



The Time of the Conclusion of Electronic Contracts: Lessons from the Traditional Contract Law from the Perspective of the UNCITRAL Rules, American Law, English Law and Iranian Law

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Abstract

The commercial relations of merchants have been affected widely by the invention of the new methods of communications, such as the Internet. Nowadays, merchants across the world accept the presence of technology voluntarily in their daily transactions. Thus, the mode of making contract, in particular international commercial contracts in large scales, has been shifted from traditional ways to electronic methods. In consequence, many legal questions have been arisen. The way of application of rules on conclusion of contracts in the paper-based world, such as the time of conclusion of contracts, to the formation of electronic contracts is one of the main issues that much ink has been spilled on by legislators and legal scholars so far. This paper scrutinizes the time of conclusion of electronic contracts under the UNCITRAL rules as an international instrument, American and English law as two representatives from the common law world and Iranian law as a civil law system. It tries to elaborate the different and similar approaches of these set of rules in determining the time of concluding traditional contracts, and then the way of application of the outcome, coupled with the provisions of legislation on electronic commerce, to electronic contracts to determine their time of conclusion. Finally, it concludes that the electronic environment must adopt its basic rules from the physical environment.

Keywords: e-commerce, e-contract, e-communication, data message, information system.

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1. Introduction

In the current era the impacts of introducing the new methods of communications can be hardly denied. It is not necessary to spend much word to illustrate and demonstrate this claim. The history of mankind is replete with new technologies that have enormous effects on human's society, and legislators, policy makers, and lawyers have endeavoured to regulate their behaviours. Once the human being's life had been influenced by the industrial revolution in the eighteenth century, and now has been affected by technology revolution evolved by the advent of the Internet in the decade of 1990s, which is, in turn, in fact a result of industrial revolution. Meanwhile, one of the areas in which the traces of technology are evident is the

large crucial world of commerce, for it has created a new space, unknown in the past, called 'cyber space' or 'electronic environment', within which commerce is able to flourish and flow more easier, faster and even safer than the past.

Following to the emergence of the new methods of communications, such as the Internet, merchants across the world welcome their presence in all aspects of their daily transitions, nationally or internationally, inter alia, pre-contract negotiations, contracts formation, payment issues and even, in some cases¹, performance of

¹. For instance, in the cases that the subject-matter of the contract is intangible goods such as 'computer software', it is delivered by downloading into the computer system of the buyer.

contracts. Businessmen are not keen to arrange face-to-face meetings, for which they incur financial costs, spend time and accept voyage difficulties and even dangers. They do prefer to conclude their intended commercial transactions as fast, inexpensive and secure as it is possible. For this aim, in Business to Business (B2B) transactions, merchants use the EDI facilities¹ to exchange commercial documents, and in Business to Consumer (B2C) transactions they take the advantage of cyberspace and establish electronic markets, without any geographical restrictions, by which they are able to advertise their products and all required information for creating a legally valid contract including prices, the process of formation of a valid contract, the methods of payment and delivery issue. Consumers are similarly able to purchase their desired goods electronically², as they have access to markets which were out of their reach before time.

As it is clear electronic contracts are the heart of electronic transactions. In the process of forming a valid contract there are two main stages called offer and acceptance. Offer means a proposal from a party (offeror) to another (offeree/acceptor) to enter into a contract on a certain thing and unambiguous terms such as selling a book for £10, delivery within three days. Acceptance means an expression of willingness to accept the offer. Once a legally valid acceptance occurs, the contract is formed and its legal consequences flow³. One of the most important issues concerning the conclusion of contracts is the time of conclusion, which is in fact the time of acceptance.

This paper tries to examine the time of concluding an electronic contract under the UNCITRAL⁴ rules as a leading international organization in harmonizing international trade law globally, American law⁵ and English law, as examples of common law world, and Iranian law as a

representative from civil law world in four distinct parts. It illustrates that how and to what extent the traditional principles and rules of contract law, of the aforementioned legal systems, are applicable to contracting electronically and how the legislation on electronic commerce law deals with the issue. For this aim, in part two it shows the importance of determining the time of conclusion of electronic contracts and its consequences. In the third part the time of conclusion of contracts in the physical world is considered and the outcome will be applied to electronic communications in the fourth part. The time of concluding electronic contracts from the perspective of electronic commerce acts will be scrutinized in the fifth part. Finally, some suggestions will be proposed in the conclusion.

2. THE IMPORTANCE OF DETERMINING THE TIME OF THE CONCLUSION OF CONTRACT

Determining the time of conclusion of contracts, whether physically⁶ or electronically⁷, is of great significance. Some legal cases to show this importance, which are common between both traditional and physical contracts, are as follows:

A: Evocation Of Offer Or Acceptance:

once the contract is formed, neither offeror can revoke the offer nor can the offeree (acceptor) revoke the acceptance, and the intervention of the parties in the process of formation of contract comes to the end⁸. The reason is that the contract has been concluded, and it is binding on the parties.

B) Incapacity, Death And Insanity Of The Parties:

the contracting parties at the time of making the contract must have legal capacity to enter into the contract. However, in case of any supervening

1. Electronic Data Interchange System

2. This is just one example of the capabilities of electronic environment in the commercial context.

3. The author does not intend to elaborate the issues of offer and acceptance here, as it is beyond the scope of the present work. For more details see for example Chitty, J., *Chitty on Contracts, General Principles*. 29th ed. Vol. 1. 2004, London: Sweet & Maxwell in English law, Corbin, L., *Corbin on Contracts, One Volume Edition* 1952: WEST PUBLISHING CO in American law, and Katouzian, N., *General Principles of Contracts*. 3rd ed. Vol. 1. 2006, Tehran: Behnashr Publication. 592 in Iranian law.

4. UNCITRAL' stands for The United Nations Commission on International Trade Law, was established by the United Nations General Assembly by its Resolution 2205 (XXI) of 17 December 1966 "to promote the progressive harmonization and unification of international trade law.

5. It is necessary to note that US law is not only a certain body of law. US law indicates 51 bodies of laws including 50 separate states and the District of Columbia.

6. The term of 'physically' means those contracts which are concluded in the physical environment either *inter praesentes* (face-to-face contracts) or *inter absentes* through the traditional methods of communications such as telephone, postal letters, telegram, telex, and fax. 'Paper-based' or 'traditional contracts' are also used.

7. The term 'electronically' means any contracts which are formed in cyber space by means of modern methods of communications such as website, e-mail and chat-room.

8. However, there may be some exceptions. For instance, in English law after sending acceptance, the acceptor is able to revoke the acceptance by an expedite means of communication. For example if the acceptance has been communicated by a postal letter, the acceptor may cancel it by making a call before the letter reaches the destination. In Iranian law, where the contract is *inter praesentes*, the parties have '*option of meeting-place*', i.e. as long as they are at the presence of each other, are able to cancel the contract, although it has been formed.

incapacity, the formed contracts are valid as well. The same rule applies to the issues of death and insanity of the parties. Death or insanity of one of the parties before making the contract is an impediment to its formation, but after the conclusion of the contract it has no legal effect.

C) The Validity Or Enforceability Of Contract:

for instance, whenever one of the parties goes bankrupt, the contract would be valid if it has been formed before bankruptcy¹ takes place; but after it, the contract is void² or voidable³.

D) The Time Of Commencing The Legal Effects Of Contract:

before the conclusion of contract the involved parties have no obligations against each other, for the legal consequences of a contract, such as passing of property and risk, flow once it is formed.

E) The Applicable Law:

the applicable substantive law to the contract is one which is in force at the time of the conclusion of the contract, and the validity of the contract is determined by it. Its subsequent amendment or alteration has no effect on the previously formed contract⁴. However, in case any dispute arisen, the applicable adjective law is one that is in force at the time of arising dispute.

F) The Time Of Limitation Of Actions And Other Deadlines:

the moment of commencement of the time of limitation for actions is the time of the conclusion of contract⁵. Besides this, whenever deadlines for any other obligations have been set, they start from the time of the conclusion of contract, such as delivery of goods or supply of services, and payment of price.

3. DETERMINATION OF THE TIME OF CONCLUSION OF CONTRACTS: AN OVERVIEW ON THE TRADITIONAL RULES

Having mentioned the importance of determining the time of conclusion of contracts, the way of such determination needs to be discussed. In some occasions, they are the contracting parties themselves that determine the time of conclusion of contracts, electronic or physical ones, expressly by incorporation of a term in the contract or

1. In English law also it has been stated that bankruptcy of offeror or acceptor in some cases is an impediment to the conclusion of contract.

2. Iranian Commercial Code, article 423.

3. Iranian Commercial Code, article 424.

4. The principle of 'the law is not retrospective' in Iranian law; in most of justifications the same principle applies.

5. However, in some legal systems there are no time limitations for bringing actions such as Islamic law.

impliedly by performing the contract partially or totally. In this case, the agreed time overcomes the time of occurrence of acceptance, i.e. the legal time of conclusion of contract; this is because of the principle of 'party autonomy'. However, when there is no express and tacit agreement, according to the underlying legal system the general principles and rules will apply, whether it is a traditional (physical) contract or an electronic one. Thus, the following situations are assumable:

3.1 In The Existence Of Mutual Agreement

when the contrasting parties agree on the time of conclusion of contract, it may be before the time of acceptance, i.e. the conclusion of contract, or after it. In the former case, the legal time of conclusion of contract would have retrospective effect. In other words, although the contract is legally formed at a time in the future, but its effects flow from the agreed time in the past. For instance, in the case that the contract has been performed partially or totally, its effects flow from the time of commencing performance in the past⁶. In contrast, in the latter form, the agreed time would be governing, except in the cases that the contract itself is unenforceable under the governing law. This form of contract, then, would be an expression of intention to enter into a contract in the future⁷.

3.2 In The Absence Of Mutual Agreement

If there is no agreement on the time of conclusion of contract, reference must be made to the general principles and rules of law. The rules may be different in formation of contracts *inter praesentes*, compared to the formation of contracts *inter absentes*, and even in the latter cases more complex than the former ones. The reason is that, the means of communications between parties have a determining role in the determining the time of conclusion of contracts, and in the current era the invention of modern methods of communications will add to the complexity of the issue, as they themselves are complicated.

6. These types of agreements are common in *construction contracts*; in which the contracting parties draw up a preliminary written agreement and while the negotiations are still in progress to reach a definite decision, they have performed a part of the intended project. By signing the contract, with retrospective effects, it is in force from the time of performance of contract in the past. See for example *Trollope and Colls Ltd v. Atomic Poer Constructions Ltd* [1962] 3 All ER 1035. For more details on construction contracts see Hudson, A. A. and I. N. D. Wallace (12th Re. ed., 2010). *Hudson's Building and Engineering Contracts*, London: Sweet & Maxwell

7. Owsia, P., *Formation of Contracts: A Comparative Study under English, French, Islamic and Iranian Law*. 1994, London: Graham & Trotman P. 596.

3.2.1 Contracts Inter Praesentes

in these types of contracts where the parties are at presence of each other, the applicable law determining the time of conclusion of contracts is straightforward. Contract is formed when an effective acceptance¹ is received by the offeror, i.e. the offeror hears the acceptance, which in legal texts it is said that the reception rule is applied². Similarly, in English law, Iranian law and American law in the conclusion of contracts through instantaneous means of communications, such as telephone, telex and fax, it is deemed that the contract is inter praesentes, and then the time of conclusion of contract is the moment at which the offeror receive the acceptance³, for instance, in contracting through telephone, hears the acceptance on another end of the line.

3.2.2 Contracts Inter Absentes

the main discussions are on determining the time of conclusion of contracts inter absentes where the contracting parties are far from each other and located in different places in terms of geography and time or are at the same time-zone but in different places⁴. In this cases first of all the common express or implied intention of the parties must be discovered, unless, having regard to the type of the means of communications between them, one of the theories, (declaration, postal, receipt or information rule)⁵ is needed to be chosen. However, one of the two theories, postal

and receipt theory, are noteworthy and of great significance, and are considered in the following section.

3.3 Choosing The Applicable Rule In Contracts Inter Absentes In The Physical World

As stated in the above section, contracts inter absentes, because of the physical distance between the parties, are made through the means of communications such as telephone, telegram, telex, fax, postal letter, e-mail, website, and chat-room. In the conclusion of contracts via telephone, telegram, telex and fax it has been held that these contracts are analogous to contracts inter praesentes, and then the same rule, i.e. receipt rule, is applicable. However, in respect of the formation of contracts through postal letters, in spite of being some opposite arguments⁶, the judicial decisions and writings of legal scholars rule that the postal rule is applied. This rule means that once the offeree (acceptor) posts the letter of acceptance, the contract is formed even if it does not reach the destination or reaches after some delays. However, what is the aim of this paper is determining the time of concluding contracts in cyber space via e-mail, website and chat-room and choosing one of the four theories. To illustrate, in a case that an acceptance is sent through e-mail, when is the contract formed? When the acceptor clicks on send bottom? Or when it reaches the ISP of the sender or receiver? Or when it is entered in to the inbox of the offeror, or even when he or she reads the e-mail and is aware of the content of the letter? Similar to this scenario is illustratable for communications through website and chat -room. For this aim, it is needed to consider the reasoning behind the application of the two leading rules, receipt or postal rule, in the paper-based contracts and then, according to the nature of e-communications, choose one of these two rules to be applied to the communications through modern methods. However, after sorting out this matter, a further step also remains, which is not perceivable in physical communications; and it is determining the time of occurrence of sending and receiving of an e-message or e-communication. For example, assuming that the postal rule applies for communications through e-mail, then at which moment sending of an e-mail occurs? Once the acceptor clicks on the 'send' bottom? Or when it is received by ISP? Or when it enters into the inbox of the addressee? For determining this issue,

1. By 'effective acceptance' it means an acceptance which is in conformity with the terms of the offer and satisfies other legal requirements. For more details in each legal system in question see *supra* note 5.

2. All three legal systems apply the same rule in this case. See *supra* note 5.

3. See for instance in common law *Entores v. Miles Far East Corpn* [1955] 2 QB327; *Brinkibon Ltd v. Stahag Stahl* [1983] AC 34 for English Law law; Iranian *supra* note 5.

4. For instance in a contract between an Iranian businessman located in Tehran and an English merchant located in London, the parties are in two different places and time-zones. In contrast, where one of the parties is located in London and another in Manchester, they are in the same time-zone but in different places. A third presumption still is perceivable, but too far in the real world and that is the case in which one of the parties is in space, where it is said that there is no time, and another party is on the earth. This assumption may be materialized sometime in the future by developing technology.

5. For instance, in communications through postal letters, *declaration* theory means the contract is formed once the letter is written, however, it has not been sent yet; the *postal* rule means once the letter is posted, and the *receipt* rule means once the offeror receive the letter; and finally the *information* rule means the contract is formed once the offeror receive the letter and reads it and is aware of its content. The postal and receipt rule are of the most of supporters among legal scholars.

6. Some believe that declaration theory should apply. This means that once the acceptor shows his/her intention to accept the offer by writing the acceptance the contract is formed, although it has not posted yet. Some others are of the view that information theory is applicable. This theory means that the contract is formed when the offeror receives the acceptance and is aware of its content. However, the supporters of these two theories constitute the minority of writers.

reference will be made to the legislation on electronic commerce in the selected legal systems which will be considered in the fifth part.

3.3.1 Receipt Rule:

In English law, as a general rule, the receipt rule is applied; i.e. the contract is formed once the acceptance is received by the offeree¹. This rule is applicable in cases in which the contracting parties communicate through instantaneous means of communications such as telephone². In communications by means of fax³ and telex⁴ the same rule is applied as well. However, the offeror may not require the reception of acceptance⁵. In the American Uniform Commercial Code (UCC) there is no express provision as to the time of conclusion of contract. However, it has been pointed out that the postal rule which introduced in 1818(see the next section) is applicable to all methods of communications even instantaneous ones! In such a case, once the acceptor announces its acceptance the contract is formed, even if it does not reach the offeror⁶. However, the condition is that the offer and acceptance must be made in the same manner, i.e. both by means of telephone or fax or any other means⁷. Moving to Iranian law, there is no indication in the Iranian Code of Civil in this respect. However, one of the eminent legal scholars is of the view that in communicating through instantaneous means of communications such as telephone, fax, and telex the acceptance is effective from the time at which it is received by the offeror, similar to the case in which the contracting parties are at the presence of each other⁸. As it is clear, while in communicating through instantaneous means of communications both English and Iranian law apply the same rule, i.e. the receipt rule, American law applies the postal rule.

3.3.2 Postal Rule (Or Mail-Box Rule)

1. The CISG also has chosen the receipt rule. In article 18(2) it provides: 'an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.'

2. *Entores v. Miles (Far east Corporation)* [1955] 2 Q.B. 327.

3. *Schelde Delta Shipping BV v. Astarte Shipping Ltd (The Parnela)* (1995) 2 Lloyd's Rep. 249.

4. *Entores Ltd v. Miles East Corp.* (1955) 2 Q.B. 327 and *Brinkibn v. Stahag Stahl and Stahlwarehandels-gesellschaft mbH.* (1983) 2 A.C.

5. Beatson, J., *Anson's Law of Contract*. 28th ed. 2002, Oxford: 28th ed., Oxford University Press. p 42

6. *Travelers Ins. Co. v. Workmen's Compensation Appeals Board*, 68 Cal. 2d. 7 (1964); *National Furniture Mfg. Co. v. Center Plywood Co.*, S.W.2d. 115 (1966).

7. Spindler, G. and F. Börner (2002), *E-commerce law in Europe and the USA*, Springer Publication. P. 690.

8. Katouzian, *supra* note 5, P. 373-4.

In English law there are some exceptions to the receipt rule discussed above. One of them is where the acceptance is sent by a postal letter to the offeror, in which the contract is formed, once the letter is posted⁹. For this reason, it has been called postal rule. The rule is applied to all cases that the parties communicate through non-instantaneous means of communications¹⁰, such as telegraph¹¹ and telex¹². In American law the UCC has no provision in this regard, but in the legal writings¹³ and judicial decisions¹⁴ the postal rule has been adopted in communicating through postal letter, and the possibility of the revocation of acceptance has not been approved once the letter is posted¹⁵. However, as mentioned above, the rule is applied whenever both parties communicate in a similar way¹⁶. In the same way, it has been argued in Iranian law that, excluding in some exceptional cases, the contract is formed once the acceptance letter is posted¹⁷. This rule is deducible from the article 191 of the ICC as well¹⁸. Therefore, all three legal systems are of common opinion in communication through postal services.

3.3.3 The Rationale Behind The Application Of The Postal Rule

It may be argued that the postal rule is an unfair one; because the offeror is bound to the contract before he receives its acceptance, and is aware of the decision of the offeree. Even the offeror may be bound to a contract for which he has never received any acceptance. The logic behind this rule is important in the adoption of an appropriate rule

9. This rule for the first time invoked in the case of *Adam v. Lindsell* (1818) 1 B. & Ald. 681 E.R. 250 and reiterated in *Byrne v. Van Tienhoven* [1880] 5 C.P.D. 344, 348: ...when an offer is made and its acceptance is posted in a letter, the contract is formed at the moment the letter is posted, even if it does not reach the destination at all... .

However, if the non-reception of the letter is due to the failure of the acceptor, for example where the address of the offeror is written incorrect, then the acceptance is effective when the offeror receives the letter within a reasonable time. See for example *Getreide-Import-Gesellschaft v. Contimar; Holwell Securities Ltd v. Hughes* [1974] 1 WLR at 161.

10. Chitty on contracts, *supra* note 5, para. 2-043

11. *Bruner v. Moore* [1904] 1 Ch. 305.

12. Chitty on contracts, *supra* note 5, sections 2-031.

13. Corbin on Contract, *supra* note 5, pp. 124-125.

14. The oldest and most well-known judicial case in this respect is *Adams v. Lindsell* (1818) 1 B & Ald 681.

15. Murry, J. E. (1986). *The Chaos of the Battle of the Forms: Solutions*, *Vanderbilt Law Review* 39: 1307-1372. P. 1307.

16. Restatement (Second) of Contracts, 2000, s. 67; *Trevor v. Wood*, 36 N.Y. 307 (1867); *Chesebrough v. Western Union Telegraph Co.*, 135 N.Y.Supp. 583 (1912).

17. Katouzian, *supra* note 5, P. 363.

18. Shahidi, M., *Formation of Contracts and Obligations*. Vol. 1. 2000, Tehran: Majd. 447. P. 153.

to be applied in communicating electronically through chat-room, website and e-mail.

Some reasons have been put forwarded: the postal rule is applied whenever the communications are assigned to a reliable third party. This belief has been pointed out in *Household Fire Insurance v. Grant*¹. Once the acceptor sends the acceptance letter, it is out of his or her control. Then the any future probable risk should be put on the recipient, i.e. the offeror, who is in a good position to control it. Furthermore, in cases that the offeror chooses communications to be made through post, admits impliedly to receive the acceptance through post as well, and then it is logical to put any perceivable risk on him². Some other believes that the post office acts as the common agent of the parties. Any communications with the agent are deemed to be made with the principal³. It has also been stated that the postal rule is applied in cases that the offer indicates the possibility of announcing acceptance by non-instantaneous means of communications such as post⁴. However, apart from the aforementioned justifications, it seems that the main reason to adopt the postal rule, more than being a logical one, is due to the practical considerations and enhancement of convenience and expedition in commercial relations⁵ in the past, for it would have taken a long time for postal letters to reach their destinations.

4. THE WAY OF APPLICATION OF THE POSTAL AND RECEIPT RULES TO ELECTRONIC COMMUNICATIONS

As mentioned previously, there are some methods to conclude an electronic contract such as exchanging e-mails, making orders on web sites and communicating via chat-rooms. However, contrary to physical contracts where an acceptance may be made expressly or impliedly by conduct, in contracting electronically it is rare to have an acceptance made by conduct⁶.

1. *Brogden v. Directors of the Metropolitan Railway Co.* [1877] 2 App. Cas. 666, 691. [1879]4 Ex.D. 216, 233.

2. Gloag, *Law of Contract*, 2nd ed., W.Green & Son, Edinburgh, 1929, p. 34.

3. Walker, *The Law of Contracts and Related Obligations in Scotland*, 3rd ed., T&T Clark, Edinburgh, 1995, para. 7.63.

4. Gringras, *The Laws of the Internet*. 1997, London: Butterworths, p.23

5. *Re Imperial Land Co. of Marseilles (Harris' Case)* (1872) L.R. 7 Ch. App. 587, p.594; *Brinkibon v. Stahag Stahl and Stahlwarenhandels-gesellschaft m.b.H* [1982] 1 All ER 293, 300.

6. This rule is not a definite one. For instance, if the goods advertised on a website is considered as an invitation to treat, then making order should be considered as an offer made by customer, and the contract is concluded at the time at which the owner of the website accepts the order by an e-mail confirmation. However, he may send

Nonetheless, as regards the time of occurrence of express acceptance by electronic means there is no judicial decision informed⁷. Then the reference must be made to the traditional rules of contract law to establish an appropriate rule.

4.1 E-Mail

Some of the writers believe that the postal rule must be applied in communications through e-mail and some other are of the view that the receipt rule is appropriate. Some reasons of each group are as follows:

4.1.1. The Reasons To Apply The Postal Rule

Those who agree with the application of postal rule state that e-mail, similar to the postal communications, is a non-instantaneous means of communication and then the postal rule is suitable, because:

a) Once an e-mail is sent, it is received and stored by the ISPs and then is transmitted to the addressee. This process is similar to posting a letter, in which after posting a letter it is entered into the postal net and then is sent to the receipt. The ISPs play the role of postal net.

b) he perceivable problems in communicating through postal letters such as delay in receipt or even non-receipt of the letter are also perceivable in communicating through e-mail⁸. Technical problems of the Internet networks, entering an incorrect e-mail address, hacking of the communication networks all can lead to the delay in receiving the e-mail or even non- receiving of it.

c) E-mail is not considered as an instantaneous means of communication⁹, and technically is not the same as telephone and fax. In communicating through telephone there is a direct line and connection between the parties, while communicating through e-mail is not so. Furthermore, in communicating through instantaneous means of communications, once the message is sent, the addressee is aware of it, while in communicating through e-mail it takes, at least, a few seconds to check the e-mail and read it¹⁰, i.e.

the goods ordered without any confirmation. However, this is rare in practice.

7. The laws of some countries provide that communicating an acceptance by electronic means is deemed as an express intention of the offeree to accept the offer. See the UCITA of America, section 103(b)(3).

8. Gringras, C. and E. Todd, *Gringras: the Laws of the Internet*, 3rd revised ed. 2008: Tottel Publishing, p. 28-29.

9. Andrew D. Murray, *Entering into Contracts Electronically: the Real W.W.W*, available at <http://eprints.lse.ac.uk/11097/>, p. 8; Chitty on Contracts, *supra* note 5, section 2-046

10. *Supra* note 49, p. 39; Reed, C. and J. Angel, *Computer Law: The Law and Regulation of Information Technology*, 6th ed, 2007 Oxford: Oxford University Press, p. 201.

some delays is sensible. This reason is the main reason of the those who are in favor of the application of the postal rule to contracting through e-mail.

a) Determining the exact time of receiving an e-mail is also controversial, and there are three possibilities: when the e-mail is received by the ISP, enters into the computer network of the addressee or is received by the addressee.

4.1.2 The Reasons To Apply The Receipt Rule

Those who agree with the application of receipt rule to be applied in communication through e-mail consider it as an instantaneous means of communication and pay attention to the commercial customs and usages, because:

a) In the past when the postal rule introduced, its application to other means of communications was not in mind. Then the postal rule must be applied only in the case that the communication method of the parties is only post. Furthermore, that is true that e-mail is not as fast as telephone, but it is considered an expedite means of communication yet, and also is not as slow as post. Then, in terms of speedy, e-mail is too more similar to telephone conversations than postal services. Then it is logical to consider e-mail as an instantaneous means of communication¹.

b) In the current ear regard must be made to the commercial usages and customs too. Is it logical to bind a merchant to a contract of sale in an international level before he receives the acceptance? International conventions such as the CISG have paid attention to this issue and apply the receipt rule to all methods of communications. Moreover, in some national laws this rule has also been adopted².

4.3 CONCLUSION: THE POSTAL RULE SEEMS TO BE MORE APPROPRIATE

Having regard to the justifications and reasoning of both groups, the author is of the view that the postal rule is more appropriate than the receipt rule. Because the receipt rule is appropriate in cases that the means of communication of the parties provides a virtual presence, as if the contracting parties are at the presence of each other. In other words, that is true that the contracting parties are far from each other physically, but in terms of exchanging wills, they are exchanged as fast as the case in which they are at the presence of each other. Telephone as a means of communication provides such a virtual

presence. With respect to the opinions of all those who are against the application of the postal rule, it is necessary to add that in communicating through e-mail such presence of wills are not perceivable, because only a delay of a few seconds in exchange of wills, disturb such presence, and then prevents e-mail to be put in the row of the instantaneous means of communications. Then once the acceptor clicks on the 'send' bottom, the contract is formed even if it does not reach the addressee or reaches with some delays.

4.2 WEBSITE

The rate of conclusion of electronic contracts over the internet is increasing³. The interaction between a customer and a website is comparable with a telephone conversation not a communication through e-mail. Analogous to a telephone conversation, where the parties response to each other once receive the word and are also aware once the line goes dead, communicating through website is comparable. Once a given customer does an action in a given website, it automatically reacts accordingly⁴, and once the connection is broken between the user and the system a message heading 'Server not responding' appears and both of the parties become aware of it, similar to a telephone conversation. Therefore, in contracting through an interactive website where customers are able to order goods or services online, the receipt rule is appropriate to be applied⁵. This means that the contract is formed once the customer receives an e-mail which indicates that the contract is formed, or stipulates a time for the conclusion of the contract, like the time of shipment; in the latter case the customer is normally informed by e-mail once the goods are shipped.

4.3 CHAT-ROOM

The communications through chat-rooms, which may be in the form of an oral, visual, or writing conversation, are, similar to a telephone conversation, i.e. an instantaneous communication and without any delay⁶. The difference is that instead of two humans, two computers are connected and controlled by the parties. Then

1. Werner, Jens, *Working Paper: E-commerce.Co.Uk – Local Rules in Global Net: Online Business Transactions and the Applicability of Traditional English Contract Law Rules*, 2000, 6 *International Journal of Communication Law and Policy* 1.

2. Such as the UCITA of America, section 215.

3. The owners of some of websites benefit from intelligent agents, which have been programmed according to their intention.

4. In some cases there is a **sensible** delay in receiving the interaction of the website. This must not lead to regard website as a non-instantaneous means of communication. Because the speedy of reaction depends on how much the Internet server is speed.

5. *Supra* note 51, p. 201.

6. Again, any delay is due to the speedy of the Internet server, not because of the method of communication itself.

similar to contracting via telephone and website, the contract is formed once the acceptance is received; i.e. the postal rule is applied.

5. THE TIME OF DISPATCH AND RECEIPT OF ACCEPTANCE IN CONTRACTING ELECTRONICALLY UNDER LEGISLATION ON ELECTRONIC COMMERCE

The legislation on electronic commerce such as the UNCITRAL Model Law on Electronic Commerce 1996¹, and the United Nations Convention on the Use of Electronic Communications in International Contracts 2005², have not set any provision on offer, acceptance, and the time of conclusion of e-contracts³. They only permit a contract to be done by exchange of data messages⁴. As discussed so far, two rules are applied in contracting electronically: the postal rule for communications through e-mail and the receipt rule for communications through websites and chat-rooms. However, the time of dispatching or receiving of an acceptance in contracting through electronic means have not been determined by traditional contract laws. For this aim legislation on electronic commerce in both national and international level has put forwarded presumptions to remove the uncertainty and determine the time of conclusion of electronic contracts which are considered in the next sections.

5.1 The Time Of Dispatch Of Acceptance In The Form Of A 'Data Message' Or An 'Electronic Communication'⁵: The Application Of The Postal Rule To E-Mail

In the absence of mutual agreement on the time of conclusion of contract, as discussed earlier in this paper, legislation on electronic commerce has provided assumptions for the time of dispatch of

acceptance. The MLEC provides that the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator⁶, unless the originator (acceptor in our discussion) and addressee (offeree in our discussion) have agreed otherwise, i.e. provided another time for occurrence of dispatch. Thus, this provision of the MLEC seems to be similar to the postal rule in the physical environment, and then the contract is formed once the acceptor clicks on the 'send' button; for after this point the message is out of his control and delivers to the ISPs and the Inbox of the addressee, respectively. The point is that the time of entrance of message (acceptance) into an information system is the time of acceptance and conclusion of contract. This means that where there is delay between clicking on the 'send' button and its entrance into an information system, such as the system of ISP, the second time is the time of dispatch, and then the time of the conclusion of contract. Also, where the message does not enter an information system, it can not be considered as dispatched. Then in this case no contract comes into existence! Therefore, it may be argued that this rule is as opposed to the postal rule in the paper-based contracts; where the contract is formed once the letter of acceptance is dropped into the post box even if it does not reach the addressee. The answer is that, on one hand, the post box plays the role of information system, and, on the other hand, according to the MLEC, in all cases the message (acceptance) must enter an information system, and if it does not, it will be similar to the case that the letter is not dropped into the post box. Thus, there is no diverse between the provision of the MLEC and the traditional postal rule. Iranian Electronic Commerce Act 2003⁷ and the US Uniform Electronic Transactions Act 1999⁸ also provide a similar provision⁹. In contrast the CUECIC provides that dispatch occurs once the electronic communication leaves the information system under the control of the sender. This provision has used the word 'leaves' compared with the MLEC which has employed the word 'enters', while there

1. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html.

2. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html.

3. The main reason is that the Model Laws try to remove the obstacles to develop e-commerce; and for this aim, as each state may set a different rule according to its own legal rules and principles in this respect, then Model Laws do not intervene in the substantive laws of the states and leave them to be determined by the national laws of each country.

4. MLEC, article 11. However this rule is not mandatory and the contracting parties are able to agree otherwise. Also see the CUECIC articles 1(10) and 4(a).

5. In the text of model laws the phrase of 'data message' has been used, while the CUECIC has employed the phrase of 'electronic communication'. Furthermore, the Model law and the CUECIC have adopted the phrases of 'information system' and 'electronic address' respectively. However, these differences are literal not substantial.

6. MLEC, article 15(1.)

7. Available at <http://www.irtp.com/laws/ec/IR%20Iran%20E-Commerce%20Law.pdf>.

8. Available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.htm>.

9. Watnick. V., *the electronic Formation of Contracts and the Common Law Mailbox Rules*, 56 Baylor L. Rev. 175, 2004, p. 175, 97; The UETA, article 15(1) and IECA, article 26. The E-sing Act of US has no provision in this regard.

is a distance between leaving and entering. This means that, under the Convention, once the sender clicks on the 'send' button the contract is formed, and it does not matter whether it enters into another information system or not. Therefore, the Convention has adopted a wide approach compared to the Model law and it is more similar to the traditional postal rule than the provision of the MLEC, IECA and UETA. Meanwhile, the UCITA provides that a computer information transaction is formed when the acceptance is received. This Act has derogated from the traditional postal rule totally¹.

5.2. The Time Of Receipt Of Acceptance In The Form Of A 'Data Message' Or An 'Electronic Communication': The Application Of The Receipt Rule To Websites And Chat-Rooms

The MLEC in setting assumptions for determining the time of receipt of data message provides that the time of receipt of a data message is determined as follows:

(a) If the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:

(i) at the time when the data message enters the designated information system; or

(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee²;

In the situation (ii) the time of receipt is the time of retrieving, as opposed to the situation (i), i.e. the section (ii) is more restricted than section (i), and this rule is logical since the sender has sent the message to an information system other than which designated for this aim. The MLEC carries on:

(b) If the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee³.

In this situation it seems that it was immaterial for the addressee that into which of his systems the message enters, and for this reason he has not designated any system. However, the Model law reserves the right of the contracting parties to agree otherwise and set another time for the receipt of message. Iranian Electronic Commerce Act is totally similar to the MLEC in this matter. The only difference is that the IECA has not provided that the parties are able to agree otherwise. However, this right is deducible from the principle of 'party autonomy'. Moreover, it has not predicted the section (b) of the MLEC. So it is unclear what will be the rule where there is no

designated system for receiving of data message⁴! Then it suggested incorporating a provision in the IECA indicating that when the message enters an information system of the addressee, the message is deemed to be received, i.e. the contract is formed, similar to the MLEC section (b). The UETA points out that an electronic record is received when it is in a format that is capable of being retrieved⁵. The UCITA provides that a message is received once it enters into a processing information system or an address in that system which is capable of being processed by a system of that kind⁶. The Convention provides that the time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address⁷. As it is clear the time of receipt in all legislation is the time of entrance into a designated system, and normally a system in the commercial relationships is designated for communications.

6. CONCLUSION

The electronic environment is not independent from the traditional environment in terms of legal rules and principles. It is neither logical nor possible to write a separate legal framework to the electronic environment. The traditional contract law has evolved over centuries and is an invaluable legal legacy. However, it must be kept up-to-date as the time passes and new legal issues emerge. One of the debatable issues, i.e. the time of conclusion of electronic contracts, illustrated in the present paper.

The conclusion is, as the judicial decisions as well as legal writings show, where the communications of the contracting parties are through instantaneous means such as telephone, fax the receipt rule is applied, then the contract is formed once the acceptance is received by the offeror. In contrast, in the communications through non-instantaneous methods, such as postal services, the postal rule is applied, i.e. the contract is formed once the acceptance is sent, even if it does not reach the offeree at all. It is considered that sending an e-mail is similar to posting a letter, then it cannot be regarded as an instantaneous means of communication, and for this reason it is

1. The UCITA, article 206(4).

2. MLEC, article 15(1)

3. MLEC, article 15(2)

4. In this respect, there is no provision in the EC Directive on Electronic Commerce and UK statutes.

5. The UCITA, section 102.

6. The UCITA, section 102

7. CUECIC, article 10(2)

appropriate to apply the postal rule in contracting through e-mail; but as to the exact time of dispatch reference must be made to the applicable law to the contract, the MLEC, IECA, UECT, CUECIC or any other Act. In contrast, it examined that communication through website and chat -room technically is similar to a telephone conversation, and then it is logical to considered them as an instantaneous method of communication and apply the receipt rule. Again the exact time of receipt of an electronic communication or an electronic message containing the acceptance of offer must be determined by the applicable legislation on electronic commerce.

However, it is recommended to the contracting parties to agree on a certain time in respect of the time of conclusion of electronic contracts avoiding any future disputes in this regard, or at least, reach an agreement on the applicable law to the contract. The reason is that the cyberspace is a world without any physical boundaries, and where there is no agreement on the applicable law to the contract, the application of the rules of International Private Law to determine the applicable law would be too complicated.