

**Singapore Management University**

---

**From the Selected Works of Eliza Mik**

---

2007

## Chapter 5 - Offer and Acceptance

Eliza Mik, *Singapore Management University*



Available at: <https://works.bepress.com/elizamik/7/>

## CHAPTER 5 OFFER AND ACCEPTANCE

THE ORDINARY RULE IS, THAT TO CONSTITUTE A CONTRACT THERE MUST BE AN OFFER, AN ACCEPTANCE, AND A COMMUNICATION OF THAT ACCEPTANCE TO THE PERSON MAKING THE OFFER.<sup>1</sup>

### INTRODUCTION

**[5.1]** This chapter deals with the basic tool of analysing the process of contract formation, the offer and acceptance model. It aims to answer two seemingly simple questions: “is there an offer?” and “is there an acceptance?” It examines which of the rules developed around the “offer and acceptance” model face Internet-specific challenges in their application.

The previous two chapters dealt with some preliminary questions related to the existence of intention. Chapter 3 disposed of the arguments that on-line contracts must be treated differently because one or both sides of the transaction are automated. Chapter 4 discussed the difficulties of identifying the other party and their impact on contractual intention. This chapter deals with the actual process of contract formation and some problems related to the manifestation of intention on-line. It provides the background for all subsequent discussions relating to the time of formation and the determination of contractual contents.

The contracting parties generally do not structure their interactions in terms of “offer and acceptance.” Accordingly, “to insist on the presence of a genuine offer and acceptance in every case is likely to land one in sheer fiction.”<sup>2</sup> This “sheer fiction”, however, provides a framework for analysing the interactions leading to a contract. The law places the labels of “offer” and “acceptance” on specific words, documents or conduct in order to determine the existence of contractual intention, the moment of formation and the contents of the contract.<sup>3</sup> As a result

[t]he outcome of a case may turn on whether a party did or said anything the law will interpret as an “offer,” and if so, whether the other party did or said anything that the law will interpret as an

---

<sup>1</sup> Henthorn v Fraser [1892] 2 Ch 27 at 35; Brogden v Metropolitan Railway Co (1877) 2 App Cas 692

<sup>2</sup> Atiyah p 55

<sup>3</sup> The Law of Contract para 2.7

“acceptance.” The law will also ask whether the “acceptance” took the proper form and whether it came at a proper time (had the offer already been withdrawn? had it lapsed?).<sup>4</sup>

The “offer” and “acceptance” model assumes a particular chronology of events and assigns specific roles to the transacting parties.<sup>5</sup> One party, the “offeror,” prescribes the terms of the contract, the time the offer remains open and the method of acceptance. The other party, the “offeree,” has the power to form the contract by a simple “yes.”<sup>6</sup> Acceptance can only occur in response to an offer - if there is no offer, there can be no acceptance.

Sophisticated analysis is usually required to determine whether and when a contract has been formed.<sup>7</sup> Even in the world of paper documents and everyday transactions it is difficult to map the offer and acceptance model onto multiple events occurring sequentially or simultaneously.<sup>8</sup> It is in those very cases, however, that the offer and acceptance model proves its value.<sup>9</sup> At the expense of some artificiality, it provides a framework for analysing the intention of the parties.<sup>10</sup> This chapter examines how this framework can be transposed onto on-line transactions, where contractual intention is manifested by means of clicks, websites and emails.

## Roadmap

[5.2] This chapter commences with some general considerations delineating the scope of discussion. It aims to establish, in broad terms, how the changed communication landscape affects the practical application of the offer and acceptance model. The basic principles relating to “offer” and “acceptance” are revisited. Next, the chapter asks: is there an offer? and attempts to distinguish between offers and invitations to treat in the case of websites with integrated transactional platforms. The solution suggested in the CUECIC is critically examined. The chapter proceeds to discuss the technological factors that may affect this distinction and tests the possibility of applying real-world analogies to determine the existence of an offer. Additional considerations flow from analysing the positions of “offeror” and “offeree.” The assumptions underlying each position are compared with the actual mechanics of web-based transacting.

Subsequently, this chapter analyses the act of “acceptance” and asks: is there acceptance? The discussion relates to the choice of communication method. Is it possible to maintain a liberal view regarding the construction of offers, which prescribe a particular method of acceptance without stating its exclusiveness? The effectiveness of acceptances, which do not conform to the prescribed method is questioned in light of the changed communication landscape.

## Preliminary Considerations

[5.3] Before approaching the main questions posed in this chapter, a number of preliminary points must be made.

<sup>4</sup> R Craswell, *Offer, Acceptance and Efficient Reliance* (1996) 48 *Stan L Rev* 481 at 482

<sup>5</sup> M Yamaguchi, *The Problem of Delay in the Contract Formation Process: a Comparative Study of Contract Law* (2004) 37 *Cornell Int'l L J* 357 at 359, 365

<sup>6</sup> see also: A L Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations* (1917) 26 *Yale L J* 169 at 181

<sup>7</sup> see: *Furmston, Norisada & Poole* p 4, citing *Australian Woollen Mills Proprietary Ltd v The Commonwealth* (1955) 93 *CLR* 546; *Harvey v Facey* [1893] *AC* 552

<sup>8</sup> *WA Dewhurst & Co Pty Ltd v Cawse* 2 *FLR* 184 at 190; *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 *CLR* 125

<sup>9</sup> *The Law of Contract* para 2.2

<sup>10</sup> *New Zealand Shipping Co Ltd v A M Satterwaite & Co Ltd, The Eurymedon* [1975] *AC* 154

### Applicability of the “offer and acceptance” model

[5.4] As indicated in Chapter 1, this thesis does not attempt to revise the offer and acceptance model and opposes theories aiming at modifying this analytical approach.<sup>11</sup> The latter derive from the misconception that on-line contracts are inherently different than real-world contracts and are therefore not susceptible to traditional legal analysis. This thesis does not investigate whether the offer and acceptance model applies to contracts formed on-line. It assumes that this model remains the best analytical tool available – irrespective of whether a contract is concluded on-line or in the real world.

### Technology-specific problems

[5.5] All principles pertaining to “offers” and “acceptances” need not be recited. The aim is to identify technology-specific problems pertaining to their application. One could examine the table of contents in a textbook on contract law and ask: which elements, or stages, in the contract formation process are affected by the novel transacting environment? An intuitive, common sense analysis reveals that very few are. The basic building blocks of agreement remain the same: intention and consideration. Offers are binding and can be revoked before acceptance. They are terminated by rejection, the death of the offeror or by the occurrence of a condition subsequent. Acceptances must be communicated within the timeframe prescribed by the offer. The same principles apply on-line. The intention of the parties remains decisive, the offer and acceptance analysis aims at determining such intention by construing the statements made or conduct engaged in during the contracting process. Not every aspect of “offer and acceptance” needs to be discussed for the simple reason that not every aspect is affected by the novel communication possibilities.

### Multiplicity of communication methods

[5.6] On-line contracts can be formed in many different ways. To speak of “Internet communications” or “electronic communications” in general over-simplifies the matter and does not reflect the multiplicity of communication methods enabled by the Internet. Parties communicate via email, instant messengers and websites, to name a few. All those communication methods rely on the Internet. The Internet itself, however, is not a method of communication but an infrastructure underlying various methods of information exchange. Each of those methods serves different communication needs and displays its own characteristics. Each method differs with regards to its intrusiveness, immediacy of communication and the ability to reach the other party in real-time. It is therefore not just a question of the underlying technology but of the different ways (and reasons) people use a given communication method.

The dichotomy between email and instant messengers on one side and web-based interactions on the other must be emphasized. People exchange emails and instant messages. People do not “exchange” websites but interact with them. Communications via email or instant messengers can be compared to traditional correspondence.<sup>12</sup> Problems of identifying an offer and an acceptance are similar – irrespective whether one analyses written documents or electronic messages circulating between the parties. The sequence and content of each message must be examined to discern, which contains an offer and which constitutes an acceptance.<sup>13</sup> The most likely scenario for mass-market e-commerce, however, are transactions occurring on websites, where the owner of the website (hereinafter referred to as “web-merchant”) presents goods or services for purchase.

---

<sup>11</sup> See e.g. Cheshire & Fifoot “[A] new contract formation rule may emerge for electronic transactions – the ‘last act’ rule whereby the last act is equivalent to acceptance.” [3.44] See also the preparatory works of the UNCITRAL Working Group IV on Electronic Commerce, which lead to the adoption of the CUECIC. It was debated whether electronic contracting requires the developments of new rules or whether the rules applied to traditional contracts can respond to the needs of novel communication techniques. A/CN.9/WG.IV/WP.91

<sup>12</sup> *Butler Machine Tool Co v Ex-Cell-o Corp* [1979] 1 WLR 401 at 404

<sup>13</sup> *Gibson v Manchester City Council* [1979] 1 WLR 294

Persons visiting websites ("users") browse through the presented information, fill out forms, tick boxes and activate scroll-down menus. At some stage, they are presented with buttons or links to indicate their willingness to purchase a product or service.<sup>14</sup> Additional elements in the contracting sequence may be the provision of payment information or the display of terms governing the transaction.<sup>15</sup> Web-based transactions are less transparent than a simple exchange of emails. On the web-merchant's side, contractual intention is manifested by setting up a website,<sup>16</sup> on the user's side - by activating different elements of the web-interface.<sup>17</sup>

### **Communication: presentation and transmission**

[5.7] The rule that intention may be manifested in any manner holds true both in the real world and on-line. Whether the parties negotiate by email, EDI or via the telephone, the legal effect of their communications depends on their intention – the contents of their statements or the meaning of their acts. The analytical tool of offer and acceptance remains the same irrespective of whether intention is manifested by means of an instant message, a website or a "click." It must be admitted, however, that a number of factors affect its application depending on the method used to manifest, that is communicate, intention.

At this stage the division into "presentation" and "transmission" must be introduced. Both constitute components of the term "communication:" a statement is presented (assumes a particular form, an arrangement of text or graphic material) and transmitted (conveyed from one party to the other). Different technologies affect different aspects of the contract formation process. While the manner of presenting content (apart from the content itself) bears on the differentiation between offers and invitations to treat, the establishment of contractual contents and the incorporation of terms, problems related to the time of contract formation arise mainly with regards to methods of transmission. The division between presentation and transmission does not, however, fold neatly along technological lines. For example, email can raise problems relating to the presentation of its contents, such as in the case of illegible messages or the impossibility to retain original formatting. Websites may also be analysed from a data transmission perspective. Some generalizations and simplifications are made for analytical purposes. The respective stages in the contract formation process are analysed from different angles: manifestations of intention can be examined either with regards to how the on-line environment changes the manner intention is presented or transmitted. Each communication method creates a different set of problems and each stage in the contract formation process faces different challenges resulting from the changed communication possibilities.

Discussing various aspects of the contract formation process in isolation may appear artificial. Such "isolation" is, however, necessary in order to examine how this process is affected by technological factors.

---

<sup>14</sup> P Quirk, J Forder, *Electronic Commerce and the Law*, 2<sup>nd</sup> ed, Milton 2003, p 65

<sup>15</sup> See: M E Budnitz, *Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?* (2000) 16 Ga U L Rev 741 at 744 for a detailed description of the web-based transacting process.

<sup>16</sup> See Chapter 3

<sup>17</sup> See Chapter 10

## GENERAL PRINCIPLES

[5.8] On-line and in the real world, the intention of the parties remains paramount. The primary purpose of the offer-acceptance analysis is ascertaining this intention. The communications of the parties are construed in order to determine whether their minds have met.<sup>18</sup> The following paragraphs briefly revise the basic principles related to “offers” and “acceptances.”

### Offers and invitations to treat

[5.9] An offer indicates a willingness to enter into a contract without further negotiations.<sup>19</sup> Offers bind the offeror and can be accepted by a simple “yes.”<sup>20</sup> Offers are distinguished from invitations to treat (“invitations”), which are non-binding indications of a general willingness to contract.<sup>21</sup> The distinction depends on the intention of the maker of the statement and is inferred from the words in the context in which they are used. Intention is evaluated objectively from the perspective of a reasonable addressee.<sup>22</sup> In sum, offers are binding, whereas invitations indicate a commencement of the contract formation process.

Offers can be accepted by a single act of acquiescence because they contain all the contents of the contract, i.e. they are certain and complete.<sup>23</sup> Determining the contents of the offer is often concomitant with establishing the contents of the contract.<sup>24</sup> The required completeness depends on the type of goods or service. There may be elements remaining to be determined, but such determination must not depend upon the agreement between the parties.<sup>25</sup> Much depends on the complexity and the parties’ familiarity with the subject matter.<sup>26</sup>

Invitations lack the required completeness and can be regarded as requests to submit offers. Designing one’s market appearance as an invitation serves protective purposes. Invitations shield the maker of the statement from the risk of “over-acceptance,” i.e. the inability to perform when the number of acceptances exceeds the number of items on stock<sup>27</sup> and also give him or her the ultimate choice whether to contract or not.<sup>28</sup>

The differentiation between offers and invitations is more than a theoretical exercise. This initial division has important practical implications. In order to determine the obligations of the parties, the contents of the contract must be known. Have the terms been validly incorporated? What statements were made during the contract formation process? When was the contract formed? The answers to any of these questions can only be found after determining which act constituted acceptance. As acceptance can only occur in response to an offer,<sup>29</sup> the analysis must commence with establishing the existence of an offer.

---

<sup>18</sup> Carter & Harland [201]

<sup>19</sup> Carter & Harland [207]

<sup>20</sup> Carter on Contract [03-001]

<sup>21</sup> The Law of Contract para 2.193

<sup>22</sup> Carter on Contract [03-020]

<sup>23</sup> May and Butcher Ltd v R [1934] 2 KB 17n

<sup>24</sup> The Law of Contract para 2.152

<sup>25</sup> May and Butcher Ltd v R [1934] 2 KB 17n per Viscount Dunedin at 21

<sup>26</sup> Carter on Contract [03-050]; Howard Smith & Co Ltd v Varawa (1907) 5 CLR 68

<sup>27</sup> Grainger & Son v Gough (Surveyor of Taxes) [1896] AC 325 at 334; Partridge v Crittenden [1968] 2 All ER 421; proposal likely to be considered an invitation, if it does not limit quantity, see: Kelly v Caledonian Coal Co (1898) 19 LR (NSW) 1

<sup>28</sup> Esso Petroleum Ltd v Customs and Excise Commissioners [1976] 1 WLR 1 at 11

<sup>29</sup> Williams v Carwardine (1833) 5 Car & P 566; R v Clarke (1927) 40 CLR 227

## Acceptances

[5.10] An acceptance constitutes a sign of agreement to an offer and concludes the contract formation process. Acceptance must correspond with the offer and be unequivocal.<sup>30</sup> It must take the form of an external act and be communicated to the offeror.<sup>31</sup> The offer may also dispense with the communication of acceptance. Such is the case of unilateral contracts, where the performance of an act obviates the need to separately communicate acceptance.<sup>32</sup> In bilateral contracts acceptance takes the form of a counter-promise, in unilateral – the performance of an act.<sup>33</sup> Depending on the construction of the offer, the same act may constitute acceptance or the actual execution of the contract (i.e. consideration).<sup>34</sup> To complicate matters further, the same act can also be an offer if the expression of intention preceding such act is considered to be an invitation. The legal meaning of the act in question depends on its language, the context and the surrounding circumstances. Not every response to an offer constitutes an acceptance.<sup>35</sup> Acceptances must also be distinguished from acknowledgements of receipt or order tracking messages.<sup>36</sup> In sum, the last act from either party's side need not constitute acceptance.

Generally, no rules prescribe the contents or form of offers or acceptances. To repeat the obvious: intention can be manifested in any manner. Offers may, however, state the time during which acceptance must occur as well as the method of acceptance. Accordingly, offerees may be limited in the range of responses, as their acceptance must take a specific form. Furthermore, in the majority of circumstances, offers and acceptances are implied rather than express. The use of the words "offer" and "acceptance" is not compulsory and by itself not determinative.<sup>37</sup> Even in the case of a formal exchange of documents it is not always clear, which document constituted an offer and which was an acceptance. Mapping the offer and acceptance model onto real-life situations carries not only signs of artificiality but also some arbitrariness as the same act may be interpreted in many ways. The web-merchant can accept by enabling a download or permitting the user to remain on the site.<sup>38</sup> The user can accept by activating a download or staying on the site. The performance of the contract can be indistinguishable from the act of acceptance.

## IS THERE AN "OFFER"?

[5.11] Different technologies create different challenges for the contract formation process. Most problems of ascertaining whether one of the parties has made an offer concern web-based transactions: one party manifests his or her intention by setting up a website, the other party visits the website and activates various elements of the web-interface. To say that "everything is a matter of construction" does not solve the problem, when manifestations of intention take the form of dynamic HTML files and sequences of "clicks."

### When does a website constitute an offer?

[5.12] This question could be paraphrased: when is a person who set up a website bound by its contents? When can a simple "click" turn the contents of a website into the contents of a contract? Websites may be offers or invitations.<sup>39</sup> It is impossible to mechanically subsume them under either category.<sup>40</sup> Such

<sup>30</sup> Carter on Contract [03-220]

<sup>31</sup> *Felthouse v Bindley* (1862) 11 CBNS 869

<sup>32</sup> Carter on Contract [03-320]

<sup>33</sup> Carter on Contract [03-020] [03-170]

<sup>34</sup> *Australian Woollen Mills Proprietary Ltd v The Commonwealth* (1954) 93 CLR 546

<sup>35</sup> D Campbell, ed., *Law of International On-Line Business, A Global Perspective*, London 1998, p 175

<sup>36</sup> *Corinthian Pharmaceutical Systems Inc v Lederle Laboratories* 724 F Supp 605 (1989)

<sup>37</sup> Carter on Contract [03-001]

<sup>38</sup> R Nimmer, *Electronic Contracting: Legal Issues* (1996) 14 J Marshall J Computer & Info L 211 at 216

<sup>39</sup> The discussion concerns websites enabling contract formation without recourse to other media.

attempts were made during the preparatory works for the CUECIC. It was stated that websites should be regarded as invitations because they are “like advertisements” and they are addressed to the world at large.<sup>41</sup> Consequently, CUECIC Article 11 established a presumption that websites are invitations.<sup>42</sup> During the discussions leading to the adoption of the CUECIC, it was also observed that: “[i]nternet transactions may not easily fit into the established distinctions between what might constitute an “offer” and what should be interpreted as an “invitation to treat.”<sup>43</sup> This statement illustrates a common misunderstanding for three reasons:

First, to claim that Internet transactions do not easily fit the traditional analytical model implies that real-world transactions do. This is obviously not the case. Most difficulties in transposing the offer and acceptance model to novel transacting scenarios result from the fact that it is a model. Applying models against real-life situations is inherently difficult. The difficulties are more pronounced in the case of on-line transactions because manifestations of intention take an unusual form. There are also more “acts” crammed into the small space of the computer screen.<sup>44</sup>

Second, as further discussed below, the “distinctions” between offers and invitations are by no means “established.” The interpretation of certain stereotyped situations as indications of final intention is not consistent and does not provide universal rules. Despite the fact that the interpretation of certain kinds of expressions appears standardized,<sup>45</sup> care must be taken not to generalize.

Third, it appears contrary to the spirit of practically all model regulations to introduce media-specific rules. Why should a statement made on a website be interpreted any differently than the same statement made in a newspaper or verbally? It is the content of a statement, not the method of its communication that must be construed to determine its legal effect.

Websites are subject to the same rules of construction like any other manifestation of intention. The fact that a statement is posted on a website does not automatically prejudice the outcome of the analysis. The question whether a website constitutes an offer or an invitation must be approached like any other manifestation of intention.<sup>46</sup> It is incorrect to ask whether websites are offers or invitations. The question is always whether a particular website constitutes one or the other.

The following paragraphs examine what factors can be taken into account in making this differentiation.

---

<sup>40</sup> Squires, *Some Contract Issues Arising from Online Business-Consumer Agreements* (2000) 5 Deakin LR 95 at 104; see also Treitel p 12, who states that where a supplier indicates the availability of goods or services on a website, “the offer would seem to come from the customer (e.g. when he clicks the appropriate “button”) and it is open to the supplier to accept or reject that offer.” Chissick & Kelman p 75

<sup>41</sup> See: A/CN.9/WB.IV/ WP.91 paras 47, 48; A/CN.9/484 para 125

<sup>42</sup> CUECIC Article 11 reads:

“A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.”

<sup>43</sup> A/CN.9/WG.IV/WP.95 para 53

<sup>44</sup> See Chapter 8

<sup>45</sup> M A Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance* (1994) 82 Cal L Rev 1127 at 1129

<sup>46</sup> Willmott, Christensen & Butler [3.4] [3.130]



### Informational and transactional

[5.13] Some websites are established solely for informational purposes. Others are equipped with transactional capabilities. In case of the latter, contracts can be formed and performed on the website.<sup>47</sup> The most common examples are downloads of software or music. Another popular service is access to information, where the website itself forms the subject matter of the contract. Performance may also occur in the real-world, such as with purchases of tangible goods (books on amazon.com) or services (tickets on virginblue.com.au).

While the current discussion relates to transactional websites, it must be remembered that this thesis is not about e-commerce but about contract formation. It is not confined to sales transactions, where consideration takes the form of payment information on one side, and the delivery of a product on the other. The imagery of the sales contract must therefore be abandoned.<sup>48</sup> The subject matter may be information, the consideration may not be monetary. It can take the form of staying on the site and permitting the web-merchant to study the user's browsing behaviour. The provision of payment data is therefore not an indispensable element. Furthermore, the fact that access to a website is "free" does not imply that there is no contract. On-line contracts are not built exclusively around the classic sales transaction and there are many alternative income models, predominantly based on advertising revenue. While the changed subject matter of the contract is not a distinguishing criterion per se, it further complicates the analysis.

### Interactivity and number of addressees

[5.14] Two potential criteria of differentiating between offers and invitations in the case of websites must be discarded at the outset: interactivity and number of addressees.<sup>49</sup> Some websites present static content, others present content in an interactive and dynamic manner. The legal characterization of a website cannot depend on the degree of interactivity.<sup>50</sup> While "passive" websites require additional steps to contact the merchant and do not enable on-line performance they may constitute an offer if a contract can be formed exclusively on the basis of the contents presented thereon. The presence of an interactive interface does not imply that the terms are certain and complete. And the other way round: the absence of interactivity does not imply that the contents of the websites are not sufficiently certain and complete to bind the web-merchant.

The differentiation between offers and invitations cannot be justified by the number of addressees of a statement. If an offer is made to the public at large the offeror becomes liable to the person who accepts, not to everyone.<sup>51</sup> The unlimited number of addressee's does not preclude a statement from being binding.

<sup>47</sup> M Chissick, G Veysey, *The Perils of On-Line Contracting* (2000) 6 CTLR 121

<sup>48</sup> R Nimmer, *Through the Looking Glass: What Courts and UCITA say about the Scope of Contract Law in the Information Age* (2000) 38 Duq L Rev 255 at 258

<sup>49</sup> A/CN.9/WG.IV/WP.91 par 47

<sup>50</sup> The "passive/active" criterion was used in a number of US cases concerning "purposeful availment," an element required to establish personal jurisdiction. The likelihood of personal jurisdiction being exercised depends the nature of the commercial activity conducted over the Internet. See: *Zippo Manuf Co v Zippo Dot Com, Inc* 952 F Supp 1119 (WD Pa 1997); *Eileen Weber v JOLLY Hotels* 977 F Supp 327 (DNJ 1997); *Bensusan Restaurant Corp v King* 937 F Supp 295 (SDNY 1996); see also: R D Shurtz, *www. International\_shoe.com: Analyzing Weber v Jolly Hotels' Paradigm For Personal Jurisdiction in Cyberspace* (1998) BYUL Rev 1663. The "non-interactive"/"interactive" division is also mentioned in the CUECIC preparatory works. See: A/CN.9/WG.IV/WP.95 para 54. It was stated that websites containing interactive applications enable the immediate conclusion of a contract and may therefore be regarded as offers. It was not explained why the possibility to conclude a contract should predetermine the legal character of websites.

<sup>51</sup> *Carter on Contract* [03-020]; *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 268

### Virtual shop, advertisement or vending machine?

**[5.15]** Absent clear language of commitment or disclaimers to the contrary, a number of rules assist in differentiating between offers and invitations. It must be examined whether websites fit under one of the stereotyped situations, which are commonly regarded as constituting one or the other.

The goods were “displayed on shelves in packages (...), with the price marked on each. A customer, on entering the shop, was provided with a wire basket, and having selected from the shelves the articles which he wished to buy, he put them in the basket and took them to the cashier’s desk (...), where the cashier stated the total price and received payment.” This passage stems from *Pharmaceutical Society of Great Britain v Boots Cash Chemists*,<sup>52</sup> a landmark case concerning the legal characterization of self-service shops. Focusing on the issue when the sale is completed, the court decided that although “the customers should go and chose what they want, the contract is not completed until the customer, having indicated the articles which he needs, the shopkeeper (...), accepts that offer.” The offer was made by the customer and no sale was effected until the shopkeeper accepted the price.<sup>53</sup> The self-service system was an invitation to treat. The position is no different if goods are obtained with the intermediation of a shop assistant.<sup>54</sup>

Replace the wire basket with a virtual shopping cart, the shelves with a scroll-down menu, the act of placing the goods in the basket with a “click-drag” and the cashier with an electronic checkout. Welcome to Amazon.com.

Websites can be likened to virtual shop displays, mail-order catalogues, traditional advertising in mass media, such as TV commercials and billboards.<sup>55</sup> The latter are routinely regarded as invitations.<sup>56</sup> The fact that a given website can be subsumed under either category does not preclude it from being binding as both advertisements and shop displays can constitute offers if they are sufficiently certain to allow the inference of intention.<sup>57</sup> Websites can also be compared to vending machines, which are generally regarded as offers.<sup>58</sup> This is so because “in that case the seller has waived any right to object to the particular customer or to say that he has already sold the goods.”<sup>59</sup> A person expresses an intention to be bound by making the vending machine publicly available and delivering the product or service to anyone who inserts the required coin and selects the product or service. The party choosing to form a contract is the person inserting the coin into the machine.

Websites do not easily fall into one of the pre-established categories. Each website can be placed somewhere on the spectrum between “advertisement” and “vending machine.” How would a dispute involving an e-commerce website be resolved under the rules derived from cases such as *Boots*, *Carlill* or *Thornton*? When does a website bear more resemblance to a shop display than to a vending

---

<sup>52</sup> [1953] 1 QB 401

<sup>53</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401 at 407; see also: *Lacis v Cashmarts* [1969] 2 QB 400

<sup>54</sup> *Fisher v Bell* [1961] 1 QB 394

<sup>55</sup> see also: Federal Trade Commission, Bureau of Consumer Protection, *Anticipating the 21<sup>st</sup> Century: Consumer Protection Policy in the New High-Tech, Global Marketplace* (1996), p 23 for a discussion of how “cybercommunications” fuse traditional marketing techniques.

<sup>56</sup> The Law of Contract para 2.196

<sup>57</sup> *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 262, see also *Lefkowitz v Great Minneapolis Surplus Store* 86 NW 2d 689 (Minn 1957); *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225; see also M A Eisenberg, above at note 45 at 1167, 1168, who criticizes the counter-intuitive nature of the construction rule that shop displays are invitations, as such rule cannot be based on the understanding of the reasonable addressee.

<sup>58</sup> The Law of Contract par 2.199; *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163

<sup>59</sup> Atiyah p 58

machine? Whenever the delivery of a digital “product” or service occurs directly on the website, the resemblance to a vending machine is unquestionable.<sup>60</sup> Neither advertisements nor billboards enable the immediate execution of a contract: products cannot be obtained directly from a TV commercial or magazine ad. Websites reduce the distance between advertising and contracting. There is no separate act of leaving the site, contacting the merchant and ordering the product. Whoever inserts payment information or “clicks” the appropriate button is provided with the service, be it remaining on the website, downloading software or obtaining another benefit.

It is questionable whether the differentiation between offers and invitations should depend on the product sold, i.e. on the ability to form and perform the contract on the website. After all, the same music can be downloaded from iTunes or bought in the form of a CD on amazon.com. At the same time, it is difficult to maintain that ticket machines are offers while websites selling tickets are invitations - just because they are websites and not tangible machines displayed in public places. Websites may provide more content (i.e. be more certain and complete) and user input in both instances (payment and/or product selection) are identical. The web-merchant is willing to contract with everyone, the choice lies with the user. The resemblance to vending machines is particularly prominent in single-click purchasing scenarios.

### Analysis of positions

[5.16] Additional insight into the division between offers and invitations may be gained by analysing the positions of the contracting parties. The offer-acceptance model assumes that one party is the offeror and the other party is the offeree. Numerous assumptions flow from this “allocation” of roles. The position of an offeror carries both dangers and advantages.<sup>61</sup> Being the “master of the offer”, he or she prescribes the contents of the contract and the method of acceptance. At the same time, the offeror is bound by the offer and the ultimate choice whether to form a contract rests with the offeree.<sup>62</sup>

Web-merchants are traditionally advised to design websites as invitations to treat.<sup>63</sup> Such advice seems logical in light of the protective function of invitations and the ability to retain control over the formation process. Legal factors aside, some practical considerations must be taken into account. Due to the high risk of abandonment, web-merchants attempt to finalize on-line contracts in as few clicks as possible: the shorter the interaction with the user, the higher the likelihood of completing the transaction. Thus, web-merchants design the contracting procedure and prescribe the permissible user input to reduce the steps necessary to form a contract.

Consequently, the user’s responses are limited. The web-interface predetermines the form and content of their input. Websites may also “recognize” users from previous visits and display personalized content.<sup>64</sup> This may further limit the required input and shorten the formation process. In sum: web-merchants impose the contracting procedure and control user behaviour. The likelihood of negotiations or battle-of-forms situations is negligible: the contents of the contract are predetermined, users are technically precluded from modifying the terms.<sup>65</sup> Negotiations and the battle-of-forms are more likely in the case of email, where both parties can present their content.

It must be admitted that the possibility to negotiate is not a prerequisite of a valid contract. In the world of standard terms and mass-market transactions users rarely have the opportunity to propose their

---

<sup>60</sup> A Endeshaw, *Web Services and the Law: A Sketch of the Potential Issues* (2003) 11 IJT & IT 251

<sup>61</sup> Carter & Harland [208]

<sup>62</sup> M Yamaguchi, *above* at note 5 at 364

<sup>63</sup> Chissick & Kelman p 75, 76; S Jones, *Forming Electronic Contracts in the United Kingdom* (2000) 11 ICCLR 301

<sup>64</sup> Y Benkler, *Net Regulation: Taking Stock and Looking Forward* (2000) 71 U Colo L Rev 1203 at 1252

<sup>65</sup> Extreme situations, such as the injection of malicious code, are excluded from this discussion.

own terms. Furthermore, terms are often accepted by the party who initially proposed them.<sup>66</sup> The limitations imposed on the other party become particularly visible in web-based transactions but are not necessarily Internet-specific. The inability to respond in any other manner than that prescribed by the web-merchant and the limited user input brings to mind vending machines.

Web-merchants generally reap the benefits of both positions: offeree and offeror. They effectively retain mastery of the offer by imposing the terms of the contract, the method of acceptance and the whole contract formation process. They also retain the final choice whether to contract. If a website is regarded as an invitation, it is the user who assumes the position of the offeror. He or she, however, may not enjoy any of the advantages inherent in this position.

Moreover, web-merchants do not necessarily require the protective function of invitations: the risk of over-exposure can be prevented by technological means. E-commerce applications can be programmed not to accept orders of goods low on stock and dynamically change product information in real-time to reflect the number of items available.<sup>67</sup> Furthermore, as digital products or the contents of the website never run out of stock, the risk of over-acceptance is often absent. It can also be assumed that in the majority of circumstances the final choice regarding whether to contract need not be retained: why would the web-merchant refuse to contract in a mass-market transaction where the identity of the other party is generally irrelevant and almost impossible to verify? The reservation of such choice is only necessary when the creditworthiness of the other party must be examined.

Due to the multiplicity of transacting mechanisms and interface designs, it is impossible to state one universal rule. Websites fit under different categories and their comparison to advertisements or virtual shops often leads to opposite results. The general reluctance to hold manifestations of intention as binding must be weighed against the fact that many websites operate like vending machines. The contracting procedure is automated, user input is restricted, both the terms of the contract and the contracting process are strictly controlled by the web-merchant. The risks of overexposure can be counterbalanced by technological protections.

Provided the contents are certain and complete and the transacting procedure does not require recourse to external methods of communication, the intention to be bound derives from the immediate ability to execute the transaction:

Where a web site offers services to be supplied 'on-line,' such as down-loadable software, or information services, in return for a customer's agreement to the supplier's terms and/or provision of credit card details, so that it appears that the supplier is willing to contract with anyone who fulfils its terms, the Web site may be construed as an offer in law.<sup>68</sup>

## IS THERE AN "ACCEPTANCE"?

[5.17] The next step in the discussion is determining the existence of an acceptance. The preceding paragraphs analysed websites. The following sections concern communication methods in general. Traditionally, legal analysis focuses on acceptances in relation to the time of formation. The latter depends on whether acceptance is effective upon dispatch or receipt.<sup>69</sup> The choice between these options largely depends on the method chosen to communicate acceptance. The anterior question is: is there an acceptance? The choice of method bears not only on the time of formation but also on the existence of the

---

<sup>66</sup> Carter & Harland [212]; Treitel p 31

<sup>67</sup> see Chapter 3 [3.8] [3.19]

<sup>68</sup> The Law of Contract para 2.198

<sup>69</sup> See Chapter 6

contract. The following paragraphs focus on whether the act performed in response to an offer is in fact an acceptance. The answer to this question can only be obtained by construing the offer.

### Method of Acceptance

[5.18] An offer may stipulate that acceptance be communicated by a particular method.<sup>70</sup> Absent explicit instructions, the circumstances of the offer may indicate what method should be used.<sup>71</sup> The offeror can prescribe any act to constitute acceptance.<sup>72</sup> Situations where acceptance is communicated via the prescribed method and where both offer and acceptance are communicated in the same manner lend themselves to straightforward analyses. Complications arise where (a) the offeree accepts via a method that is different from that requested by the offeror ("alternative acceptance") and (b) where the offer is silent as to the method and acceptance is communicated via a different method than the offer. Two questions arise: Are alternative acceptances legally effective? When can acceptance be communicated by electronic means?

The above questions acquire additional complexity in the changed communication landscape. When the leading cases were decided the methods of communication were few: addresses and numbers were tied to specific devices or locations, letters, telegrams or telexes were delivered to an office or home address. Nowadays, contracting parties are exposed to many different channels and methods of communication. The average person has several communication terminals, such as mobile phones, fax machines, desktop and laptop computers. Apart from a home and an office address, people have multiple electronic addresses and usually two phone numbers, fixed line and mobile. The multiplicity of addresses and communication devices creates potential confusion for both contracting parties.<sup>73</sup>

Acceptance can be sent by post, via sms, instant messenger, email, to name a few methods. Acceptance can be received in multiple formats on various devices. Electronic addresses are not tied to specific devices or locations. Emails may be received on mobile phones, voice calls can be terminated on computers. Some devices and addresses introduce problems of availability, reliability and cost. The offeror may request acceptances to be sent to a web-mail account due to its universal accessibility, ease of monitoring and generous storage. Other correspondence can be directed to a secure corporate account, which is accessible only from within the company network.

The effectiveness of the act done in response to the offer depends on the construction of the offer.<sup>74</sup> The on-line environment does not change anything in this regard, but introduces new elements into the discussion. The offeree's convenience must be weighed against transactional security and any potential prejudice to the offeror. The latter chooses the method of acceptance based on the required immediacy of response and its intrusiveness.

Prescribing a method of acceptance is reminiscent of communication rules in EDI trading partner agreements, where parties agree on the method of communicating contractual statements. "Communication rules" can also be found in option contracts, where the exercise of an option is often prescribed, with regards to both form and content,<sup>75</sup> or in other long-term arrangements where contractual notices must be made in a specific format or manner.<sup>76</sup> Although the exercise of an option or notification

<sup>70</sup> *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1970] 1 WLR 241 at 245

<sup>71</sup> *The Law of Contract* para 2.226

<sup>72</sup> A L Corbin, above at note 6 at 199

<sup>73</sup> see, e.g. E Wilson, Email becomes just one tool among many, *The Australian*, October 10, 2006, IT Business, p 1: "users are having difficulty managing uncoordinated voice calls, email, SMS, instant messaging, wireless email and voice over the internet protocol."

<sup>74</sup> *Cheshire, Fifoot and Furmston* p 55

<sup>75</sup> *Bowman v Durham Holdings Pty Ltd* (1973) 131 CLR 8

<sup>76</sup> *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749

occur on the basis of a pre-existent agreement, both are useful for the discussion. The contents of an offer are construed identically as the contents of a contract.

Similar problems arise in the case of “designation” of information systems or electronic addresses, where the effect of an acceptance may be delayed or conditional depending on whether the offeree complied with the offeror’s request and sent the electronic message to a specific account or information system.<sup>77</sup> Two situations are analysed: first, the offer prescribes the method of acceptance; second, the offer is silent.

### Offer prescribes the method of acceptance

[5.19] The offeror may request any method of acceptance and demand compliance.<sup>78</sup> Acceptance is effective as soon as the offeree performs the stipulated act.<sup>79</sup> If the offeror insisted on a particular method, “a purported acceptance in any other manner is not an acceptance.”<sup>80</sup> A popular view, however, is that where an alternative method is as timely and not less disadvantageous to the offeror, that method will suffice.<sup>81</sup> If an offeror requests a reply “by return of post,” a reply by telegram, or some other means that is received no later than the letter by post, is effective.<sup>82</sup> Accordingly, even when the method is prescribed, the offeree may use a different method, which is “just as good.”<sup>83</sup> It is claimed that in order to preclude other methods, clear words must be used - the method must be indicated as exclusive.<sup>84</sup> Only in the latter instance can alternative acceptances be regarded as ineffective.<sup>85</sup> The problem was discussed mainly in relation to option contracts, where the exercise of the option did not comply with the prescribed manner.<sup>86</sup> The controversy boils down to whether precise observance of the method of acceptance is necessary and whether an indication of exclusivity is required to preclude the effectiveness of alternative acceptances.<sup>87</sup>

The effectiveness – or permissibility – of alternative acceptances concerns the very existence of a contract. This discussion is therefore more than an academic exercise concerning the construction of offers. The permissibility of alternative acceptances raises practical and theoretical objections.

### Practical Considerations

[5.20] Account must be taken of the multiplicity of electronic addresses, accounts, telephone numbers and devices by which a person can be reached. Statements that the method needs to be “just as fast or faster” must be approached with caution. Speed alone is not determinative. Convenience, cost and accessibility must also be taken into account. If it were speed alone, the offeror would request acceptance by phone. It cannot be claimed that acceptances by phone or instant messengers are admissible by default. Accordingly, arguments to the effect that offerees can protect themselves against revocation by

<sup>77</sup> see Chapter 7

<sup>78</sup> *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1970] 1 WLR 241 at 245

<sup>79</sup> *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1970] 1 WLR 241 at 245; *Dunlop v Higgins* (1848) 1 HLC 381 at 400; *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216 at 236

<sup>80</sup> *Carter & Harland* [228]

<sup>81</sup> S Christensen, *Formation of Contracts by Email – Is it Just the Same as the Post?* (2001) QUT LJJ at 29; Willmot, *Christensen & Butler* [3.435]

<sup>82</sup> *Tinn v Hoffman & Co* (1873) 29 LT 271

<sup>83</sup> *The Law of Contract* para 2.226

<sup>84</sup> *Carter & Harland* [228]

<sup>85</sup> *The Law of Contract* para 2.226

<sup>86</sup> *White Trucks Pty Ltd v Riley* (1948) 66 WN (NSW) 101; *Yates Building Co Ltd v R J Pulleyn & Sons (York) Ltd* (1975) 119 Sol Jo 370; *Mobil Australia Ltd v Kosta* (1969) 14 FLR 343; *Spectra Pty Ltd v Pindari Pty Ltd* [1974] 2 NSWLR 617

<sup>87</sup> *Cheshire & Fifoot* p 134



reverting to faster methods of communication are inherently flawed.<sup>88</sup> It is also proposed that a request for a reply 'by return' post should be interpreted as indicating the need for a "prompt reply rather than as stipulating that acceptance must be by letter and no other means."<sup>89</sup> This argument holds true if the acceptance arrives no later than a letter would normally reach its destination. It does not, if the acceptance is sent via a method, which is equally fast but arrives at a device or location, which are not monitored or accessible by the addressee.<sup>90</sup>

Regarding "more advantageous" methods, the prescribed method is the most advantageous. There can be nothing more advantageous than what the offeror requested. The offeror prescribes a particular method of acceptance in order to monitor only one communication channel, address or device.<sup>91</sup> The liberal view disregards the fact, that the offeror's request may be based on a willingness to accept the risks inherent in a given method.<sup>92</sup> Even if electronic methods are fast they are often less reliable. Certain methods imply the use of a particular format and may therefore be stipulated for evidentiary purposes.<sup>93</sup>

Taking into account that the offeror knows his or her whereabouts and communication facilities at the stipulated time of acceptance, prescribing a specific method may be the only means of ensuring actual communication. An alternative acceptance may not be received or may be received with an undesirable delay: anticipating that his or her mobile phone will be out of range, the offeror requests acceptance by fax, which guarantees delivery to the office and immediate handling by relevant staff. Similarly, the offer may require the firing of a cannon knowing that the offeror will be in a particular area where the shot can be heard. Ultimately, the motives for the request are irrelevant. A liberal approach was easy to maintain in cases like *George Hudson Holdings Ltd v Rudder*,<sup>94</sup> where the personal delivery of the letter occurred to the same address as indicated in the request for a mailed acceptance. The effectiveness of the acceptance would have been questionable had it been delivered to a branch office or broadcast on the radio.

Another illustration are websites, where users order goods by filling out forms.<sup>95</sup> A liberal approach to alternative acceptances would imply that users may disregard the web-based transacting process and use a different channel to place their orders. A number of undesirable consequences would follow. First, the benefits of automation would be lost as email and some other communication methods are generally more cumbersome to manage on a mass-market scale. Web-merchants would be forced to acquire additional resources, both human and technical, to handle incoming communications. The existence of many smaller web-merchants would be threatened. After all, the success of e-commerce lies in automation and the facilitation of the shopping experience. E-commerce giants like amazon.com provide email addresses for customer relationship management, not for ordering books. The possibility to abandon the web-based transacting process generates confusion for both parties and reduces the benefits of automation. Users who communicate "outside" of the prescribed procedure risk that their orders are never processed or processed with considerable delay.

---

<sup>88</sup> B A Eisler, *Default Rules For Contract Formation by Promise and the Need for Revision of the Mailbox Rule* (1990/1991) 79 Ky LJ 557 at 567

<sup>89</sup> Carter & Harland [228]

<sup>90</sup> *Eliason v Henshaw* (1819) 4 Wheaton 225, offeror requested acceptance by wagon, which brought the offer. Offeree thinking the post would be speedier, accepted by mail. He was wrong. No contract was formed. See also: *Frank v Knight* (1937) OQPD 113

<sup>91</sup> see Treitel p 31, who states that the offeror prescribes the method of acceptance with a particular object in view.

<sup>92</sup> D H Evans, *The Anglo-American Mailing Rule: Some Problems of Offer and Acceptance in Contracts by Correspondence* (1966) 15 ICLQ 553 at 560, see also: *Financings Ltd v Stimson* [1962] 1 WLR 1184 at 1186, offeror not bound by oral acceptance if acceptance in writing was requested.

<sup>93</sup> *The Law of Contract* para 2.226, citing *Walker v Glass* [1979] NI 129

<sup>94</sup> (1973) 128 CLR 387 at 392, 395

<sup>95</sup> Assuming for the moment that the ordering form constitutes an acceptance.

## Theoretical Considerations

[5.21] The adequacy of the offeree's response can also be evaluated from a theoretical perspective. The following arguments can be raised against the permissibility of alternative acceptances.

First, the offeror is entitled to insist that he or she is not bound unless acceptance is communicated in the requested manner.<sup>96</sup> It is argued, however, that as the instruction is for the offeror's benefit, he or she may waive it and recognize another method by making no objection to a non-complying acceptance.<sup>97</sup> Unquestionably, the offeror may waive the right to insist on the stipulated method. The offeror may also decide not to. Consequently, the existence of the contract is left to his or her discretion: the legal effect of the act purporting to be "acceptance" is not automatic but conditional on its (explicit or implied) recognition by the offeror.

Second, it can be claimed that if acceptance occurs otherwise than by prescribed method, the offer is "never accepted in accordance with its terms."<sup>98</sup> The method can be regarded as part of the offer and acceptance should mirror the offer unconditionally.<sup>99</sup> An "alternative acceptance" can also be regarded as a counter-offer, which is then accepted by the original offeror.<sup>100</sup> Acceptance of the counter-offer is left to the discretion of the original offeror. Offerors may be estopped from denying formation or their insistence on the prescribed method may be regarded as unreasonable. Both the "waiver" and the "counter-offer" approach encourage speculation at the expense of the offeree.

Third, a liberal approach necessitates the establishment of principles regarding the moment of effectiveness of alternative acceptances: are they effective on dispatch, receipt or on coming to the offeror's actual attention? While only the latter solution appears fair to the offeror, it is disadvantageous to the offeree as actual notification is difficult to prove and injects subjective elements into the discussion.<sup>101</sup>

Fourth, if offerors can prescribe any sign to constitute acceptance or request acceptance within a specified time, it must be assumed that they can also request - and insist on - a specific method of acceptance. Prescribing the method can be regarded as a way of stipulating the time and the sign. The request for the offer to be accepted within a specified time is interpreted strictly: if acceptance occurs after the expiry of the offer, there is no contract. The prescribed method of acceptance should be treated identically. Acceptance must be expressed in accordance with the offeror's request: a notice delivered on pink paper is not effective if it was to be delivered on blue paper.<sup>102</sup> After all, the offeror may have trouble reading text from specific background colours.

Ultimately, what is the difference between prescribing a method and stating its exclusivity? Offers rarely expressly prescribe a method as exclusive for the simple reason that the average offeror does not realize the legal complexity of the problem. A liberal approach forces the offeror to monitor all communication devices and addresses - even those, which are not held out for contracting purposes. If the

<sup>96</sup> *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1970] 1 WLR 241 at 246

<sup>97</sup> *Cheshire & Fifoot* [3.42]; *Treitel* p 31

<sup>98</sup> *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1970] 1 WLR 241 at 245; see also: *United Dominion Trust (Commercial) Ltd v Eagle Aircraft Services* [1968] 1 All ER 104 per Lord Denning at 107; *Phillips Fox (A Firm) v Westgold Resources NL & Ors* [2000] WASCA 85

<sup>99</sup> *Carter on Contract* [03-220]

<sup>100</sup> *Carter & Harland* [228]; *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* [1959] SR (NSW) 122; *Duncan Properties Pty Ltd v Hunter* [1991] 1 Qd R 101

<sup>101</sup> See Chapter 7

<sup>102</sup> *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 329-330



offer is not clear, the offeror must bear the risk that the offeree accepts by an unexpected or uninvited method. If, however, the offer prescribes the method, the offeree must comply.

A liberal approach provides no transactional security to either party. Instead of leaving effectiveness to the offeror's discretion, be it in the form of waiver, acceptance of counter-offer or making acceptance conditional upon coming to his or her actual attention, alternative acceptances should be regarded as ineffective from the outset. Otherwise, one is left to a post factum evaluation whether the offeror's insistence on a particular method or the exercise of his or her discretion were reasonable and whether the method actually chosen by the offeree caused prejudice to the offeror.

When the offeror prescribes the method of acceptance and the offeree accepts via a different method, it can be questioned whether such act constitutes acceptance. Alternative acceptances should be ineffective, they cannot conclude the contract formation process.<sup>103</sup> The offeror is entitled to recognize solely those acceptances, which are communicated via the requested method.

### Offer does not prescribe method of acceptance

[5.22] If the method is not prescribed, "acceptance can be given by the same or an equally expedient method"<sup>104</sup> as adopted for the offer. Acceptance sent by ordinary post was held ineffective where the offer was made by telegram, as the use of telegram was an indication that a prompt reply was expected.<sup>105</sup> Absent instructions, the method must be "reasonable."<sup>106</sup> It is safest to accept via the same method as used by the offeror.<sup>107</sup> The practical questions are: how far can the offeree depart from the offer? When is it reasonable to accept by electronic means?

The post is usually perceived as reasonable.<sup>108</sup> Facsimile has been afforded similar treatment.<sup>109</sup> Where an offer is made electronically and no form of acceptance is specified, acceptance must generally be by electronic means.<sup>110</sup> If, however, the offer is not made electronically, it can be doubted whether email or an instant message can be regarded as reasonable. "Factors to be considered are the speed and reliability of email, the prior course of dealing between the parties and the usage of trade."<sup>111</sup> The issue is part of a larger problem: when can it be assumed that the other party agreed to communicate by electronic means?<sup>112</sup> Absent prior dealings, responding to an offer made by traditional means with an electronic "acceptance" raises objections. Everything depends on the terms of the offer and the communication information (such as address, telephone number) provided by the offeror.

<sup>103</sup> Willmot, Christensen & Butler [3.435]

<sup>104</sup> S Christensen, above at note 81 at 29

<sup>105</sup> Quenerduaine v Cole (1883) 32 W R 185

<sup>106</sup> see also Restatement (Second) Contracts par. 65 (1981); Polhamus v Roberts, 175 P 2d 196 (NM 1946), holding that authorized methods of acceptance are determined by what can reasonably be expected by the contracting parties; Farley v Champs Fine Foods Inc 404 NW 2d 493 (ND 1987), holding that any "reasonable and usual" mode of acceptance may be used where the mode of acceptance is not specified by the offeror."

<sup>107</sup> Hayne v Cook 109 NW 2d 188 (Iowa 1961); S A Williston, A Treatise on the Law of Contracts, 4<sup>th</sup> ed, New York 1991, para 6.35

<sup>108</sup> In Parks Enterprises v New Century Realty Inc 652 P 2d 918 (Utah 1982); acceptance by mail was held unreasonable where vendor's agent personally delivered offer to vendor and counteroffer to purchaser and where counteroffer required acceptance within 48 hours.

<sup>109</sup> Hofer v Young 45 Cal Rptr 2d 27, 29 (Ct App 1995)

<sup>110</sup> D Campbell, ed, Law of International On-Line Business, A Global Perspective, London 1998, p 78

<sup>111</sup> P Fasciano, Internet Electronic Mail: A Last Bastion for the Mailbox Rule (1997) 25 Hofstra L Rev 971 at 995

<sup>112</sup> The problem is particularly prominent in the UETA, which does not apply unless the parties have agreed to transact by electronic means; see UETA Section 5

If the offer is oral and it is clear that an oral acceptance is expected, the offeree must ensure that acceptance is understood by the offeror.<sup>113</sup> If the offeror desires actual communication then any method requiring additional steps, such as retrieval from a mailbox or mail-server, is undesirable. Unless specifically instructed or where prior communications originated in electronic form, the choice of an electronic method of communication cannot be regarded as reasonable.

### Conclusion:

**[5.23]** This chapter described some problems of applying the offer-acceptance model in the on-line environment. It opposed attempts to modify this model or to introduce media- or technology specific presumptions based on the fact that a statement was made, for example, on a website.

Online transactions are different to the extent that intention is manifested differently. Should on-line contracts, however, be analysed differently than real-world contracts? Do the differences warrant a change in the analytical tool? The answer to both questions is negative. There are, however, additional considerations to be taken into account when applying the offer and acceptance model in the on-line environment.

The question whether a website constitutes an offer or an invitation must be approached like any other manifestation of intention. Intention is always determinative. It is evaluated on the basis of the contents presented in the body of an email or posted on a website. Additional factors must be taken into account: the technical restrictions imposed on the user and the technological protections available to the merchant. One must resist the temptation to exaggerate the differences and to create a parallel legal regime for on-line transactions. If the contents of a website are sufficiently certain and complete to evince an intention to be bound, the website constitutes an offer. If the transaction can be executed on-line in its entirety and the final choice whether to contract rests with the user, websites display more similarity to vending machines than to shopping displays.

If the method of acceptance is prescribed, alternative acceptances should be ineffective and preclude contract formation – even absent an indication of exclusivity. If the method of acceptance is not prescribed, the use of electronic methods of communication may not always be perceived as reasonable, especially if the offer was expressed by traditional means. The increasing complexity of the communication landscape, particularly regarding the multiplicity of terminating devices, addresses and communication risks, dictates a more strict approach to the offeree's choice of method of acceptance.

---

<sup>113</sup> Cheshire, Fifoot & Furmston p 55