

Entering Into Contracts Electronically: The Real W.W.W

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INTRODUCTION¹

The formation of contracts feature in all areas of our lives. Every day we unconsciously enter into a variety of contracts: we travel by bus or rail, we purchase goods and accept services and we carry out duties regulated by contracts of employment. Contracts are so prevalent that the ordinary man or woman in the street does not realize the legal complexities of the transaction into which they are entering. As lawyers are aware, these transactions are not as legally simple as their everyday nature suggests. We require evidence of a *consensus in item*, or a meeting of the minds, achieved by a clear and unambiguous offer and an unqualified acceptance of that offer. We have developed special rules to allow us to determine what the exact terms of the contract are, when it was formed and where it is governed

The Internet is the world's fastest growing commercial market place. Estimates of its growth show unprecedented development. Recent figures from the Department of Trade and Industry put the current value of worldwide electronic commerce at US\$12bn *per annum* with an estimated value of US\$350-500bn by 2002.² Even the DTI's most conservative estimate suggests a growth in e-commerce of over 2,900 per cent in four years. At the heart of this development is the ability to contract electronically. The question how, when and where contracts are formed over the Internet is no longer academic, it is an important commercial consideration. We will find in a few years that we enter into contracts over the Internet as freely, and with as little thought, as we currently do in a bookshop or a café. As lawyers though we must ask the same questions of these new electronic contracts as we currently ask of traditional contracts: when are they formed, were are they governed and what are the terms of the contract? These three questions will be revisited throughout this chapter, as the WWW of When, Where and What will prove to be increasingly important for the development of e-commerce.

MAKING SENSE OF THE TECHNOLOGY³

The Internet is merely another. The law has, to date, dealt with the advent of the Royal Mail, the telephone, telex and fax machine. There is no reason to suppose the development of e-mail or the World Wide Web will affect in any way the application of the current principles of contract law. The Internet, though, does raise unique technological issues when examining contract formation. It is these technological issues which all too often cloud our analysis of the contract. Before going on, it is therefore necessary to take some time out to examine the practicalities of contract formation on the Internet and to explain some terminology which will be used throughout this chapter.

There are two main methods of electronic contracting, each with their own characteristics, and each requiring to be treated separately. Most people are familiar with the first; electronic mail, or e-mail. E-mail is the digital equivalent of a letter. You type it out, sometimes attach things to it, address it and then send it to your desired recipient. E-

mail can do all the things that real mail (sometimes called snail mail) can do. It can be used to make an offer or to communicate acceptance. It can be used for advertisements and circulars and can even be a source of junk mail (spam). E-mail is even sent and received like real mail. The sender puts it in his outbox, the digital equivalent of a post-box, and this is then collected by his mail server, who forwards it to the recipient's mail server, who then deliver it to the recipient's inbox, which may be seen as the equivalent of his letter-box.⁴ This process, although usually very quick, is not instantaneous. Just as in actual reality letters can be delayed or even lost in the post.

The second method of contracting is perhaps less familiar. This is the click-wrap method of contracting used on the World Wide Web.⁵ These contracts are formed using the link between server and client machines which is in place during data exchanges on the Web. The usual format of such a contract is that the webpage operator places an advert on its page called a webadvertisement, offering a product or service for sale. For example, the Web site may carry an advertisement for this book, where the operator offers to supply it in exchange for a certain sum of money. On this webpage will be a hypertext order form which the customer will fill out. At the end of this form will be a button saying '*submit*', '*I Accept*', or something similar. When the customer clicks this button, they submit their order to the Web site operator. This is like taking the goods to the cash register in a shop, except that the cashier will usually be a computer instead of a person. Like communications between a customer and a cashier in a shop, communications across the Web are instantaneous. This is important for the analysis which follows.

ALLOWING FOR ELECTRONIC CONTRACTS—PERMISSIVE REGULATION

The first question which requires to be addressed, with regard to electronic contracting, is whether such virtual contracts are allowed at all by the current law. Only if that question is resolved in the affirmative can we move on to more complex issues of exactly when a contract is concluded, what its terms are, and where it is regulated.

Many everyday contracts are devoid of formalities, and as such may be concluded in writing or orally, electronically or physically. These informal contracts, which are the vast majority of all contracts including most contracts of sale and lease, can safely be concluded over the Internet. Many contracts, though, require to be in writing, or have some other form of formal requirement such as the attachment of a physical signature or attestation by witnesses to be effective.⁶ These formal requirements can cause problems when the principles of e-contracting are applied. A major issue is the application, in Cyberspace, of rules which require the contract to be 'written', or 'in writing'.⁷ Can a digital document fulfill the necessary formal requirements of such a contract?

Experts agreed the answer was no.⁸ If there is a requirement for a contract to be 'in writing', reference will usually be made to the Interpretation Act 1978 which defines writing as 'includ[ing] typing, printing, lithography, photography and other modes of representing or reproducing word in a visible form'.⁹ This relatively dated definition of writing meant that for many formal contracts electronic contracting could not be used as digital communications, merely a series of electrical impulses, do not have the requisite

degree of visibility required for the definition given by the Interpretation Act. For a country which set itself the target of being the 'world's best place in which to trade electronically',¹⁰ this was a major barrier to the development of e-commerce.

Recognizing this, the Department of Trade and Industry recommended equivalence for electronic documents (and for digital signatures) part of the Electronic Communications Bill.¹¹ Equivalence is a commonly used method of integrating new systems or technologies into a developed legal system; one replaces the function of a specific document or rule with a replacement which is deemed to be functionally equivalent to it. Thus, to give an example, a written document may communicate information, provide a formal record and be used as evidence of the parties' intentions. All these roles of the written document may be equally well met by the use of electronic documents. Therefore, in such cases, an electronic document may be the functional equivalent of a written document, and simply replacing the one with the other has no wider impact on the specific contractual/evidential rules of the system in question. This has proven to be the method of choice of governments, and intergovernmental agencies, in providing for the legality of electronic documents.¹² The UK Act, unlike many of its counterparts,¹³ does not simply provide blanket equivalence for electronic communications. It instead empowers Ministers to give full legal effect to electronic communications by subordinate legislation.¹⁴ This 'curative' power of Ministers will hopefully be used to ensure that in those situations where electronic communications lack the necessary formality, full legal effect will be given to them if they prove to be the functional equivalent of their real world counterparts. The Act will allow Ministers to sweep away the last formal barriers to electronic contracting and allow e-commerce to develop within those areas where previously, due to provisions on formality, it has not been allowed to develop to its full potential.¹⁵

WHEN?—OFFERS AND INVITATIONS TO TREAT

As any student of law will tell you a contract is formed—the 'when' issue—at the point there is consensus between the contracting parties, and this is usually when there is an unconditional acceptance of an offer.¹⁶ At this point, our first distinction is introduced into the equation; this is the difference between an offer and an invitation to treat.

An offer is a proposed set of terms which can form the basis of a contract. The key features of an offer are that it contemplates acceptance and is capable of being accepted.¹⁷ Sometimes, though, statements, which look like offers are not capable of forming the basis of a contract as they do not contemplate acceptance. These statements are usually referred to as invitations to treat, as their role is to invite the purported offerree to make an offer, thereby opening the negotiation process. It is important to be able to differentiate between these invitations to treat and true offers, as acceptance of an offer creates a concluded contract whereas 'acceptance' of an invitation to treat is merely an offer. To assist in the identification of such invitations the law has developed presumptions as to whether certain common statements or actions amount to an offer or are merely invitations to treat. Thus in the real world, or actual reality, we can state with some degree of confidence that shop displays are invitations to treat,¹⁸ as are exposing

items for sale at auctions¹⁹ and advertisements.²⁰ Applying these principles to virtual reality we find that advertisements on Web sites may be dealt with in a similar manner to their actual reality counter parts. Webvertisements may, in fact, be closer to shop displays than to advertisements in magazines or on television due to the interactivity of Web sites. On the Web you may virtually examine the product, some products such as software may even allow you to sample the product, and you may then offer to buy the product immediately without leaving the virtual store. It has been said elsewhere that webvertisements ‘fuse the advertising and the shop’.²¹ It is not clear why a virtual shop should fuse advertising and the shop any more than a real shop, but in any event the result is clear—a webvertisement will be an invitation to treat unless it clearly indicates the webvertiser intends to be bound upon acceptance.²²

WHEN?—CONTRACT FORMATION AND THE POSTAL RULE

The process of contract negotiation over the Internet is the same as in actual reality: invitation to treat, offer and final acceptance. As already discussed, there are two primary methods of communication used in the contract formation phase, electronic mail, or e-mail and web page, or click wrap, contracts. Both methods of contract negotiation can easily be dealt with by applying current rules if you bear in mind the technical difficulties the Internet poses. Remember the Internet is simply a means of communication.

A contract is concluded when the acceptance is communicated to the offeror.²³ Such an acceptance may be express, either written or oral, or may be implied by the conduct of the offeree. There is, though, an important exception to this general rule when the acceptance is communicated by post. The postal rule states that if the offer contemplates acceptance by post the acceptance is effective once posted, rather than when it is received. The rule is designed to remove uncertainty from the contract formation process. It provides the offeree with confidence that an acceptance once posted will be effective, even if the postal system delays delivery of the acceptance beyond the offer date.²⁴

Both primary methods of electronic communication may potentially be affected by the postal rule. Each method of communication has its own characteristics and for this reason, they shall be treated separately.

The Postal Rule and E-mail Acceptances

Electronic mail is often seen as the digital equivalent of the postal system.²⁵ It appears therefore that the postal rule should apply to acceptances sent by electronic mail. Unfortunately we find the application of the postal rule is somewhat clouded. Although it is generally accepted that postal communications sent via the Royal Mail do benefit from the rule,²⁶ other comparable methods of communicating acceptance do not benefit from the rule; thus the courts have held that acceptances sent via telex are only effective upon their receipt by the offeror,²⁷ and a similar, albeit *obiter*, statement in relation to facsimile communications was made by Lord Gill in the case of *Merrick Homes v. Duff*.²⁸ To determine whether the postal rule applies to e-mail acceptances we need to ascertain why some methods of communication benefit from the rule while others do not.

Several alternative explanations for the development of the rule have been suggested.²⁹ Some commentators suggest the postal rule applies when you entrust your communication to a trusted third party.³⁰ This school of thought developed due to the statement of Theisiger LJ in *Household Fire Insurance v. Grant*: ‘the acceptor, in posting the letter, has ... *put it out of his control* and done an extraneous act which clenches the matter’.³¹ Other commentators, though, suggest the postal rule only applies when the offer contemplates acceptance by non-instantaneous means of communication.³² This difference of opinion is important when applying the postal rule to e-mail. E-mail communication is seen as a direct communication between the parties, much like a standard telephone conversation,³³ but is not instantaneous. If the ‘trusted third party’ school of thought is correct then acceptances sent by e-mail do not benefit from the legal presumption provided by the postal rule. If, though, the second school of thought is correct, then e-mail, as a non-instantaneous form of communication, should benefit from the postal rule presumption. The question which is correct is clearly of some import, but is one which proves difficult to answer.

In his work on the law of contract, Professor Walker prefers the suggestion that the Post Office is the common agent of the parties, and communication to the agent is communication to their principal.³⁴ This theory falls down on two counts though. First, a letter lost in the post would be sufficient to conclude a contract on this thesis yet in *Mason v. Benbar Coal Co.*³⁵ The court declined to hold a contract was completed by the posting of an acceptance without delivery.³⁶ Secondary, the Post Office does not know the content of the letter. It may not be an acceptance but a refusal or a revocation. These communications do not benefit from the postal rule.³⁷ If the Post Office were the agent of the offeror then all communications should benefit from the postal rule, rather than the current position where only acceptances benefit. Professor Gloag proffers an alternative explanation in his seminar work on the law of contract. He suggests the offeror has impliedly contracted to accept a letter posted as sufficient notification to them.³⁸ It is clear, upon reading Gloag, that this is merely suggested as a possible explanation for the rule,³⁹ prefacing, as he does, the statement with the suggestion that, perhaps [the rule] is best justified by its convenience and the necessity of some definite rule’.⁴⁰

Having examined the basis of the development of the postal rule, and applying the reasoning of Professor Gloag, above, the logical conclusion would be that e-mail acceptances do benefit from the postal rule. The reasons for this are twofold. First, e-mail is not instantaneous like the telephone, telex or fax. With all instantaneous methods of communication, the sender knows immediately whether their transmission has been successful.⁴¹ E-mail is different from these methods of communication. You can ask for a delivery receipt, but this merely signals delivery to a mailbox not a user. In addition, you do not necessarily expect a delivery receipt to be instantaneous and may therefore delay any follow-up action. Given this, it is submitted that an e-mail with a request for a delivery receipt is more analogous with a recorded delivery letter than a fax or telex. As recorded delivery mail benefits from the postal rule and so should e-mail.

Secondly, e-mail is much more fragmented than a telephone call or a facsimile transmission. E-mail messages are split into packets and may be sent via several different routes. The sender has no guarantee that the packets will all arrive together or even that all the packets will arrive.⁴² As e-mail shows none of the characteristics of the methods of communication which do not benefit from the postal rule, and as it demonstrates many of the characteristics of ordinary mail, it is submitted that the postal rule does apply to e-mail acceptances.⁴³

The Postal Rule and Click Wrap Acceptances

Contracts concluded directly over the Web are becoming more commonplace. Such 'click wrap' contracts may be for the provision of goods or services in return for payment, such as the amazon.co.uk secure order form for the purchase of books,⁴⁴ or they may be mere registration forms which will provide the contractual terms of use regulating the Web site in question.⁴⁵ These HTML-based contracts use a different communications method from e-mail. We therefore cannot assume that as the postal rule applies to e-mail it also applies to these contracts.

The main difference between click wrap contracts and e-mail is that communications between web clients and servers, unlike e-mails, is instantaneous. The best way to imagine the transfer of data between the computers is to treat it as a telephone conversation, just one between computers rather than two individuals. If either party goes off-line at any point the other will be aware of this change in status. This is because all communications between clients and servers have an inbuilt self-checking mechanism called a checksum.⁴⁶ If the checksum does not arrive, or is not confirmed the client/server will know there has been a breakdown in communications within seconds. The checksum is almost the computer equivalent of, 'someone saying "Okay?" after asking a question over the telephone'.⁴⁷ The legal impact of this technical development is that click wrap contracts demonstrate the characteristics of a telephone conversation rather than a mail message. As the sender of the acceptance is in position to be able to determine whether their message has been successfully received, almost instantaneously, the postal rule will therefore not apply because it does not need to. Click wrap acceptance require to be received to be effective.

The Postal Rule—Conclusion

Given the above analysis, and increased reliance on electronic communications,⁴⁸ it is perhaps time the postal rule was restated for the twenty-first century. A possible reformulation would focus on the non-instantaneous nature of communications which benefit from the rule. Perhaps the new rule should state that, 'where an offer contemplates acceptance by a non-immediate form of communication, that acceptance is effective from the time it leaves the acceptor's control'. Such a definition would remove the need for trusted third party and would encompass all non-instantaneous methods of communication (including those not yet invented). It does, though, require that methods of communication can be split into immediate and non-immediate, and non-immediate, a distinction that may become blurred with future technological advances.

WHEN?—CURRENT EUROPEAN PROPOSALS CONCERNING GROSS BORDER TRANSACTIONS

As can be seen from the above analysis, contract formation over the Internet is technically complex, and is, to date, legally uncertain. There are several reasons for this uncertainty. There is the debate, discussed above, over whether or not the postal rule applies to electronic communications, and there is the issue of what qualifies as ‘receipt’ in the digital world: to be received does the communication have to reach the offeror or is delivery to his mail or Web server sufficient?⁴⁹ Above all, though, contracting over the Internet is legally problematic due to its disregard for national boundaries. The above discussion addresses the question of contract formation from a United Kingdom perspective. The rules discussed, and the application of these rules in the manner discussed, provide a method of analyzing the formation of electronic contracts within the UK. Many electronic contracts are not domestic contracts. One of the great success of the Internet is the creation of a worldwide market place. A trader in Rome can, through a webpage, reach a customer in New York just as easily as one in Sorrento. This cross-boarder impact of the Internet adds a further dimension to electronic contracting, that of international private law, with questions of jurisdiction and choice of law awaiting settlement.⁵⁰

In an attempt to stimulate electronic commerce, and provide for harmonization in the process, the European Union has examined the issue of contract formation in the Electronic Commerce Directive.⁵¹ The Directive had a difficult formative process. The original draft was finalized by the European Commission in November 1998 (as Directive COM (1998) 586) but following detailed examination in May 1999 by the European Parliament it became clear the original proposals regarding contract formation were in urgent need of review.⁵² This review was carried out in the summer of 1999 and the amended proposals were published in August 1999 (as Directive COM (1999) 427). Following further detailed analysis by the Council of the European Union the draft Directive was substantially amended once more. The Directive was finally enacted on 8 June 2000, with little change made to the Sections regulating contract formation. The following section analyses the potential effect of the new Directive on the formation of Electronic Contracts.⁵³

The Directive requires Member States to amend existing legislation to ensure that current requirements, including requirements of form, which may restrict the use of electronic documentation in the formation of contracts, are removed.⁵⁴ The Directive therefore employs a functional equivalent approach seen previously in the UNCITRAL model law on electronic commerce.⁵⁵ The formation of electronic contracts is to be regulated in accordance with Section 3 (Articles 9-11) of the Directive.

The final version of the Directive differs substantially from the previous drafts in determining when a contract is concluded electronically. Both the November 1998 and the August 1999 proposals specifically proved when a contract was deemed to be concluded.⁵⁶ The final Directive has replaced all attempts to define when a contract is

concluded with guidelines as to when orders from customers and acknowledgements from service providers are deemed to be received.⁵⁷ The revised language is a compromise which has been arrived at following intensive lobbying from consumer groups, members of professional organizations and representatives of the Internet community. Like most compromises it proves to be an unsatisfactory solution. The revised draft was obviously devised to allow its application equally in the Civilian and the Anglo American models of contract formation, both of which are in use in the European Union. The effect of this compromise is that the Directive says remarkably little on contract formation. It provides duties for those who market their products over the Internet,⁵⁸ but makes no attempt to define the legal the legal position of an electronic offer or acceptance. In addition the Directive is of limited effect when dealing with contracts concluded exclusively by e-mail due to several exceptions which apply to e-mail communications.⁵⁹

The Directive proves to be extremely disappointing to those who read it with a hope of obtaining guidance on the formation of contract within the European Union. It will prove a valuable tool in identifying the domicile of service providers and it will assist consumers in seeking redress once a breach of contract has been determined,⁶⁰ but it provides no more than equivalence at the point of formation of a contract. Although the Directive may assist in cross-border disputes, it will not alter the current position on formation of electronic contracts previously discussed.

WHAT? —INCOPORATING CONTRACTUAL TERMS

The terms of any contract, whether it is formed in virtual reality, or actual reality will be those agreed upon by the parties at the time the contract is concluded. This was clearly illustrated in the celebrated case of *Thornton v. Shoe lane Parking* where Lord Denning treated the issue of a ticket by an automated ticket machine as the point at which the contract was concluded, ruling that the terms of issue printed on the ticket could not form part of the contract. This approach may be seen as a development of the rule in the so-called ticket cases, particularly *Parker v. South Eastern Railway Co.*⁶², where terms printed on tickets or receipts have been held only to be validly incorporated into the contract if the terms have been brought to the other party's attention before the contact is concluded.

Two separate issues determine which terms have been agreed by the parties. The first is, 'when is the contract concluded?' This is because, as seen, extra terms cannot be incorporated in to the contract after it has been concluded. At the point the contract is concluded the parties have consensus, and any attempt to introduce further terms after this point creates dissensus unless, of course, all parties agree to the new term.⁶³ From our previous analysis we have established that all contractual terms to an e-mail contract must be introduced prior to the acceptance being sent, and for the click wrap contracts all terms must be introduced before the acceptance is received by the offeror. The second issue is the identification of what terms have been introduced into the contract. Generally, these fall onto three categories: Express Terms, Terms Incorporated by Reference and Implied Terms.⁶⁴

Incorporating Express Terms

The incorporation of express terms into either e-mail or click wrap contracts should not pose any difficulties. Such terms will be clearly set out in the transmission of information between parties, and as such should be easily identified. There are, though, two problem issues regarding express terms which parties should always bear in mind when negotiating an electronic contract. The first is that parties must take care to identify the document or documents which are intended to constitute the contract. This will be more common with e-mail contracts than with click wrap contracts due to the potential for prolonged exchanges between the parties at the negotiation stage.⁶⁵ The second potential problem of express terms is their interpretation by the courts in the event of a dispute. Contracting parties should attempt to limit as far as possible any inconsistencies or ambiguities in their contractual terms. In the event of any disagreement between the parties on the terms of the contract the court will apply the established rules of contractual interpretation.⁶⁶

Incorporating Terms by Reference

The structure of the Web, with its interconnected, hyperlinked pages, lends itself to incorporation by reference.⁶⁷ Consequently, terms incorporated by reference are common in relation to click wrap and e-mail contracts. The terms that the contracting party wishes to incorporate are set out in a separate document and are incorporated into the final contract by a reference to this separate document somewhere in the contractual documentation. Commonly with click wrap contracts, this separate document is a separate web page held on the same server as the click wrap contract. This is usually known as the terms and conditions page and is accessible via a hypertext link embedded in the main click wrap agreement page. The problem is, though that to be effectively incorporated the terms must not only be clear and unambiguous, they must also clearly have been intended to form part of the contract. This means that the party relying upon these incorporated terms must take all steps to bring them to the attention of the other party before the contract is concluded and in such a manner as to make it clear these terms are intended to be contractual terms.⁶⁸

What does this mean with regard to click wrap contracts? It is suggested that as webvertisemetns are *prima facie* advertisements, not contractual documents, customers will not expect to find contractual terms and conditions contained therein. The Web site operator will have to draw these terms clearly to the customer's attention and will have to do so before the contract is concluded.⁶⁹ The design of the Web site must be such that any terms to be incorporated by reference are referred to prior to the 'Submit' or 'I Accept' button. This is because once the submission button is clicked the transaction will be processed in a matter of seconds with the customer receiving their confirmation (the acceptance) before they have an opportunity to scroll further down the page. Further, the terms and conditions must be clearly signposted; merely giving an opportunity to find the terms on another page would probably be insufficient, as would putting the terms on a general information page. Effectively to incorporate any external terms and conditions

the site operator must offer a clearly marked and prominent link to the specific terms and conditions they wish to incorporate into the contract before the customer can enter into the contract. The site operator can ensure the terms and conditions have been incorporated into the contract by requiring the customer to indicate they have knowledge of, and have accepted, these terms and conditions before processing their order. This is easily done by requiring the customer to check a box on the order form or by placing the order form on a separate page which requires the customer to click an acknowledgement as the link to the order page.⁷⁰ If the customer has acknowledged they are aware of the terms and conditions will be incorporated into the contract even if the customer has not read them.

Implied Terms

As with contracts concluded in actual reality there will be occasions where terms will be implied into contracts concluded in virtual reality. As implied terms usually come about apart from the contract formation process, the fact that a contract has been concluded in Cyberspace will be of no impact to the rules on formation of contract. Implied terms may be implied by fact, such as terms required to give a contract business efficacy,⁷¹ and terms implied on the basis of custom or usage.⁷² Additionally terms may be implied by the common law such as the implied term of seaworthiness implied into contracts for the carriage of goods by sea,⁷³ and the implied rule of non-derogation from grant.⁷⁴ As the introduction of these terms is uniform, no matter how the contract was negotiated and concluded, the use of e-mail or click wrap contracts will not affect the established rules and reference should be made to traditional contract texts for further guidance on implied terms.⁷⁵

WHERE?—CHOICE OF LAW AND CROSS BORDER TRANSACTIONS⁷⁶

Having spent most of this chapter discussing the questions *when* the contract is formed and *what* its terms are, we arrive, finally, at the question *where* it is governed. As has already been discussed, the Internet is a unique market place in terms of market penetration. Any computer, anywhere in the world, connected to the Internet can access a Web site and may conclude, through that site, an electronic contract.⁷⁷ The potential for cross-border disputes in web contracts is, obviously, much greater than in actual reality where most consumer contracts, and a high degree of commercial contracts, are domestic in nature. Issues of private international law, and in particular choice of law, are therefore to the fore when disputes arise.

Assuming a Web site operator is based in Scotland, which legal system regulates his contracts with overseas customers? At common law, the proper law of the contract, usually the *lex loci contractus*, governed the contract.⁷⁸ In essence, this is the position today, but now the proper law of the contract will be interpreted in light of the Contracts (Applicable Law) Act 1990 which introduced the Rome Convention⁷⁹ into the UK. The convention provides rules to assist in the identification of the proper law of the contract, in effect replacing the common law in most areas.⁸⁰ Throughout this section, reference

will be made to the convention, and to the report of Professors Giuliano and Lagarde,⁸¹ in an attempt to answer this question.

When dealing with cross-border contracts, choice of law issues are pertinent on three levels. For formal contracts we must determine which law applies in answering the question whether the contract is formally valid. That is to ask, have all necessary formal requirements been complied with? This will include issues such as requirements of writing, witnessing and signatures.⁸² As most Internet contracts are currently of an informal nature formality will not be discussed further here, except to say that regulation of this area may be found at Article 9 of the Rome Convention and is discussed at some length in the Giuliano and Lagarde report.⁸³ Secondly, we must deal with the issue whether the contract is materially invalid, that is to ask whether the contract has actually been formed, and is legally valid, according to the laws of the jurisdiction which apply to the contract.⁸⁴ If there is the possibility that the contract is materially invalid, the courts have to decide whether this is the case, by applying the law of some particular jurisdiction. The question is, though, if the parties have not agreed this, which jurisdiction's laws should apply? This is regulated by the Article 8 of the Convention, which states that 'the existence and validity of a contract, or of any term of a contract, shall be determined by the law which *would* govern it under this Convention if the contract or term were valid'.⁸⁵ Material validity is established, therefore, using the proper law of the contract, discussed below. This may seem unreasonable if, as one of the parties is obviously claiming, there is in fact no contract. The best explanation for the terms of Article 8(1) is provided by Giuliano and Lagarde who state that, '[t]his is to avoid the circular argument that where there is a choice of the applicable law no law can be said to be applicable until the contract is found to be valid'.⁸⁶ Finally, we have the issues covered by the applicable law, for example questions of interpretation, performance and the consequences of breach of contract. These, like the question of material validity, are dealt with by establishing the proper law of the contract in accordance with Articles 3, 4 and 5 of the Convention as follows.

The Convention applies to choice of law issues in contract, and begins by identifying the law applicable to the contract.⁸⁷ The general principle is that the parties are free to choose the law applicable to the contract. This choice can be made expressly or can be implied from the circumstances.⁸⁸ This means that, generally, a Web site operator may include a choice of law clause in the terms and conditions of the Rome Convention, the law of the place identified will govern the contract.⁸⁹

If the parties to the contract choose no applicable law, the issue becomes more complicated. Article 4 of the Convention regulates such occurrence. In such a case, the applicable law is the law of the country which has the closest connection with the contract. Article 4(2) contains a presumption to help identify this country stating, 'the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or for traders the country in which their principal place of business is located'. The characteristic performance of a contract is usually the act for which payment is made.⁹⁰ This may be the supply of goods or services or the provision of

information. The effect of this is that the courts will usually apply the law of the country where the person who has to provide/supply the required goods or service maintains their principal place of business or is habitually resident. Thus, to give an example, if Company A, which is based in Edinburgh, runs a Web site offering to supply software and that software is bought and downloaded by Company B in Germany, then, in the absence of a specific choice of law clause, the contract will be governed by Scots law, as the company carrying out the characteristic performance (the supply of the software) has its principal place of business in Scotland.⁹¹

The above analysis alters substantially if we replace company B with consumer B. The Rome Convention ensures that consumers can rely on their usual consumer protection measures when contracting with overseas traders. If the object of the contract is the supply of goods or services to a party who is not buying in the course of trade then Article 5 applies to the agreement.⁹² The effect is that if the seller advertises in the consumer's country of residence the contract will be regulated by the law of the consumer's place of residence, not the place of residence of the party carrying out specific performance. Thus, to return to our example, if company B is replaced with consumer B, German law, not Scots law, now regulates the contract. The provisions of Article 5(2), though, qualify this. The buyer's place of habitual residence comes into play only if: (1) conclusion of the contract was preceded by a specific invitation from the seller to the buyer or the seller intended to advertise to consumers such as the buyer,⁹³ (2) the seller received the buyer's order in the country in which the buyer was habitually resident, or (3) if the contract is for the sale of goods, and the buyer traveled from the country of his habitual residence to another country to give his order, and the seller arranged his journey with the intention of inducing him to enter into the contract. If none of these circumstances arises the proper law of contract as determined by Articles 3 and 4 will govern the contract. Transactions concluded over the World Wide Web raise many issues when dealing with Article 5(2). Is a webvertisement made in the country of the buyer's habitual residence or is it made in the seller's country of residence? Where is the order received?⁹⁴ By putting an advertisement on the Web does the webvertiser *intend* it to reach consumers in all 214 wired countries? These questions are causing problems, both for the determination of choice of law and for consumer protection.⁹⁵

CONCLUSION—ANALYSING ELECTRONIC CONTRACTS

The wired world is coming. Electronic communications will soon become the most common method of contracting. Smart fridges will order groceries directly from the store and interactive televisions will replace high street shops. The way we live our lives will be changed forever by e-commerce, and to drive all this the electronic contract has to be valued and respected in a similar manner as the oral or written contract.

The above is, of course, gross hyperbole.⁹⁶ The Internet is a remarkable communications tool, and undoubtedly e-commerce will grow in importance, but the Internet is no more than a tool of communication like the telephone, telex or fax machine. Just as they have

been integrated into our rules of contract so will Internet communications. What is undoubtedly true is that electronic contracting is becoming commonplace, and in a few year's time a substantial percentage of both commercial and consumer contracts will be concluded in Cyberspace. This discussion has hopefully emphasized that, although e-contracts do suffer some problems not usually associated with oral or written contracts, these problems are easily surmountable, in most cases by the simple application of current rules. By asking three basic questions, *when* was the contract concluded? *what* are the terms of the contract? And *where* is the contract governed?, we can deal with most questions asked about a contract whether it is formed electronically or by more traditional means. There is nothing different in the eyes of the law about a contract formed in Cyberspace. These questions are equally valid when analyzing traditional or electronic contracts. The 'Real W.W.W' when analyzing contractual relationships is not World Wide Web, but When What Where.

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¹ The following introduction is, necessarily, limited in its detail. Much more detailed and erudite discussions of the general rules of contract may be found in McBryde, *The law of Contract in Scotland* (W.Green/SULI, Edinburgh, 1987); Walker, *The Law of Contracts and Related obligations in Scotland* (3rd edn., T&T Clark, Edinburgh, 1995); Beale *et al.*, *Chitty on Contracts* (28th edn., Sweet & Maxwell, London, 1999).

² Department of Trade & Industry, *Our Competitive Future: Building the Knowledge Driven Economy* (HMSO, London, 1998), para. 4.14. A more recent survey carried by Forrester Research suggests the value of the US e-commerce market could be US\$184 billion by 2004. This suggests a more conservative but still substantial growth rate of 870% over 5 years. Source: E-commerce Survey, *The Economist*, 26 Feb.2000, 6.

³ For an excellent, and detailed, discussion of the technology involved in e-mail and the World Wide Web see Davies in L. Edwards and C. Waelde (eds.), *Law & the Internet* (Hart, Oxford, 1997).

⁴ This is, of course, a simplification of the process. The mail is split into packets and then each packet is sent individually, perhaps via several servers, before it finally reaches the recipient. More detailed analyses may be found at: Davies *ibid*, 102-3, and Gringras, *The Laws of the Internet* (Butterworths, London, 1997), 17-18.

⁵ Web-based contracts are termed click wrap as they are seen as the modern equivalent of shrink wrap contracts. For more on shrink wrap contracts see Gringras, 'The Validity of Shrink Wrap Licenses' (1996)4(2) *International Journal of Law & Information Technology* 77; Bainbrige, *Introduction to Computer Law* (4th edn., Longman, London, 2000), ch.18.

⁶ See e.g. the effect of ss. 1-3 of the Requirements of Writing (Scotland) Act 1995 (RoW(S)A).

⁷ Such as contracts for the sale of land, Row(S)A s.1.

⁸ See Select Committee on Trade & Industry, *Seventh Report* (19 May 1999) <http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmtrdind/187/18702.htm> at para.53; Department of Trade & Industry, *Building Confidence in Electronic Commerce—A Consultation Document* (The Stationary Office, London, 1999) at para.16.

⁹ Sched.1.

¹⁰ *Building Confidence in Electronic Commerce*, *supra* n.8, summary.

¹¹ Department of Trade & Industry, *Promoting Electronic Commerce* (Cm 4417, The Stationary Office, London, 1999). The bill has now been enacted as the Electronic Communications Act 2000 (c.7).

¹² The use of the functional equivalent approach has been proposed by the United Nations, UNCITRAL Model Law on Electronic Commerce 16 Dec.1996; the European Union, Directive on electronic commerce Dir.2000/31/EC (see in particular recital 34) and the Department of Trade & Industry, *Promoting Electronic Commerce*, *supra* n.11, at 22-3. The approach is analyzed in Murray, Vick and Wortley, 'Regulating E-Commerce: Formal Transaction in the Digital Age' (1999) 13.2 *International Review of Law, Computers & Technology* 127.

¹³ See e.g., the provisions of the electronic commerce Dir., *supra* n.12, and the UNCITRAL Model Law on Electronic Commerce, *supra* n.12.

¹⁴ Section 8.

¹⁵ Perhaps even developing the capacity electronically to transfer land. See Burdon, *Automated Registration of Title to Land* (Registers of Scotland, Edinburgh, 1998); Murray, Vick & Wortley, *Supra* n.12 at 137-41.

¹⁶ In the words of Viscount Stair, 'an offer accepted is a contract'. Stair, *Institutions*, I.x.3.

¹⁷ Thus in *Thomson v. James* (1855) 18 D 1, Lord President MacNeill said, 'an offer is nothing until it is communicated' (at 10). This is because an offer is not capable of acceptance until it has been communicated to the offeree.

¹⁸ *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.* [1953] 1 QB 401; *Fisher v. Bell* [1961] 1 QB 394. There is no recent Scottish authority on this issue but the older authority of *Campbell v. Ker*, 24 Feb.1810, FC suggests Scots Law is in accord with English Law.

¹⁹ *Fenwick v. Macdonald Fraser & Co.*(1904) 6 F 850; Sale of Goods Act 1979 s.57(2). The Scottish authority may be seen as being at odds with the English case of *Warlow v. Harrison* (1859) 1 E&E 309 on the question whether the addition of the words 'without reserve' turns the invitation to treat into an offer to the general public. This does not affect the general principle illustrated here though.

²⁰ *Partridge v. Crittenden* [1968] 2 All ER 421, but see the exception to this rule which applies to advertisements which offer a reward: *Carlill v. The Carbolic Smoke Ball Co. Ltd.* [1893] 1 QB 256; *Hunter v. General Accident Corporation*, 1909 SC (HL) 30.

²¹ Gringras, *supra* n.4, at 14.

²² In which case the webadvertisement, in actual reality, will act as a general offer applying the principle of *Carlill v. Carbolic Smoke Ball*, *supra* n.20.

²³ See McBryde, *supra* n.1, at para.5-97.

²⁴ For more detail on the postal rule, see McBryde, *supra* n.1, at paras. 5-103-5-109; Evans, 'The Anglo-American Mailing Rule: Some Problems of Offer and Acceptance in Contracts by Correspondence' [1966] *International and Comparative Law Quarterly* 553; Gardner, 'Trashing with Trollope, A Deconstruction of the Postal Rule in Contract' [1992] *Oxford Journal of Legal Studies* 170.

²⁵ *Supra* p.18.

²⁶ *Adams v. Lindsell* (1818) 1 B & Ald. 681; *Thomson v. James*, *supra* n.17. It should be noted that telegrams also from the rule: see *Bruner v. Moore* [1904] 1 ch.305.

²⁷ *Entores Ltd. v. Miles Far East Corporation* [1955] 2 QB 327; *Brinkibon Ltd v Stahag Stahl und stahlwarenhandelsgeellschaft mbH* [1983] 2 AC 34. It should be noted that this is not a uniform rule. The House of Lords in *Brinkibon* recognized special considerations may be needed for noninstantaneous telexes such as those sent out to office hours; see Lord Wilberforce at 42B-E.

²⁸ 1996 GWD 9-508. The Second Division reserved opinion on the use of facsimile transmissions when the case was heard on appeal: 1997 SLT 570. This issue was revisited in the Sheriff Court case of *McIntosh v. Alam*, 1997 SCLR (Notes) 1171. Here, Sheriff Sir Stephen Young held delivery of a facsimile copy of a letter of missive was effective to conclude the contract. Time was not of the essence so he did not examine the role of the postal rule. Cusine and Rennie suggest this principle may be extended to cover missives sent by e-mail. See Cusine and Rennie, *Missives* (2nd edn., Butterworths, London, 1999) at para.2.06.

²⁹ The most complete analysis is probably that of Evans, *supra* n.24, where he discusses 11 possible explanations at 558-61. A more recent analysis from the Law & Economics standpoint has been carried out Professor Richard Posner who suggests a twelfth, economic, reason for the rule. See Posner, *Economic Analysis of Law* (5th edn., Aspen Law & Business, New York, 1998) at 113-14.

³⁰ See Davies, *supra* n.3, at 98.

³¹ (1879) 4 Ex.D 216,223, emphasis added. Thesiger LJ was paraphrasing an earlier judgment of Lord Blackburn in *Brogden . Directors of the Metropolitan Railway Co.*(1877) 2 App.Cas.666, 691.

³² See Gringras, *supra* n.4, at 23; McBryde, *supra* n.1 at para. 5-107; Dickie, 'When and Where are Electronic Contracts Concluded?' (1998) 49 *Northern Ireland Legal Quarterly* 332.

³³ See Davies, *supra* n.3, at 106. As Davies explains, the message will often travel via several intermediate servers but these merely forward information in the same way a standard telephone carries the necessary electronic impulses of a telephone conversation.

³⁴ Walker, *supra* n.1 at para. 7.63. This was the justification used in a series of 19th century cases on the rule. Evans, *supra* n.24 at 558-9, puts forward a cogent and erudite argument against this theory.

³⁵ (1882) 9R883.

³⁶ See also Lord Fullerton in *Higgins & Sons. v. Dunlop, Wilson & Co.* (1847)9 D 1407, 1414. This should be compared with the decision in England in the case of *Household Fire Insurance v. Grant*, *supra* n.31, where a letter lost in the post was sufficient to conclude a contract.

³⁷ See e.g. *Thomson v. James*, *supra* n.17.

³⁸ Gloag. *The Law of Contract* (2nd edn., W.Green & Son, Edinburgh, 1929), 34. This theory is not without its own problems. How was this contract formed? At which point was there acceptance of this implied term? In addition, in English Law, there is the vexed issue of where to find the consideration for such a contract.

³⁹ It is possible that Gloag wished to suggest that the offeror made a promise to the offeree that he would accept the contract was concluded when the offeree posted his acceptance. At the time Gloag wrote his treatise on the Law of Contract though, a promise could only be established by writ or oath, which meant a promise not given in writing was effectively worthless. In Gloag's own words, 'the principle that an obligation for which no return is asked or made is nevertheless binding is limited, in its practical effects, by the rule that a gratuitous obligation cannot be proved except by the writ or oath of the promisor' (at 50). Given these constraints Gloag may have been forced to refer to an implied contractual term (contracts did not require proof by writ or oath) when he really wanted to refer to a promise. This would answer the questions posed above.

⁴⁰ *Ibid.* Atiyah also takes this approach. See *An Introduction to the Law of Contract* (5th edn., Clarendon Press, Oxford, 1995), 71. This view is also criticized by Evans, *supra* n.24 at 559. This though is the approach taken by Lord Brandon in *Brinkibon*, *supra* n.27 at 48F and is based upon the approach of Mellish LJ in *In re Imperial Land Co. of Marseilles* (1872) LR 7 Ch. App. 587, 692. A similar, although less robust, stance is also taken by Lord Wilberforce at 41F.

⁴¹ With the telephone, you can instantly check; with the fax and telex you receive a communications report.

⁴² If the sender has requested a delivery receipt, they should in such a situation receive a 'bounce' message indicating this. If, though, they have not requested such a receipt, the mail server will attempt to send the message to the mail server identified without informing the sender of the status of their message. It may be several hours or even days before they receive the 'undeliverable' message, a kind of electronic 'return to sender'. Again, the analogy of ordinary and recorded delivery mail may be used.

⁴³ For a contrary view, see Dickie, *supra* n.31.

⁴⁴ This form is at:<<https://www.amazon.co.uk/exec/obidos/order2/026-2417710-1639251>>.

⁴⁵ A good example of such a service agreement is on the Wiley Interscience page:<http://www3.interscience.wiley.com/terms.html>.

⁴⁶ The checksum is there for technical rather than legal reasons. All Internet communications are packet switched. This means they are sent as several packets rather than one whole. The client machine reassembles the information and, with the World Wide Web, displays the page on a browser. If any packet were to go missing the information would be corrupted, therefore the client receives with the information would be corrupted, therefore the client receive with the information packets a checksum, a calculation of exactly how much information there should be. If the checksum does not match the received information the client knows there is missing/incorrect information and can request it is resent.

⁴⁷ Gringras, *supra* n.4, at 26.

⁴⁸ E-mails now outnumber, by volume carried daily, traditional (or snail mail) communications.

⁴⁹ For more discussion on this vexed issue see, Dickie, *supra* n.32, at 333; Gringras, *supra* n.4, at 24. Art. 11(1) of the e-commerce Dir., *supra* n.12, provides that a communication is delivered when the party to whom it is addressed is able to access it. This should deal with this problematic issue.

⁵⁰ Discussed *infra* at pp. 31-34.

⁵¹ *Supra* n.12.

⁵² See in particular the report of proceedings of the European Parliament for 6 May 1999, available from <http://www.europarl.eu.int/dg7/cre/mi2/0506.pdf>

⁵³ See Appendix I to this volume.

⁵⁴ See Recital 34.

⁵⁵ *Supra* n.12.

⁵⁶ In the Nov.1999 revision it was provided that: 'where a recipient, in accepting a service provider's offer, is required to give his consent through technological means, such as clicking on an icon, the contract is concluded when the recipient of the service has received from the service provider, electronically, an acknowledgement of receipt of the recipient's acceptance' (Art.11).

⁵⁷ Art311(1)

⁵⁸ See in particular Arts.10(1), 10(3) and 11(1).

⁵⁹ See Arts.10(4) and 11(3).

⁶⁰ This is achieved through Arts.3 (Internal Market), 5 and 6 (information to be Provided) and 16-20 (Implementation).

⁶¹ [1971] 2 OB 163

⁶² (1877) 2 CPD 416.

⁶³ In effect agreeing a new contract.

⁶⁴ For detail on these categories see Walker, *supra* n.1, chs. 20-22; McBryde, *supra* n.1, chs.6,13.

⁶⁵ Web site operators making use of click wrap contracts have to ensure that automated response systems only accept terms which they find acceptable. Thus, if I were to operate a site selling steel at £100 per tonne, I would need to ensure that the automated response system on my server was programmed in such a way as to ensure it would not accept a communication saying, 'I wish to order 100 tonnes of steel at \$100 per tonne'. The results of such an automated acceptance would be to create a contract on these new terms. This can easily be remedied by giving the response system a checksum against which it checks any offers received.

⁶⁶ See McBryde, *supra* n. 1, ch.24. The Parole Evidence Rule and the Rule of Prior Communings have been greatly modified by the Contract (Scotland) Act 1998, available at:<http://www.legislation.hmso.gov.uk/acts/acts1997/1997034.htm>.

⁶⁷ As do modern e-mail systems which allow for embedded hypertext links.

⁶⁸ Thus courts have continually held that where 'contractual' terms are found in places where the customer would not expect to find them they do not form part of the contract. See *Chapelton v. Barry UDC* [1940] 1 KB 532, *Taylor v. Hutchison* (1886) 14 R 4 (advertising leaflet).

⁶⁹ Some terms will require a greater degree of highlighting than others. Exclusionary terms for instance will require a greater degree of highlighting than others. Exclusionary terms for instance will require a significant degree of explicitness. See Denning LJ in *Spurling v. Bradshaw* [1956] 2 All ER 121, 125F, 'Some clauses which I have seen to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient'.

⁷⁰ The author would always advise any webvertiser to take the action described above. Simply offering a link to a terms and conditions page may prove insufficient as people become used to modern technology and begin to ignore parts of pages of no interest to them, scrolling immediately down to the order form/button.

⁷¹ See *The Moorcock* (1889) 14 PD 64.

⁷² See *William Morton & Co.v. Muir Bros& Co.*, 1907 SC 1211.

⁷³ See *Steel v. State Line Steamship Co.*(1877)3 App.Cas.72.

⁷⁴ See *Barr v. Lions Ltd.* 1956 SC 59.

⁷⁵ McBryde, *supra* n.1, ch.6; Walker, *supra* n.1, ch.22.

⁷⁶ This section deals with choice of law, not jurisdiction. For a discussion of jurisdictional issues in Cyberspace see, Chapter 10 by Paul Torremans.

⁷⁷ The most recent Internet Software Consortium Survey (Jan.2000) reveals that 227 countries are currently connected to the Internet and have at least one host computer. <http://www.isc.org/ds/www-200001/dist-bynum.html>

⁷⁸ See Leslie, 'Private International Law', *The Laws of Scotland: Stair Memorial Encyclopaedia* (Butterworths/Law Society of Scotland, Edinburgh, 1989), vol.17, para.244ff.

⁷⁹ The EEC Convention on the Law Applicable to Contractual Obligations. See Sch.1. of the Contracts (Applicable Law) Act 1990.

⁸⁰ Although the common law still regulates some rules of contract formation and validity. The capacity to contract, for example, is still regulated by the common law. See Art.1(2)(a) of the Convention and North and Fawcett, *Cheshire and North's Private International Law* (12th edn., Butterworths, London, 1992), 469-70.

⁸¹ *Report on the Rome Convention* [1980] OJ C282/1. The report may be considered when interpreting the Convention. See s.3(3)(a) of the Contracts (Applicable Law) Act 1990.

⁸² All these matters are dealt with as matters of formal (contractual) validity not matters of procedure. See Cheshire and North, *supra* n.80 at 507.

⁸³ *Supra* n.81. at C282/28-C282/32.

⁸⁴ See Cheshire and North, *supra* n.80 at 505-7

⁸⁵ Emphasis added. There is an exception to this in Art.8(2) when a party wishes to establish they did not consent to the contract and it would be unreasonable to apply the terms of Art. 8(1). For more on this see Cheshire and North, *supra* n.80 at 506-7.

⁸⁶ Report on the Rome Convention, *supra* n.81 at C282/30.

⁸⁷ Art.1.

⁸⁸ Art.3(1). An example of circumstances which would allow choice of law to be implied would be where the contract fails to comply with the formalities of one of the possible jurisdictions interpreting the contract. In such a situation, the court may imply the parties' intended for the contract to be governed by the law of another jurisdiction.

⁸⁹ *Ibid*

⁹⁰ The Giuliano and Lagarde report, *supra* n.81 at 282/20

⁹¹ A similar (non-Internet) case which illustrates this point is *William Grant & Sons v. Marie Brizard Espana SA*, 19 Jan. 1998, available at: <http://scotcurd1-1-http.pipex.net/opinios/HAM0601.html>. This case involved the export of whisky from Scotland to Spain. Lord Hamilton found that the characteristic of a contract of sale of goods was the sale and delivery by the seller of the goods, and that the contract was therefore regulated by Scots Law.

⁹² See Cheshire and North, *supra* n.80 at 495 and 509.

⁹³ The invitation or advertisement must be in the country in which the buyer is habitually resident. It would not be enough for the seller to advertise in his own country and for the buyer to reply to an advertisement there.

⁹⁴ This is particularly pertinent when the seller is based in one country but operates out of a server based in another country.

⁹⁵ See below Chapter 10.

⁹⁶ At least the author hopes it is.
