

Implicitly of Electronic Contract Formation: With Reference to Email and Website

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DISSERTATION.COM



Boca Raton

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Dissertation.com
Boca Raton, Florida
USA • 2011

ISBN-10: 1-61233-778-3
ISBN-13: 978-1-61233-778-4

IMPLICITY OF ELECTRONIC CONTRACT FORMATION: WITH REFERENCE TO EMAIL AND WEBSITE

ABSTRACT

This research is conducted with an intention to have an overview of the contracts made online, what possible difficulties can arise within such commercial transactions and to assist readers upon the legal ambience which environs it.

1. INTRODUCTION

*“A long time ago, maybe last Thursday ...”*¹

Communication plays an important role in a society and it is seen that with development in communication the society changes. From the industrial revolution which led its way to the development of postal system to the information age which introduced the internet. This further led to the development of electronic communication and thus the era we are in today is full of electronic communication and commercial contracts are immensely being conducted through emails, websites; all modes of electronic communication. Therefore with this article I intend exploring the legal issues which arise while forming a contract online and also to look into depth as to whether the traditional approach of communication in written contracts is of any relevance to the electronic era. Moreover I also intend convincing the readers on the

¹ [A.A. Milne] available at: McGrath, P and Kevan, T. (2001) *E – Mail, the Internet and the Law*. 1st edn. Hertfordshire: EMIS Professional Publishing, p. 3.

fact that the postal rule which set a landmark in written contracts should not be applied to contracts made through email.

It is seen that the internet provides mainly four new methods of forming electronic contracts, *i.e.* contracts made through emails, websites, electronic data interchange (EDI) and chat rooms. Web based (websites) contracts and email are the basic methods which are being opted by the consumer as well as the businesses mostly today. According to the web based method, businesses can have their own websites which act more like online shops, and the consumer can visit the site and choose a product from the range being offered. Then they can either purchase the product or leave the website as in the real world they leave a shop however for purchasing the product the consumer is taken through a different process whereby he/she is required to fill a form on the website which requires the payment details (generally customer credit card). These are then verified by the seller and so the product is dispatched to the consumer, and prime example of such a business would be *Amazon.com*.²

Due to the rapid increase of the usage of electronic mode of communication, the old law on contract gave rise to an uncertainty of the validity of any contract made online, since the old law was concerned with the traditional means of communication consisting of telex, fax or face to face correspondence between parties creating the contract. This resulted in the development of E-commerce Law and in 1996 the United Nations Commission on International Trade (UNCITRAL) drafting the *Model law on E-commerce*. Moreover the European Union drafting the *Electronic Commerce*

² Pitiyasak, S. (2003) 'Computer and Telecommunication Law Review', *Electronic contracts: contract law of Thailand, England and UNCITRAL compared*, 9(1), pp. 16 – 30.

Directive 2000/31/EC and the *Electronic Commerce (EC Directive) Regulations 2002* to create certainty in contracts made online. However it is seen that the general law of contract requiring offer and acceptance still remains the principle rule in contracts created online as well.

2. **CONTRACT CREATION**

A contract can be created in numerous ways varying from either being created orally, electronically, or in writing. This is evidenced by section 4 of the *Sale of Goods Act 1979* which states that a contract of sale:

“... may be made in writing (either with or without seal), or by word or mouth, or partly in writing and partly by word of mouth, or maybe implied from the conduct of the parties.”³

Today the world is seen to be inclined towards forming contracts more electronically than adopting any other way of making contracts. When we say contracting electronically, this refers to contracts made through the modern mode of communication such as emails and websites. However does the general law of contract applies to the modern era of contracting and doing business, a question which we need to determine first. Under the *English law* for there to be a valid contract the existence of the following elements is very essential:

- *Two or more parties to the contract,*
- *The parties must enter into an agreement: which includes an offer⁴ followed by an unequivocal acceptance,⁵*
- *The parties to the contract must have intention to create legal obligations,⁶ and*
- *Consideration must be present.⁷*

Therefore a contract made online under *English law* would require the same elements to be present in it as mentioned above. However if we compare the *English law* with *Thai contract law*, then for constituting a valid contract under *Thai law* presence of only three major elements is required, *i.e.* an offer, an acceptance and the intention to be legally bound, excluding the concept of consideration.

³ Bainbridge, D. (2004) *Introduction to Computer Law*. 5th edn. Essex: Pearson Education Limited, p. 304.

⁴ *Storer v Manchester City Council*, [1974] 1 WLR 1403, (CA).

⁵ *University of Edinburgh v Onifade*, [2005] SLT (Sh Ct) 63 at (6).

⁶ *Balfour v Balfour*, [1919] 2 KB 571, (CA).

⁷ *Currie v Misa*, [1875] LR 10 EX 153.