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts*, 2005, <http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf>, para 199.

²¹² *Ibid* para 80.

²¹³ *Ibid* para 82. See also UNCITRAL, *Report of the Working Group on Electronic Commerce on Its forty-first session*, 19 May 2003, <<http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0384360>>, para 116.

²¹⁴ UNCITRAL, *Explanatory note by the UNCITRAL secretariat*, para 183.

²¹⁵ See Article 11 UNEDIC.

4.3.2 The time of online contract formation

Initially the draft of the UNECIC included a rule on the time of contract formation.²¹⁶ The draft Article 8 provided that a contract is concluded when the acceptance of an offer becomes effective, that is when the acceptance is received by the offeror. Evidently, the Article was intended to reflect the rules in the CISG, however with the modification that the verb reached was replaced with receive, to align with the provisions on the time of receipt.²¹⁷

On adoption, UNCITRAL took the view that there should not be an attempt to provide a rule on the time of online contract formation that may be inconsistent with domestic rules on contract formation. Moreover, the issue was deemed to be adequately dealt with by regulating the time of receipt and dispatch of electronic communication since the postal acceptance rule and the reception theory are generally used in business transactions.²¹⁸

During the drafting of the UNECIC it was also discussed whether to include provisions with regards to the legal regime of revocation or modification of an offer or acceptance.²¹⁹ Strong support was expressed in favour of that view and it was argued that generally, various domestic laws, offers little harmony on those issues and it would be desirable to set out uniform rules.²²⁰

The winning concept, throughout the UNECIC, was that similar rules should govern electronic contracts and other types of contracts to avoid the creation of a dual regime.²²¹ Businesses across the globe have also supported the view that similar rules should apply to contracting by traditional means as well as electronic means.²²² Thus, the UNECIC does not include any rules to specifically address those issues in an electronic environment.

4.3.3 The time of dispatch and receipt of electronic communication

The legal effect of dispatch and receipt of an acceptance was left to be determined by the law applicable to the contract.²²³ Notwithstanding, the rules will provide some certainty in online contracting. It should be noted that the rules governing the time of dispatch and receipt of electronic communications greatly departs from the provisions in its MLEC

²¹⁶ UNCITRAL, *Report of the Working Group on Electronic Commerce on its thirty-ninth session*, para 66.

²¹⁷ *Ibid* para 66 and para 67.

²¹⁸ UNCITRAL, *Explanatory note by the UNCITRAL secretariat*, para 174.

²¹⁹ UNCITRAL, *Report of the Working Group on Electronic Commerce on its thirty-ninth session*, para 68.

²²⁰ *Ibid*.

²²¹ UNCITRAL, *Explanatory note by the UNCITRAL secretariat*, para 175.

²²² See the Appendix of the Ad Hoc ICC Expert Group, *Report on draft UNCITRAL convention on electronic contracting*, 5 December 2001.

²²³ UNCITRAL, *Explanatory note by the UNCITRAL secretariat*, para 176.

predecessor, thus creates new legal rules for online contracting.²²⁴ The wording is different compared to the same provision of the MLEC, but it is not intended to produce a different practical result.²²⁵

The definition of electronic communication includes an offer and an acceptance made by data messages in order to form a contract.²²⁶ The rules on time of dispatch and receipt of electronic communications in the UNECIC are intended to supplement national rules on dispatch and receipt by transposing them to an electronic environment.²²⁷ However, the parties are free to agree otherwise and the applicable law to the contract may or may not lead to the application of the rules.²²⁸

According to the rules, the time of dispatch of an online offer or acceptance is when it leaves an information system under the control of the originator.²²⁹ The MLEC provides that the time of dispatch is when the electronic communication enters an information system outside the control of the originator. The reason for the change is that it is easier to find evidence of the time a communication leaves an information system under the control of the sender than when it is delivered to the designated information system or to intermediary transmission systems.²³⁰

In addition, the UNECIC differs from the MLEC by covering the situation when parties exchange offer and acceptance thorough the same information system or network.²³¹ Under those circumstances the time of dispatch and receipt coincide, which would apply when a contract is concluded via a website. Thus, the inclusion of this provision may indicate that communication via a website is instantaneous.²³²

Furthermore, the time of receipt of an online offer or acceptance is the time when it becomes capable of being retrieved by the addressee, at an electronic address that has been designated by the addressee.²³³ The terminology used differs from that used in the MLEC and focuses on retrieval at an electronic address. An electronic address could be an e-mail address, IP address or some other location where a computer can access information or receive e-mail. This terminology aligns more closely with traditional notions of a physical address and is more technology neutral.²³⁴ An e-mail is for

²²⁴ Connolly C & Ravindra P, 2006.

²²⁵ UNCITRAL, *Explanatory note by the UNCITRAL secretariat*, para 15.

²²⁶ Article 4 UNECIC.

²²⁷ UNCITRAL, *Explanatory note by the UNCITRAL secretariat*, para 15.

²²⁸ Article 3 UNECIC.

²²⁹ Article 10(1) UNECIC.

²³⁰ UNCITRAL, *Explanatory note by the UNCITRAL secretariat*, para 177.

²³¹ *Ibid* para 178.

²³² The Ad Hoc ICC Expert Group, *Report on draft UNCITRAL convention on electronic contracting*, 2001.

²³³ Article 10(2) UNECIC.

²³⁴ Connolly C & Ravindra P, 2006.

example capable of being retrieved when it has reached an electronic inbox.²³⁵

Further, the rule takes into account the need of an objective rule since it was noted that the time of receipt should not be determined subjectively.²³⁶ However, when a communication is sent to an address other than the designated address, an additional requirement of the addressee to become aware of the communication applies in addition to the requirement that it has to be capable of being retrieved.²³⁷

Rather than being a firm rule, the provision on the time of receipt is more of a set of presumptions and the retrieval is presumed to occur when the communication reaches the electronic address.²³⁸ Whether the communication is indeed capable of being retrieved or is hindered by spam filter or other security tools that may restrict receipt of the communication is left outside the scope of the UNECIC. In event of a dispute a party might overcome the presumption by demonstrating that the communication was not capable of being retrieved.²³⁹

4.4 The relationship between the CISG and the UNECIC

The UNECIC aims to provide an overarching solution for where its provisions will apply, and take precedents over the provisions of any other Convention.²⁴⁰ The UNECIC is not supposed to reproduce or duplicate the entire regime of the CISG.²⁴¹ Nevertheless, it is hard to conclude upon the actual relationship between the two Conventions.

The UNECIC expressly refers to six Conventions in particular, where it is applicable, including the CISG.²⁴² This may indicate that the UNECIC is aimed at supplementing the CISG as far as necessary. The UNECIC does not state which of its provisions that might be relevant in respect of the exchange of electronic communications, to which other Conventions, such as the CISG also apply.²⁴³ It is left to be decided by the institution applying the UNECIC.

²³⁵ UNCITRAL, *Explanatory note by the UNCITRAL secretariat*, para 183.

²³⁶ UNCITRAL, *Draft Convention on the use of electronic communications in international contracts: Note by the Secretariat - Addendum: Background Information*, 17 November 2004, <<http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0459325>>, p 14.

²³⁷ Article 10(2) UNECIC.

²³⁸ UNCITRAL, *Explanatory note by the UNCITRAL secretariat*, para 16.

²³⁹ Luddy Jr W J & Schroth P W, 2006, p 4.

²⁴⁰ UNCITRAL, *Explanatory note by the UNCITRAL secretariat*, para 288.

²⁴¹ UNCITRAL, Note by the Secretariat, *Legal aspects of electronic commerce- Electronic contracting: provisions for a draft convention*, Working Group IV (Electronic Commerce), Thirty-ninth session, New York, 11-15 May 2002, <<http://daccessdds.un.org/doc/UNDOC/LTD/V01/872/66/PDF/V0187266.pdf?OpenElement>>, para 49.

²⁴² Article 20(1) UNECIC.

²⁴³ UNCITRAL, *Explanatory note by the UNCITRAL secretariat*, para 291.

Before the UNECIC was adopted, the desire of a clarification of the interaction between such Convention on electronic contracting, and the CISG, was expressed.²⁴⁴ The CISG-AC opinion provides guidance on the applicability of the CISG to electronic contracting, and concludes that issues in international electronic contracting may be sufficiently covered by the CISG. Such interpretation may, however, only be valid until the UNECIC enters into force and supplements the CISG.²⁴⁵

²⁴⁴ See Ad Hoc ICC Expert Gropp, 2001.

²⁴⁵ Hahnkamper W, *Acceptance of an Offer In Light Of Electronic Communications*, Journal of Law and Commerce, Vol. 25:147, 28 April 2006, <<http://www.uncitral.org/pdf/english/CISG25/Hahnkamper.pdf>>, p 148.

5 Conclusive Analysis

5.1 To regulate or not to regulate online contracting

In my view, one of the first issues to consider is whether online contracting requires special regulation or not. The common view is that the law governing online contracting should not differ too much from the law governing traditional contracting. The trend, and also the approach taken by several nations around the world, is that it is important to put in place a regulatory framework that enables electronic contracting.

When drafting the UNEDIC, there was a constant battle between the desire to ensure legal certainty by providing detailed rules applicable to online contracting and the mere creation of a legal framework to facilitate and enable e-commerce. This is clearly evident in the reasoning around the article on invitation to make offers. The final version of the UNEDIC shows that the winning concept was the mere providing of a legal framework.

The view of the writer is, to enhance legal certainty in online contracting there are issues that should be regulated further. One such issue being the time of online contract formation. However, in doing so, it is important to balance the interest of legal certainty, the desire of technology neutral laws and the risk of excess regulation. Additionally, one should keep in mind that under the *principle of freedom of contract* and the *principle of party autonomy*, parties in B2B e-commerce are free to agree on the terms and conditions of their contract, regardless of any laws.

Both Australia and Sweden have chosen a light-touch approach in regulating electronic contracting. Strong reliance lies on traditional contract law, rules and principles. This approach may be sufficient when regulating electronic contracting domestically. One of my major concerns is, however, that due to the international and borderless nature of the Internet, it can be very clumsy to rely on traditional contract laws, which may differ between jurisdictions.

5.2 The time of online contract formation under Australian and Swedish law

As shown in this thesis, generally, the time of online contract formation is when the acceptance becomes binding and effective. This point in time may vary depending on what rules that are governing the contract.

The major difference in determining the time of online contract formation under Australian and Swedish law stems from the application of the

principle of promise and the *principle of contract*. In Australia, the *principle of contract*, has forced the appearance of the postal acceptance rule, under which a contract is formed when an acceptance is dispatched. In Sweden, there is no such rule, and an acceptance must have reached the offeror to become effective.

The Australian ETA does not provide a rule on the time of online contract formation. Nevertheless, the provisions on the time of dispatch and receipt of electronic communications provide certainty when applying traditional legal rules and principles, to online contracting. As oppose to the Australian ETA, the Swedish *E-commerce Act* does not contain any legal provisions on the time of dispatch and receipt of electronic communications. In my view the level of legal certainty when determining the time of online contract formation is therefore lower under Swedish law, than under Australian law. Having said that, I also recognise that since it is not established whether the postal acceptance rule or the general rule applies to online contract formation, uncertainty also exists under Australian law.

5.3 The possible impact of the UNECIC

The purpose of UNCITRAL's MLEC was to provide guidance when countries developed their national electronic transactions law. Subsequent to the release of the MLEC, more complex issues have arisen, often due to divergence in national legislation. The UNECIC is on the other hand applicable directly on international contracts.

I support the view that when entering into force, the UNECIC is likely to mediate between contradictory electronic contracting laws and establish an international framework. Technically the UNECIC only applies to cross-border transactions. However, many of the rules in the Convention are equally applicable to domestic transactions. It is therefore recommended that nations apply the rules also to domestic online contracting. It would be arguably more efficient for businesses if the same rules apply, both for their domestic and international transactions.

The UNECIC may provide increased legal certainty when determining the time of online contract formation. However, even with the inclusion of provisions on the time of disptch and receipt of electronic communications, the exact time of online contract formation remains unregulated.

Applying the rule on contract formation in the CISG in combination with the rules on the time of dispatch and receipt of electronic communication in the UNECIC, may at the moment be as close as we get to a uniform international rule on the time of online contract formation. However, this will only be the case when the law applicable to the contract leads to the application of the CISG.

The rules of the Australian ETA are based on the MLEC and differ slightly from the rules in the UNECIC, but the UNECIC rules are not intended to

provide a different result. If the ETA was to be amended to align with the provisions in the UNECIC, one benefit would be the inclusion of a provision regulating whether a website constitutes an invitation to treat.

The debate between EU Member States and the European Commission about who should sign the UNECIC has prevented individual countries to sign while the debate is ongoing. Interestingly, Montenegro recently signed the Convention, despite being in the process of becoming a EU Member State. Regardless of whether Sweden would sign the UNECIC as an individual country or if EU would sign as a regional organisation, Sweden would benefit from strengthened legal certainty. The provisions of the UNECIC would provide a regulatory framework that, in my view, Sweden lacks, for international as well as domestic online contracting.

Overall, I think what makes it particularly hard to conclude on the possible impact of the UNECIC, is that parties in B2B contracting always have the freedom to choose what rules should apply to their contract.

5.4 A uniform rule on the time of online contract formation

I argue that there is a need for an international uniform rule on the time of online contract formation that applies to international as well as domestic contracting. Ultimately, such rule should be supplemented with rules on the effectiveness of an online offer.

The main reason to adopt a uniform rule is the requirement of legal certainty stemming from the nature of the Internet as a global web of linked networks and computers. Some certainty is provided by adopting rules on the time of dispatch and receipt of electronic communication. However, different legal systems will still apply different rules to determine the effectiveness of an offer and acceptance. A party situated in one country may be unaware of the fact that the law of another country is applicable to the formation of the contract. The parties may decide the applicable law to their contract, but when no choice is made it would be beneficial if the same rule apply under every legal system. Further, one may argue that businesses would save a lot of time, money and effort, when not being forced to investigate legal systems worldwide.

I do however realise that in practice it may be problematic to bring about the idea of uniform rule on the time of online contract formation. One problem is that it would be extremely hard to agree on such rule on an international level. For example, throughout the drafting of the UNECIC it was constantly pointed out that the Convention should focus on specific issues in electronic contracting and the provisions of the CISG should not be repeated. It was argued that including a rule on the time of contract formation in the UNECIC would make the Convention less attractive for countries to sign. Other examples are the fact that the Nordic countries have

opted out of the CISG's provisions on contract formation and that the EU was struggling when adopting harmonised rules on electronic contracting.

Another issue to consider is the strong desire of technology neutral laws. Along with new technological developments rules that solely regulate online contracts will perhaps become dated within the next decade.

The interests of national sovereignty and the desire of technology neutral laws generally have a great impact. Therefore I am forced to conclude that even though a uniform rule on the time of online contract formation is desirable, in practice, it may not be a feasible achievement to adopt such rule. Having said that, in my view, a requirement of such rule still exists.

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