

# E-COMMERCE and CONTRACT LAW

By Timothy Beale

E-commerce presents challenges not only for traditional areas of law, such as taxation law (as seen by the recent controversy over the taxation of online retail shopping<sup>1</sup>), and intellectual property, but also for contract law. The inherent characteristics of the internet mean that e-commerce challenges fundamental concepts of contract law (for example, that each of the parties has contractual capacity to enter into binding legal relations).

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**A** contract is a contract whether it is consummated in the cyber environment or in the physical environment. In essence, there is no difference from a legal perspective, but from a commercial position many differences do arise.

Australian law already recognises contracts formed using facsimile, telex and other similar technology. The principles are the same in the case of both paper and electronic communications. However, undertaking e-commerce in an online environment creates special rules that the parties to the contract should be aware of. One key issue is that of the jurisdiction in which the contract is made and where it can be enforced, which can have a significant bearing on the nature of the contract.

## CONTRACT ELEMENTS

As a general rule, each of the following elements must be satisfied to create an enforceable contract:

- an offer is made by one party (the offeror) to another person or persons (the offeree);
- the offer is accepted in unequivocal and unconditional terms by the offeree and acceptance of the offer is communicated to the offeror;
- consideration is provided to support the contract;
- there is an intention to be legally bound on the part of both offeror and offeree; and
- each of the parties has contractual capacity to enter into

binding legal relations.

Provided these general elements are present, a contract may be formed by a variety of methods, including by oral agreement between the parties or in documentary form – for example, through the exchange of letters or contract documents. The same elements must be present where a contract is formed through electronic communications. Generally speaking, there are no requirements for the contract to take a particular form (for example, in writing), or be carried out by following specified procedures. Nevertheless, there are some kinds of contracts for which form requirements must be met if the contract is to be valid and enforceable.

Uncertainties arise when the established common law principles are applied to the formation of e-contracts in the online context. As e-contracts rarely involve face-to-face bargaining between the parties, or the exchange of documents in hard copy form, it is necessary to consider a range of issues including: how requirements that documents be in writing and signed are to be met, authentication of a party's identity and signature, message integrity, non-repudiation of messages, contractual capacity, and validation of a party's authority to enter into the contract.

## Offer

Before a contract can arise, a party must first make an offer to either another person or persons or, in some cases, >>

## Special rules apply to contracts that are transacted in the online environment.

a class of persons. The offer must be complete in its terms. This does not mean that the offer has to detail in full all of the terms that govern the relevant transaction because, in many cases, some or all of the terms governing the resulting contract can be implied either by statute, or by trade association, or through a prior course of conduct. But the general position is that the offer must contain all the essential terms that will govern the transaction.

Once the offer has been accepted, only those terms that have been expressly stated in the offer or which can be implied will be binding on the offeree. As well as terms that are expressly stated, further terms can often be implied through the operation of statutes, by trade association or on the basis of a prior course of conduct between the parties. For example, certain terms will be implied into a sale of goods transaction by the operation of the *Sale of Goods Act*, unless the terms are specifically excluded. The *Sale of Goods Act* will imply that the goods are of merchantable quality, are fit for the purpose and, if sold by sample, the goods correspond with the sample provided. Likewise, the *Competition and Consumer Act 2010* (Cth) implies certain non-excludable conditions and warranties into contracts for the supply of goods and services to a consumer.

Further, it is important that the terms and conditions of the offer are complete at the time the offer is made. After acceptance has been communicated, only those terms that are expressed in the offer will be binding upon the offeree, unless implied by law. This issue was considered in the case of *Specht v Netscape Communications Corp.*<sup>2</sup>

### Acceptance

The general position is that for an acceptance to be effective, it must be communicated to the offeror. Again, there are exceptions: where offers are made to the world at large, or where acceptance by the offeree's conduct is required or implied.

As for when acceptance is effective, *Brinkibon v Stahag Stahl und Stahlwarenhandels-gesellschaft Mbh*<sup>3</sup> provides clear advice that when instantaneous communication is involved, then acceptance will be effective at the time of the receipt of the communication, and not at the time of sending. This case involved a series of telex communications between two parties located in different jurisdictions. The House of Lords endorsed the views of Lord Denning in *Entores Ltd v Miles Far Eastern Corp*<sup>4</sup> that, for acceptance to be effective, the communication must be received by the offeror, in which case the contract is made when and where the acceptance is received.

Online contracting typically involves the electronic communication of offers and acceptances over the internet in the form of either:

- an exchange of email messages between the parties using the Simple Mail Transfer Protocol (SMTP) to compose and send messages and Post Office Protocol (POP) or Internet Message Access Protocol (IMAP) to retrieve messages from a mail server; or
- direct data communications through a web browser using the Hypertext Transfer Protocol (HTTP), such as where a customer completes an online order form and clicks a button to finalise the transaction.

Views differ as to whether the instantaneous communication or the postal rule applies to contracts formed through acceptances sent by email and other web-based electronic communications. The question has not been judicially considered in Australia and is not addressed in the *Electronic Transactions Acts*. There is support for the view that the 'receipt' rule developed in relation to the formation of contracts by instantaneous communications using earlier technologies, such as the telephone and telexes, should also apply to contracts formed by means of email and other web-based communications. If this approach prevails, e-contracts would be formed at the time and place the acceptance is received by the offeror's web servers.

The *Electronic Transactions Act 1999* (Cth)5 (ETA) contains default rules to determine the time and place of dispatch and receipt of an electronic communication that apply in the absence of any alternative agreement on these matters. These default rules are to be updated by the *Electronic Transactions Amendment Bill 2011* (see below). All amendments retain the proviso that, in all cases, parties can agree to alternative terms to determine the time and place of dispatch and receipt of electronic communications. For the purposes of contract law, the time of the dispatch and the receipt of an electronic communication are significant to the issue of contractual acceptance. In particular, these amendments will:

1. adopt the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 rule clarifying that dispatch occurs at the time an electronic communication leaves the information system of the originator;
2. provide that where an electronic communication does not leave the information system of the originator, the time of dispatch is deemed to be when the communication is received by the addressee;
3. confirm that the default rules for determining the time of dispatch are not affected if the information system supporting an electronic address is in a different location from where the electronic communication is sent, which could be in a different location or jurisdiction;
4. provide that the time of receipt of an electronic communication is the time when it becomes 'capable of being retrieved' by the addressee at a designated electronic address; or, when sent to another electronic address, when the electronic communication is both 'capable of being retrieved', and the addressee has become aware that the electronic communication has been sent to that electronic address; and
5. replicate the existing provision to provide that the place

of dispatch and receipt of electronic communications is the place where the originator or addressee has its place of business.

**Consideration**

Consideration is a part of contractual law within common law jurisdictions. In *Dunlop Pneumatic Tyre Company Ltd v Selfridge & Company*,<sup>6</sup> it was described as: 'An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.' Generally, this requirement is easily satisfied. If a merchant offers to sell or barter some goods or services for other goods or services or cash, then there clearly is sufficient consideration to support the transaction. This may not necessarily apply to the online environment, as the goods or services are often provided free. It is not unusual for software to be offered at no charge. In certain circumstances, there is no consideration to support the alleged contract and, therefore, no contract ever comes into existence. If the offeror, namely the software-provider, desires to bind the offeree to certain terms and conditions of a licence (a contract), then there will need to be some consideration to support the transaction.

**Intention**

The general rule is that where the parties are in a domestic or social environment, there will be a presumption that the parties do not intend to create legal relations; but if the parties are not in a domestic or social environment the presumption is reversed, in that the parties are presumed to have the intention to create legal relations. Being only a presumption, it is open to either party to show that even though the environment was commercial in nature, there are extenuating circumstances to establish that there was never any intention to create legal relations. This is best exemplified in *Rose and Frank Co v JR Crompton and Bros Ltd*.<sup>7</sup>

**Capacity**

It is a basic principle of law that if an entity does not have the capacity to enter into a contract, then that entity cannot be brought to bear on the terms of the agreement. The lack of capacity has primarily centred upon one party, through the operation of the law, not having the capacity to be bound to a contract. The law generally provides that a minor does not have the capacity to contract, except where the contract relates to necessities of life such as basic clothing, food, health and accommodation.

**CLICK-WRAP AGREEMENTS**

The feature of the click-wrap agreement format is that the website-user is typically presented with all the terms and conditions of the agreement and is required to view or scroll through them and to click on the 'I agree' or 'I accept' button to denote their assent before completing the transaction. The click-wrap arrangement was described by the US District Court in *Specht v Netscape Communications Corp*:<sup>8</sup> 'A click-wrap license presents the user with a message

on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked.' 'Browse-wrap' describes the situation where a website-user is given the opportunity of viewing the seller's terms and conditions but is not required to click an 'I agree' or 'I accept' button to indicate assent to the terms and conditions before finalising the transaction online, such as by submitting an order for a product or service. In the browse-wrap scenario, the website may contain a hypertext link or a button saying 'click here for legal terms', which the internet-user may choose to click or ignore. It is only if the internet-user chooses to click on the hyperlink or the button that they are taken to another webpage where the terms and conditions governing the transaction are displayed. Early US cases rejected the validity of shrink-wrap licences on the ground that terms and conditions contained in materials inside the packaging and which had not been brought to the purchaser's attention at the time of formation of the contract were not incorporated into the contract. However, by the late 1990s the courts began to view shrink-wrap terms more favourably, and in cases decided by the US Court of Appeals for the Seventh Circuit they were held to bind a purchaser. In *ProCD Inc v Zeidenberg*,<sup>9</sup> the court held that shrink-wrap licences are enforceable in certain circumstances. >>

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**PAYMENT ON RESOLUTION**

ProCD had developed a product known as Select Phone (the compilation of over 3,000 telephone directories on CD), which was sold in stores for \$150. ProCD invested over \$10 million in developing this product. The packaging of the consumer version of the CD purchased by the defendant indicated that the software was subject to restrictions set out in the licence included with the documentation inside the box. The licence also appeared on the screen when the software was used and would not allow users to proceed until they indicated assent to the terms of the licence. The licence terms expressly stated that the application program or information should not be sold for commercial purposes. Zeidenberg purchased the CD and loaded it on to a website where he sold it at a price less than that charged by ProCD. When he was sued for breach of contract, he argued that nothing in the contract prevented him from selling the information. He argued that, at the point of purchase, it was impossible to read all the terms of the shrink-wrapped licence and that, since he had no adequate notice of those terms, he was not bound by them. Easterbrook J held that the licence terms were binding on the customer even though they had not been seen at the time the product was purchased. The court held that the economics of the new information economy suggested that the defendant should be bound by the shrink-wrapped terms and, furthermore, if he did not like them, he could have taken the CD back. However, by acquiescing and choosing to keep and use the product, the defendant was bound by the terms.

Browse-wrap contracts will be enforceable if the offeree has sufficient notice of the terms of the agreement prior to completing the transaction. The decision of the Second Circuit in *Register.Com, Inc v Verio, Inc*<sup>10</sup> distinguished *Specht* and held that *Verio* was prohibited from using information obtained from Register.com's domain name database in violation of a browse-wrap contract. The Register.com web site contains a WHOIS facility which enables website-users to submit a query to the domain name database, but users did not see the terms of use until after the query results were provided. A website-user was not required to click a button to accept the terms of use, or otherwise indicate that s/he assented to them. Nevertheless, the court held that *Verio* was bound by the terms of use because it was using Register.com's WHOIS data with full knowledge of the terms on which Register.com offered access to its database. The circumstances could be distinguished from those at issue in *Specht*, where a website-user who downloaded Netscape's software had not necessarily seen the terms of the offer.

### ELECTRONIC TRANSACTIONS LEGISLATION

In order to ensure that transactions are legally valid and enforceable if done in electronic form, numerous countries worldwide have enacted legislation governing the enforceability and conduct of electronic transactions. The common feature of such laws is that they eliminate barriers to doing most transactions in electronic form. They authorise the conduct of most transactions in electronic

form and make it clear that transactions will not be held to be unenforceable simply because they are conducted in electronic form.

The electronic transactions legislation enacted by the Commonwealth, states and territories adopts a 'light-handed' or minimalist approach to the development of a regulatory regime for electronic transactions. It provides no legislative guidance on how and when the requisite elements of a valid contract are established in the electronic environment. While the legislation sets out rules governing the time and place of receipt and the place of despatch of electronic communications, it does not address the time and place of contract formation.

The aim of the electronic transactions legislation enacted by the Commonwealth, states and territories was to remove existing legal impediments to the use of electronic transactions, by ensuring that a transaction would not be invalid simply because it involved an electronic communication. The Acts do not attempt to comprehensively set out all the rules covering electronic commerce, but are instead intended to provide a regulatory framework to:

- facilitate the use of electronic transactions;
- promote business and community confidence in the use of electronic transactions; and
- enable business and the community to use electronic communications in their dealings with government.

### Electronic Transactions Amendment Bill 2011

The Electronic Transactions Amendment Bill 2011 (ELTA Bill), which was introduced into the Commonwealth Parliament on 9 February 2011, aims to increase certainty for international trade and encourage the further growth of electronic commerce, such as online retailing.

The ELTA Bill amends the ETA by clarifying the traditional rules on contract formation to address the needs of electronic commerce, including the recognition of automated message systems, clarification of an invitation to treat, rules to determine the location of the parties, updating the electronic signature provisions and default rules for time and place of dispatch and receipt.

To implement the model provisions set out in the Bill, states and territories will seek to amend each of their respective *Electronic Transaction Acts* within the next 12 months.

The United Nations Convention on the use of Electronic Communications in International Contracts 2005 was adopted by the UN General Assembly on 23 November 2005. It builds on the Model Law of 1996, with the purpose of facilitating international trade by offering practical solutions for issues arising out of the use of electronic communications in the formation or performance of contracts between parties located in different countries. It aims to enhance legal certainty and commercial predictability, but does not otherwise purport to vary or create contract law.

Implementation of the Convention does not require significant changes to Australia's electronic transactions

laws. The amendments will apply to both domestic and international contracts.

### ELECTRONIC SIGNATURES

A requirement under a Commonwealth, state or territory law for a person's signature to be provided will be satisfied by means of an electronic communication that uses a method to identify the person and indicate the person's approval of the information communicated.<sup>11</sup> The person whose signature is required must consent to this requirement being met by the method proposed to be used to make the electronic communication. Where the signature is required to be given to a Commonwealth entity, the method used to make the electronic communication must comply with any information technology requirements imposed by that entity. If other legislative provisions are enacted setting out more specific requirements governing signatures in electronic communications, those specific provisions will override the *Electronic Transactions Acts*.<sup>12</sup>

The ELTA Bill provides for the legal recognition of electronic signatures (irrespective of the method used) by establishing general conditions under which an electronic signature is regarded as authenticated with sufficient credibility and enforceability.

In particular, it amends the ETA to provide that an electronic signature must be capable of indicating the signatory's 'intention' in respect of the information contained in the electronic communication, rather than the signatory's 'approval' of the information contained in the electronic communication.

The ELTA Bill also aligns the domestic electronic transactions regime with the Convention by confirming that the notion of 'signature' does not necessarily imply a party's approval of the entire content of the communication to which the signature is attached. Instances where the law requires a signature that does not indicate the signatory's 'approval' of the information contained in the electronic communication include, for example, the execution of a particular document that needs to be witnessed. In these circumstances, the witness' signature does not (and is not intended to) indicate the signatory's approval of the contents of the document. It merely identifies the signatory as a witness to the execution of the document.

### ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

In 2000, UNCITRAL resolved that, upon completion of its Model Law on Electronic Signatures, the Working Group on Electronic Commerce would examine a number of issues, including a possible convention to remove obstacles to electronic commerce in existing conventions, dematerialisation of documents of title, and electronic contracting. Following adoption of the Model Law on Electronic Signatures, in 2001 UNCITRAL started to prepare an international instrument dealing with electronic contracting, which would also aim at removing obstacles to electronic commerce in existing uniform law conventions and trade agreements.

The United Nations Convention on the Use of Electronic Communications in International Contracts (the UN Convention), drafted by UNCITRAL and adopted by the General Assembly of the UN on 23 November 2005, is now open for signature and ratification by all countries. The Convention is intended to enhance legal certainty and commercial predictability where electronic communications are used by private parties engaging in international e-commerce. Also relevant is the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Sales Convention), which applies to contracts for the sale of goods between parties in different countries that are signatories to the Convention, with the exception of goods bought for personal, family or household use and auction sales.

Wide use of electronic authentication and signature methods may be a significant step towards reducing trade documentation and the related costs in international transactions. While to a very large extent the pace of developments in this area is determined by the quality and security of technological solutions, the law may offer a significant contribution towards facilitating the use of electronic authentication and signature methods. The UNCITRAL Model Law on Electronic Commerce has become the single most influential standard for legislation in this area, and its wide implementation has helped to promote an important degree of international harmonisation. Wide ratification of the UN Convention would provide even greater harmonisation, by offering a particular set of rules for international transactions.<sup>13</sup> ■

This article is based on chapter 7 in B Fitzgerald, A Fitzgerald, T Beale, G Middleton and Y Lim, *Internet and E-commerce Law: Technology, Law and Policy*, Sydney Thomson LawBook Co, 2007.

**Notes:** 1 See various media reports; for example, 'Gerry Harvey calls for GST on online purchases', *The Age*, 23 November 2010 <http://www.theage.com.au/business/gerry-harvey-calls-for-gst-on-online-purchases-20101123-1850x.html>. Michael Pascoe, 'Poor Gerry Harvey - tell him he's dreaming', *The Age*, 24 November 2010 <http://www.smh.com.au/business/poor-gerry-harvey-tell-him-hes-dreaming-20101124-186nm.html>. 2 *Specht v Netscape Communications Corp* 2001 WL 755396 (SD NY, 5 July 2001). 3 *Brinkibon v Stahag Stahl und Stahlwarenhandels-gesellschaft Mbh* [1983] 2 AC 34 (HL). 4 *Entores Ltd v Miles Far Eastern Corp* [1955] 2 QB 327. 5 Section 14, *Electronic Transactions Act* 1999 (Cth). 6 *Dunlop Pneumatic Tyre Company Ltd v Selfridge & Company* [1915] AC 847 at 855. 7 *Rose and Frank Co v JR Crompton and Bros Ltd* [1923] 2 KB 261 at 288. 8 *Specht v Netscape Communications Corp* 150 F. Supp. 2d 585 (SDNY 2001), affirmed 306 F.3d 17 (2nd Cir. 2002). 9 *ProCD Inc v Zeidenberg* 86 F.3d 1447 (7th Cir. 1996). 10 *Register.Com, Inc v Verio, Inc* 356 F.3d 393 (2d Cir. 2004). 11 *Ibid*, s10(1). 12 *Ibid*, s10(2). 13 UNCITRAL, *Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods* (2007) at paras 233 & 234. [http://www.uncitral.org/pdf/english/texts/electcom/08-55698\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf)

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