# ELECTRONIC CONTRACTING, NEW WINE IN OLD BOTTLES

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*The rise of the Internet as a commercial tool has created a level of uncertainty surrounding the law of offer and acceptance. This paper discusses the implications associated with online contractual dealings and the issues that have created these uncertainties.*

**3975 Words**

# Index

## An introduction to contractual formation

Technological developments and the advent of the Internet have led to new paradigms in international as well as local commercial activity. These changes have reduced the certainty of contractual negotiations leaving a commonly held belief that the law of offer and acceptance does not readily apply to such transactions when conducted online[1].

Dealings and transactions that formulate or initiate contractual negotiations are not restricted to the written word. The law of offer and acceptance applies to new technology in the same way that applied to technological advances of the past. This paper explores the issues that have created uncertainty around contractual dealings. To do this, it is necessary both to look into the origins of contractual law and to investigate cases that will apply too and formulate the conditions necessary to create contractual certainty in commerce.

The increased use of international commercial transactions using the Internet is another concern. In the past, international commercial transactions were generally restricted to negotiations between commercial entities. The Internet has increased the scope of business to consumer dealings, and even consumer-to-consumer transactions across jurisdictional borders[2]. For this reason, the formation of contract using the Internet creates segregation into two initial categories. These categories include both those negotiations that occur strictly within a single jurisdiction, and next, those negotiations that involve multiple legal jurisdictions.

Another concern focuses on the relationship of parties. Many Web based transaction engines act as third parties during the process of offer and acceptance. This interaction can complicate the formation of contract. Because of this, it is necessary to determine the legal standing of the third party[3]. The third party could be a party to the contract, an agent or one of the two contracting parties, or may just be

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[1] Rasch, 2006

[2] Department of Communications, Republic of South Africa "Discussion Paper on Electronic Commerce Policy" (1999)

[3] **Debenhams Retail Plc v Customs and Excise Commissioners** [2004] EWHC 1540

an ancillary facilitator or medium, across which, and through whom the contractual bargaining occurs[4].

Lord Steyn[5] reminds us ". . . it is wise for practitioners to bear in mind that the higher you go in the legal system the more important it is to concentrate on the footholds of the secure theoretical foundations."

Without legislation detailing the legal position of electronic contracts, the process of offer, acceptance and the terms of a contract created using the Internet will establish itself by means of the general law of contract. This will happen for the most part in the same manner as for the negotiation of terms of a contract in the physical world[6]. Thus, establishing offer, acceptance and the terms of a contract remains the same whether the form is in writing, orally, or implied though the conduct of the parties in the same manner as existed prior to the rise of ecommerce over the Internet.

## Issues with electronic contracting

The Internet is fundamentally a means of communication. Issues with law that have arisen because of the Internet are thus a result of the differences between communication in the physical world and communication using the Internet. Contractual negotiations are the result of a series of communications that create a legally binding agreement. For this reason, there is little difference between contracts made online than those formed through face-to-face communication. The facts surrounding the form of the communication are the primary difficulty.

At the most fundamental level, the existence of an offer and an acceptance is one of the primary requirements for the creation of a contract. The set of laws used to determine whether there has been a valid offer and an acceptance created across the Internet or a mere invitation to treat have their lineage in the case law concerning postal and telex communications.

It is important to remember is that the Internet is not a single communications channel. The Internet is a collection of separate protocols used to communicate over the same physical connection. The result of this collection of protocols is that

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[4] McKendrick [1], 2005 (pp163-164)

[5] Butterworths; The Law of Contract, 1999, Forward

[6] Lee, 2002 (pp 62-100)

different legal issues will apply to the individual communication protocols. Protocols such as e-mail correspond to the process of sending a letter by post. A result of this is that we can match the physical world laws to the corresponding situations created by each of the individual Internet protocols. In this manner, we may see that the World Wide Web could be analogous to a mail order catalogue based purchasing system. The same principles govern the process of contractual creation whether or not the process is faster.

As an offeror may stipulate the method of acceptance[7], it would be wise for parties to agree to the form of acceptance prior to the conclusion of the contractual negotiations.

A further important issue that surrounds Internet contracting is the general rule of law that, for an acceptance of an offer, it must be "communicated" to the offeror[8]. Under normal circumstances, the offeror must actually receive the acceptance before a contract will come into existence.

## *E-mail*

There are a number of contractual issues associated with e-mail. There are for example, numerous debates over the applicability of the postal rule. When sending an e-mail, there are several potential moments at of acceptance. These are:

1. The first moment occurs when the e-mail departs the sender's outbox controlled by the sender. In Internet-based e-mail transactions, the e-mail cannot be recall once it has left the sender's outbox. This is a situation analogous to the postal rule.
2. The next is the instant of recept of the e-mail into the recipient's inbox. At this point, the e-mail is accessible to the recipient.
3. The next possible instant that could potentially be the moment of acceptance is when the recipient collects the e-mail from the mail server into the mail client's inbox. At this point, the recipient has received the e-mail.

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[7] **Eliason v Henshaw (1819) & Manchester Diocesan Council for Education v Commercial and General Investments** (1970).

[8] McKendrick [1], 2005; p43 - 44

4. Finally, there is an argument for defining the moment of acceptance as the point when the recipient has opened or read the e-mail.

The additional inclusion of features such as e-mail recall (in products such as Microsoft Outlook), read receipts and send receipts (in most e-mail servers and client) further obfuscate the moment that could be considered the time when acceptance was made.

E-mail is the digital equivalent of a letter sent through the post. All normal functions of postal mail transpire through e-mail. This includes not only the ability to send advertisements or invitations to treat[9], but also equally offers and acceptances.

It must be remembered that the "*question of whether the mailbox rule applies to e-mail is one that the courts have not yet answered. Its applicability seems to depend on whether e-mail is deemed to be more like instantaneous communication than like traditional mail services. Unlike real time chat e-mail, however, it is probably not instantaneous in the sense of this rule*."[10]

E-mail, maybe fast, but it is not instantaneous. Failed delivery, rerouting, damage in delivery or simply delayed all arise with E-mail. For this reason, e-mail, may be argued to most closely mirror a postal letter delivery.

## The postal acceptance rule[11]

The postal acceptance rule states that where an acceptance is to be sent by post, the contract associated with that acceptance is considered as concluded at the moment of posting the letter, not when the letter is received (or in fact if the letter is received). If the offeror does not wish to conclude, the contract through acceptance via the post, s/he may stipulate the form of acceptance.

Lim (2004) points out that there have been at least "twelve theories or explanations offered for the postal acceptance rule". He further notes that two of these theories apply particularly well to Internet-based contractual transactions. The first theory hypothesises that the postal acceptance rule is applicable to Internet

[9] ***Partridge v Crittenden*** [1968] 2 All E R 421

[10] Cavazos & Morin, 1994

[11] The postal acceptance rule dates back to **Adams v. Lindsell**, 1 Barnewall and Alderson 681, In the King's Bench (1818); See also **Household Fire Insurance Co v Grant** [1879] 4 Ex D 216

transactions as the communication proceeds through a third party. Next, an argument exists for the theory that the postal acceptance rule applies to e-mail, as it is a non-instantaneous means of communicating.

Contractual acceptance through e-mail remains unsettled by judicial review or decision. As such, there is still a high degree of uncertainty surrounding the issues of offer and acceptance related to the formation of contracts through e-mail based communication. In the US, this issue has been determined through statutory intervention (Uniform Electronic Transactions Act, 1999; USA). In the UK, the issue remains unclear.

In cases concerning international transactions, the *Sale of Goods (United Nations Convention) Act 1994*[12] may be applied. This act overrides the concept of "postal acceptance" is and as an alternative presents the approach that acceptance "*will become effective at the moment the indication of consent reaches the offeror*". In practice, the acceptance transpires at the instant that the communication arrives at the offeror's computer. While no decided cases on this point are available as guidance, the courts have traditionally been disinclined to extend the application of the postal acceptance rule.

Although telex, faxes and e-mail are separate technologies, they share many features. In both **Entores v. Miles Far East Corp**[13] and **Brinkibon Ltd v Stahag Stahl** (1983), the courts declined to extend the application of the postal acceptance rules.

Lord Wilberforce[14] stated at 42, "*where the condition of simultaneity is met, and where it appears to be within the mutual intention of the parties that contractual exchanges should take place in this way, I think it a sound rule, but not necessarily a universal rule*". The issue of "read receipts" for e-mail could be an important factor in a future decision. Lord Fraser of Tullybelton (at 43) differs somewhat in his judgement from Lord Wilberforce, stating that:

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[12] The UN Convention on Contracts for the International Sale of Goods (United Nations Convention) Act 1994

[13] **Entores v Miles Far East Corp** [1955] 2 QB 327

[14] In **Brinkibon Ltd v Stahag Stahl** (1983) 2 AC 34 (House of Lords, UK)

*"A party (the acceptor) who tries to send a message by telex can generally tell if his message has not been received on the other party's (the offeror's) machine, whereas the offeror, of course, will not know if an unsuccessful attempt has been made to send an acceptance to him. It is therefore convenient that the acceptor, being in the better position, should have the responsibility of ensuring that his message is received."*

From the above cases, we can see that technological differences such as the inclusion of read and sent receipts. Further, the arguable position of e-mail as to whether it is or is not "instantaneous" has created a level of uncertainty in contracting as "*the question of the applicability of the postal acceptance rule to e-mail acceptances has not been judicially settled*."[15]

The postal acceptance rule as a generally consideration does not to apply to Web-based communications. This is because most Web-based systems employee mechanisms such as check-sums to maintain constant communication between the client and server systems. The constant verification this communication channel provides for the implication that communications take place though an immediate send process. Thus, both parties receive communications instantaneously.

## *World Wide Web*

"Click-wrap" or "click-through" contracts are the most commonly formed Web-based contract[16]. These contracts may start with a Web-based advertisement (in invitation to treat) or some other collateral offer for consideration. These Web-based orders are generally included when the customer "clicks" and acceptance button (such as one labelled; "accept", "submit", "proceed to check out" or some other similar phrase).

This form of contractual negotiations is different from e-mail and deserves separate consideration. "Click-wrap" Internet contracts[17] have their own issues, but they still mirror many of the technologies that have preceded them.

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[15] Lim (2002), p66

[16] Dunn (2001); Durtschi et al (2002)

[17] Reed, 2004

As the response to the offer or acceptance immediately displays on the customers Web browser, web based communications fulfil the requirements of an instantaneous transaction. There are some possible avenues of dispute with this analogy. For instance, what happens when a customer accept to finalise the transaction, but their Internet link drops before they receive the reply? To answer this question we need to look to the case of **Entores Ltd v Miles Far East Corporation**[18].

Lord Denning at 333[19] states the position of the law with regards to contracts conducted via telex: *It is not until his message is received that the contract is complete…"*

From Lord Denning's analogy, we may see that a *"contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received."*[20] Thus, the contracting party's are under an equitable obligation to notify each other of any failure. In cases where communications have failed and one of the parties is left believing that the contract was successfully negotiated, the other party would be estopped from denying the contract if they had not taken reasonable steps to notify the other party of the failure.

In cases of where both of the contracting parties normally reside and contract within the European Union, additional statutory requirements apply. The electronic

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[18] **Entores Ltd v Miles Far East Corporation** [1955] 2 QB 327 (Court of Appeal, United Kingdom)

[19] **Entores Ltd v Miles Far East Corporation**; Lord Denning at 333 "*Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of a sentence acceptance, the teleprinter motor will stop. There is obviously no contract. The clerk at Manchester must get through again and send his complete sentence. But it may happen that the wine is not go dead, yet the message does not get through to London. Thus, the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the ink at the London end fails, or something of that kind. In that case, the Manchester clerk will not know of the failure but the London clerk will know of it and will immediately send back a message 'not receiving'. Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until his message is received that the contract is complete…"*

[20] **Entores Ltd v Miles Far East Corporation** [1955] 2 QB 327 at 334

commerce regulations[21] as introduced by Parliament in the UK in 2002 override the postal rule in some instances and may require a separate acknowledgement through means such as e-mail for Web-based transactions. *Paragraph 11*, for instance states: "*the order and the acknowledgement of receipt will be deemed to be received when the parties to whom they are addressed are able to access them*".

Although this directive does not change in the position of contracts negotiated solely by e-mail[22], it does set the boundaries required for Web-based transactions.

## Invitation to treat, offers and acceptance

A display of goods is as a rule an invitation to treat[23]. Further, there is a supporting rationale behind treating the display as an invitation to treat rather than as an offer[24]. However, where a machine makes the display, the display is likely to construe an offer[25].

This poses the difficult question of how to treat a Website. An advertisement is an invitation to treat and many web sites do little more than act as electronic billboards. At the other extreme there are organisations who deal online completely for all phases of the commercial process. These organisations may have no facilities to accept orders other than through the web site and use electronic agents to conduct negotiations.

It is thus important to note that the facts of the individual case will have a large part to play in solving contractual issues involving the web. Partridge v Crittenden[26] and Fisher v Bell[27] demonstrate that not all advertisements satisfy the requirements to be an offer, but rather may just be an invitation to treat.

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[21] Statutory Instrument 2002 No. 2013; ELECTRONIC COMMUNICATIONS, The Electronic Commerce (EC Directive) Regulations 2002

[22] Ibid, Para 9 (4) "*The requirements of paragraphs (1) and (2) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications*."

[23] **Pharmaceutical Society of Great Britain v. Boots Cash Chemists** (Southern) Ltd. [1953] 2 QB 795

[24] **Fisher v Bell** [1961] 1 QB 394

[25] **Thornton v Shoe Lane Parking** [1971] 1 All ER 686

[26] **Partridge v Crittenden** [1968] 2 All ER 421

Carlill v Carbolic Smoke Ball Company[28] conversely supported the decision that an advertisement was a unilateral offer where certain provisions applied. It is easy to see that the form of the contract will give rise to different results. It is not always clear if the "purchaser" is also the party making the offer, or the acceptance[29].

From the above cases, we can see where much of the perceived inconsistency lies. The difficulty in determining the legal status of a web site is thus not the issue with the law, but with determining where the facts best match prior case law. It is not possible to group all web sites in the same proverbial basket. What needs to be decided initially is the actual status of the web site in legal terms. This, and thus the difficulty, is a matter of fact not law.

In an attempt to deal with the complexities that have appeared from the development of online consumer transactions, the ECC e-commerce law requires the supplier to issue a receipt for the order.[30] This receipt is generally issued by e-mail.

In a recent case, Argos[31] defended claims of a breach of contract based on the terms and conditions set on their web site. Argos states that the e-mail is not an order confirmation or order acceptance. In this way, the company has to acknowledge the offer. Argos asserts that they only issue an invitation to treat. Thus, the customer makes the offer to the site.

Amazon.com[32] provides an example of this practice. Amazon has a page defining the terms and conditions associated with the site. Terms designed to protect the seller from entering into a unilateral offer consisting of an agreement that it did not intend to make link to the site for general download. This feature helps ensure that

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[27] **Fisher v Bell** [1961] 1 QB 394.

[28] **Carlill v Carbolic Smoke Ball Company** [1893] 1 QB 256

[29] **Daulia v Four Millbank Nominees Ltd** [1978] 2 All E R 557

[30] See Article 52 of the e-commerce law - the Electronic Commerce (EC Directive) Regulations 2002; commonly called the Electronic Commerce Regulations

[31] Neumann, 2002 [*Argos Ltd, an online retailer based in the UK, received GBP 1 million worth of orders when it mis-priced Sony Nicam televisions in its online catalogue appearing to offer them for GBP 3 instead of the normal retail price of GBP 299*]

[32] http://www.amazon.co.uk/exec/obidos/tg/browse/-/1040616/026-9370677-1792435

both parties understand the point at which the close of negotiations occurs and forms a binding contract.

A number of offer and acceptance issues that had not been completely resolved remain. In particular, the issue of online software downloads creates its own problems. For instance, does downloading the software constitute acceptance, installing the software, etc? Many software vendor licenses for instance state that the "loading of the software onto a computer indicates your acceptance of the following terms...[33]" The terms of the agreement are likely to be enforceable if the software company is able to demonstrate that the user had an opportunity to view the terms prior to installing the software.

The US case of Williams v America Online Inc[34] demonstrates the difficulties that that may occur. In this case, Mr Williams started proceedings in Massachusetts stemming from a class action over the installation of AOL software. AOL asserted that the proceedings must commence in Virginia as the terms state Virginia was the exclusive jurisdiction or any claim. Mr Williams however argued that alterations to his computer came about before he agreed to the conditions. Mr Williams described the complicated process by which he had to "agree" to the conditions after the configuration of his computer had already occurred.

Further, Mr Williams demonstrated he was able to click, "I agree" without seeing the terms of service. This meant that the actual language of AOL's terms of service failed to display on the computer screen unless the customer specifically requested it, overriding the default settings.

The court rejected AOL's assertions and stated that:

*"the fact the plaintiff may have agreed to an earlier terms of service for the fact that every AOL member enters into a form of terms of service agreement does not persuade me that plaintiff's ... have notice of the forum selection cause in the new terms of service before reconfiguration of their computers."*

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[33] E.g. Microsoft Office XP Installation license terms. (http://www.microsoft.com/terms)

[34] **MARK WILLIAMS and another(1) vs. AMERICA ONLINE**, INC. 2001 WL 135825 (Mass. Super., February 8, 2001)

Any terms of the contract not brought to the attention of the contracting parties[35] prior to the acceptance of the contract will be unenforceable. Thus, assurances or terms displayed after the completion of the contract (i.e. after clicking the “accept” button) will not be enforceable. These terms to be enforceable they would either need to be agreed prior to acceptance or the submitting party to the contract would need to give fresh consideration.

## Electronic agency issues

The inclusion of electronic agents makes the traditional requirement for a "meeting of minds" more difficult to prove. With many smaller vendors, hosting and creating their own e-commerce enabled web site requires the interaction of a third party. Often, this involves the use of an external service provider, which offloads the Internet shopping trolley function. In this way, smaller vendors can create an e-commerce enabled site quickly and simply.

The issue, which arises in this instance, is in determining the contracting parties. Many small vendors provide little more than billboards style advertising through their web site. The complex task of maintaining the databases, transaction processing, and the shopping cart function becomes simplified when outsourced to another provider. In some instances, a redirection takes the customer to a completely new site or domain.

In such cases, it may be necessary to investigate whether a contractual arrangement has resulted between the client browsing a web site and the transaction agent or if indeed the transaction facilitator is a contractual agent for the Web store vendor[36]. Agency has become a specialised area of contract law in itself. As such it will not be covered in any depth in this paper, though it is an area that does require due consideration and may influence the process of offer and acceptance.

## Acceptance in unilateral contracts

A unilateral contract (similar to the one implied by the justices in Carlill v Carbolic Smoke Ball Company[37]) will likely result from extravagant boasts and

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[35] **Roscorla v Thomas** (1842) 3 QB 234

[36] Lim, 2002

[37] **Carlill v Carbolic Smoke Ball Company** [1893] 1 QB 256

claims made on an organisation's website that involve some form of consideration. Where a company's web site makes claims about a product and the consumer acts upon those claims, the company may be bound to fulfil their promise.

## *Other issues in Contractual formation that impact offer and acceptance*

The impersonal nature of the Web creates a few issues that may affect the process of offer and acceptance and invalidate a contract rendering it a void. One such issue would involve the age of the contractor. As the Internet is effectively unbounded, the age of the person entering into an electronic contract may be an issue. All incidents, if the person is under 18, any contract is potentially unenforceable against that person. Further, jurisdictional requirements of age may vary.

The subject matter of a contract may render the acceptance invalid if the goods ordered breach regulations in a particular jurisdiction. Examples of this circumstance include both the nature of the goods or the age of the contracting parties.

## *Jurisdiction and communication of acceptance*

The appropriate law of a contract is the system of domestic law that defines the obligations assumed by the parties to the contract. International law does not thoroughly define the requirement needed in a contract. The status is clearest where the parties have explicitly chosen the law that will apply in the contract. The parties may expressly choose the body of law, which will apply to all or part of their contract including offer and acceptance.

The UK requires that the parties must expressly choose to include the Hague Uniform law (ULIS)[38] in the contract terms before it applies to the sale of goods. This can if included have an impact on the process of offer and acceptance. Where there is knowledge of the residence or place of business of the contracting parties who each exist in a different state, several results arise in the case of a web site operation (for instance). Either "*the contract concerns the sale of goods which are to be carried from one state to another or the acts constituting offer and acceptance have been effected in different states or the goods are to be delivered to a state other than that where the acts constituting offer and acceptance have been effected*"[39].

[38] Art.3, s.1 (3) Uniform Laws on International Sales Act 1967.

[39] Schu, 1997.

Complications may occur if parties reside in a different state from where they hold their e-mail[40] or other accounts[41]. In cases such as this, the location the e-mail is accessed becomes an issue and the time at which the acceptance is made are both critical points. The place where the user accesses their e-mail may affect the acceptance. In many jurisdictions, the time and place of receipt of a message derives from when it is available to the recipient[42]. In the case of e-mail, the time it is available to the recipient is when it arrives on the client's mail server. In this way, the timing and even validity of an offer and acceptance to a contract may come into dispute and may even come into effect in two or more places[43].

## Conclusion

To establish the formation of an electronic contract using the Internet, the general common law of contract and the doctrine of international law are legitimate. There is little fundamental difference in the process of offer and acceptance in the "real world" to the Internet. Whether conducted by writing, orally, or implied from the conduct of parties contractual negotiations are formed in a similar manner whether completed by telephone, face to face or over the Internet (using methods such as e-mail or the Web).

As with the introduction of all fundamentally new technologies, the Internet has created some level of uncertainty in contracting. However, an offer remains an expression of readiness to enter into a legally binding promise under agreed terms. An acceptance remains to be the willing act of accepting the offer with no further negotiations or dialogue.

True, the Internet has changed commerce, but the foundations of offer and acceptance in contract law remain firm, it is only the evidential requirements of fact that have changed.

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[40] **Hyde v Wrench** (1840) 3 Beav 334

[41] Treitel (2003) states that the communication of acceptance determines the time and place at which the contract is created. The general rule is that a contract is formed at the time and place that the acceptance is received, unless accepted by post, in which case the contract is formed at the time and place of postal of the acceptance.

[42] Art.1335 Italian Civil Code; US: Restatement 2d of Contracts, S 56; Germany: case RGZ 144, 292.

[43] **Apple Corps Limited v Apple Computer**, Inc. [2004] EWHC 768

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11. **Hyde v Wrench** (1840) 3 Beav 334
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16. **Roscorla v Thomas** (1842) 3 QB 234
17. **Thornton v Shoe Lane** Parking [1971] 1 All ER 686

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2. Directive 2000/31/EC on Electronic Commerce OJ 2000 L 178/1 and Council Directive 94/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees OJ I 171 7.7.99
3. Resolution adopted by the General Assembly [on the report of the Sixth Committee (A/51/628)] 51/162 Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law.
4. Germany: case RGZ 144, 292
5. Sale of Goods (United Nations Convention) Act 1994
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7. Uniform Electronic Transactions Act, 1999; USA
8. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), with additional article 5 bis as adopted (United Nations Model Law on Electronic Commerce (1996))
9. US: Restatement 2d of Contracts, S 56 & The United States Framework for Global Electronic Commerce