

OFFER AND ACCEPTANCE IN CROSS-BORDER ELECTRONIC CONTRACTS: A BRIEF COMPARATIVE PERSPECTIVE

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Abstract

Electronic communications have become a widely accepted method of contract conclusion, in part due to the relative ease of contracting afforded to parties who contract inter absentes. The traditional rules of contract law are specifically designed for paper-based contracts, and it is necessary to consider whether these rules would find the same application in contracts concluded electronically. Of particular interest to me is the approach taken to offer and acceptance. This paper will investigate the current position in South African law with reference to the common law and legislation, and compare that to the provisions of the international instruments which provide guidelines for regulating electronic contracts. In doing so, I aim to clarify the meaning of “offer” and “acceptance” when referring to electronic contracts and identify any advantages and disadvantages brought about by this definition.

Keywords: offer; acceptance; electronic communication

1. Introduction

The law of contract forms the bedrock of the law of trade, governing aspects such as sale, lease, insurance and labour relations. Although the law has naturally evolved over the years to accommodate changes in culture and accepted practices, it has been somewhat slower in developing alongside the meteoric expansion of modern technology. Over the past 20 to 30 years, technology has developed more rapidly than any person could have foreseen, demanding the development and creation of legal rules to address the new struggles brought about by this technological boom. However, the law has been slow to change in this respect, leading to much uncertainty.

This uncertainty has especially been seen in respect of contracts concluded by electronic means, either via e-mail or, in some jurisdictions, even via text message.¹ It can be argued that the relative ease of communication provided by electronic media is a great benefit to cross-border trade, making it easier for parties in different locations to contract without having to be in the same place. Indeed, the use of electronic methods of contracting means that parties never even have to meet in order for a valid contract to come into existence between them, allowing for more cross-border transactions to take place.

Still, despite the advantages of contracting parties having this inexpensive and efficient method of communicating at their disposal, it is necessary to examine the specific rules that govern electronic contracting, more importantly the validity of contracts concluded in this manner. In this paper the focus will be on investigating the rules relating to consensus as one of the validity requirements of a contract, specifically the roles of offer and acceptance as indicators of the moment of contract conclusion. The concepts of offer and acceptance will be examined in relation to how they are determined when dealing with electronic contracts. Attention will be paid to how domestic South African law approaches offer and acceptance, and this will be compared with the treatment of offer and acceptance in electronic contracts in other international legal instruments.

2. The South African position: overview

2.1 Traditional common law position

The traditional rules of the law of contract in South Africa state that no contract can come into existence unless the offer is accepted.² For this reason it is of the utmost importance to determine when acceptance takes place, as this is arguably the point when a contract is concluded. Given that we are discussing the position with regard to cross-border trade, the focus in this discussion will be on the common law rules as they relate to contracts concluded between parties *inter absentes*.³ According to case law on the matter,⁴ there are four different theories which could potentially be used in determining whether valid acceptance (and thus

¹ The use of text messages to conclude a valid contract was accepted by the South African court in *Jafta v Ezemvelo KZN Wildlife* (2009) 30 ILJ 131 (LC).

² RH Christie, GB Bradfield *The Law of Contract in South Africa* (2011) 6th ed 60-82.

³ An example of this is where contracts are concluded by post or another means due to the parties having considerable distance between them.

⁴ *Cape Explosives Works Ltd v SA Oil and Fat Industries Ltd* (1) 1921 CPD 244.

valid contract conclusion) has taken place. These are the declaration theory, the expedition theory, the reception theory and the information theory.⁵

South African courts have mostly adopted the information theory to determine when acceptance has taken place between parties contracting *inter absentes*.⁶ This theory states that a contract will only be formed once the offeror becomes aware of the acceptance. To date the only exception has been acceptance in postal contracts, where the courts have traditionally applied the expedition theory as adopted in *Cape Explosive Works Ltd v South African Oil and Fat Industries Ltd*.⁷ This provides that the contract is concluded at the moment when acceptance is sent to the offeror. However, in more recent case law, there appears to be a move towards the use of the information theory instead.⁸ Thus, it could be argued that in light of more recent decisions, if Simon in Canada accepts Diane in South Africa's offer of the sale of her small business, and sends her a notification of such acceptance via post, then the contract will only be concluded once Diane is aware of the content of the communication. In the event that she receives the mail and does not read it until a month has passed, then the contract will only come into existence at that time. Mere receipt of the communication is not sufficient for contract conclusion, the addressee must be aware of the contents thereof in order for a valid contract to have come into being.

These rules were also used to govern contracts concluded by electronic means (fax, telegraph, telephone and e-mail) until the introduction of the Electronic Communications and Transactions Act, which came into effect in 2002. This Act now regulates all electronic communications in South Africa, and these statutory rules bring more certainty to the law regarding electronic contracts, while still retaining many of the same principles of traditional contracting.⁹

2.2 Electronic Communications and Transactions Act¹⁰

Sections 22 and 23 of this Act are relevant for our present discussion, as they govern the issues of offer, acceptance and validity of electronic contracts. Section 22 confirms the

⁵ Quinot G 'Offer, acceptance and the moment of contract formation' in HL MacQueen and R Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (2006).

⁶ *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A); *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001 (3) SA 952 (SCA)

⁷ (1) 1921 CPD 244.

⁸ *Kaap Suiwelkoöperasie Bpk v Louw* 2001 (2) SA 80 (SCA).

⁹ Christie *The Law of Contract in South Africa* 82.

¹⁰ 25 of 2002, hereafter referred to as ECTA.

validity of electronic communications and transactions, and sets out specific rules for contract conclusion by means of data messages. Our focus is on section 22(2), which states that:

“An agreement concluded between parties by means of data messages is concluded at the time and place where the acceptance of the offer was received by the offeror.”

From this, we can distill a number of requirements. First, we see that there must have been a valid offer made. Second, the offeree must have accepted such offer and communicated such acceptance to the offeror. Finally, that communication must have been received by the offeror. It is thus not sufficient to claim that a valid contract came into being purely due to the fact that the offeree accepted the offer. The offeror must have received a confirmation that the offer was accepted.

One must pause to consider what the legislature meant by “received”. If the communication is available for the offeror to retrieve, is that sufficient to say that he has received it? Or, as in the common law, is it required that the offeror first take cognisance of the contents of the communication before it can be said that he has received it? In the first instance, it would seem that the legislature follows the reception theory when determining the time and place of acceptance. In terms of this theory, the decisive moment would be the moment that the acceptance reaches the offeror, the moment that it is delivered to him.¹¹ If it is the second, then we would apply the information theory as favoured in more recent court judgments.

The answer to this question is found in section 23(b) of ECTA, which reads as follows:

A data message-

- (b) must be regarded as having been received by the addressee when the *complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee*;¹²

¹¹ According to Quinot, “(t)he offeror may not necessarily be aware that the acceptance has reached him”, meaning that the mere fact that the acceptance has been delivered is sufficient to establish contract conclusion in terms of the reception theory. ‘Offer, acceptance and the moment of contract formation’ in HL MacQueen and R Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (2006) 79.

¹² Own emphasis

From this we see that once the information (communication of acceptance) enters a system and the offeror is able to retrieve the information from that system, then it is deemed to have been received by him, regardless of whether or not he in fact retrieves it. The key element here thus appears to be the ability to retrieve something from a central depository, for example an e-mail server. It is suggested that this is due to the fact that it is relatively easy to discover when an electronic communication has been placed at the offeror's disposal, given that both e-mail and text messages are date and time stamped. This would provide a definite time of receipt of acceptance (and by extension contract conclusion) in the event of a dispute. It is also important to note here that the entirety of the message must have entered the information system in order for it to be said to be received. Incomplete messages are not capable of being accessed or retrieved by the offeror, and thus it cannot be said that the necessary acceptance has taken place.

For this reason, it appears that the legislature's treatment of offer and acceptance when it comes to electronic contracts differs from the traditional common law position. In terms of ECTA, the reception theory is followed, as the acceptance must merely be received by the offeror in order for it to be valid. There is no requirement in these sections or elsewhere in the Act that the offeror must have acknowledged the contents of the electronic communication. This is in contrast to the use of the information theory in traditional paper-based contracts *inter absentes*, which requires that the actual fact of acceptance contained in the communication be brought to the offeror's knowledge before the contract can validly be said to be concluded.

It is necessary to note that parties are not bound to use these statutory provisions, which will only be applicable where parties have not elected self-regulation.¹³ Theoretically, parties can choose and develop their own rules regarding offer and acceptance, but most elect to use the framework provided in ECTA.

The rules in ECTA provide a very useful framework for regulating electronic communications and transactions in the South African context. However, attention must also be paid to the position in the applicable international instruments, which will be discussed briefly here.

¹³ S Snail "Electronic contracts in South Africa: A comparative analysis" 2008 (2) Journal of Information, Law and Technology 1-24.

3. International perspective

Although ECTA provides very clear rules for offer and acceptance in electronic contracts, it is useful to compare it to the international rules governing the topic. This will be done by looking at the most important international instruments regulating electronic communications, namely the UNCITRAL Model Law on Electronic Commerce 1996 and the UN Convention on the Use of Electronic Communications in International Contracts 2005.

3.1 *UNCITRAL Model Law on Electronic Commerce 1996*

This Model Law was one of the first instruments to provide detailed rules for electronic commerce, and as such was drawn upon by many countries in the drafting of their domestic electronic commerce legislation, South Africa amongst them. For this reason, we see many overlaps between the Model Law and ECTA. Article 15 of the Model Law addresses the time and place of dispatch and receipt of data messages. Article 15(2) sets out the rules regarding receipt of data messages and thus the time of acceptance of the electronic communication.

Like the position in South African law, this section states that parties are not bound to the provisions of the Model Law, and can choose to independently regulate their agreement.¹⁴ It thus serves as a guideline for parties in the absence of such an agreement. The Model Law draws a distinction between the situation where the addressee (in this instance the offeror) has identified a specific information system for receiving data messages and the situation where no system is identified.¹⁵ In the former situation, the receipt is deemed to occur when the message enters the designated system.¹⁶ If the offeree chooses to send his acceptance to an information system other than the one designated, then receipt takes place when the addressee actually retrieves the communication.¹⁷ In the latter situation, where no information system has been designated, then the offeror is deemed to have received the message when it enters any of the information systems which he has access to.¹⁸

The underlying requirement thus seems to be data message entering the information system. Once there, it must be able to be retrieved by the addressee in order for it to have been received by him. That moment is the moment we consider when trying to establish the time and place of acceptance. There are clear parallels between the wording of the Model Law and

¹⁴ Article 15 (2) UNCITRAL Model Law on Electronic Commerce

¹⁵ Article 15 (2)(a)-(b) UNCITRAL Model Law on Electronic Commerce

¹⁶ Article 15 (2)(a)(i) UNCITRAL Model Law on Electronic Commerce

¹⁷ Article 15 (2)(a)(ii) UNCITRAL Model Law on Electronic Commerce

¹⁸ Article 15 (2)(b) UNCITRAL Model Law on Electronic Commerce

the wording of ECTA. Both mark the receipt of the complete data message as the pivotal moment, which is a strong indicator that the reception theory is the applicable theory when determining issues of offer and acceptance in electronic communications. There is no requirement that the addressee acknowledge the contents of the communication, having access to it in its entirety seems sufficient to establish valid receipt and thus valid acceptance.

3.2 United Nations Convention on the Use of Electronic Communications in International Contracts 2005¹⁹

This is the most recent international instrument governing electronic communications in international contracts, and it is thus worth examining in the context of rules relating to offer and acceptance in order to note any potential shifts in the international perspective. Article 10 of UNECIC contains the rules regarding the time and place of dispatch and receipt of electronic communications. This provision largely echoes the UNCITRAL Model Law and the provisions in ECTA, and identifies the moment of receipt of the electronic communication as the “time when it becomes capable of being retrieved by the addressee at a designated address”.²⁰ It also draws a distinction between the situation where the addressee has specified an address for delivery, and the situation where the sender has sent it to another address.²¹

However, there is an important difference from the position taken in the Model Law. Article 10(2) of UNECIC states that:

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 address.*²²

This section adds on an additional requirement in the event that the communication has been sent to an address other than the one specified by the addressee. The addressee must be aware that the electronic communication has been sent to that address. In those circumstances it is no longer sufficient that the complete message be delivered to the information system so that the addressee can retrieve it. Awareness of the delivery is also required, and this is the first indication that the addressee’s awareness of the communication could play a role in determining when it was received. Granted, it is only referring to

¹⁹ Hereafter referred to as UNECIC.

²⁰ Article 10(2) UNECIC.

²¹ Article 10(2) UNECIC.

²² Own emphasis.

awareness of the delivery itself and not awareness of the contents of the communication itself, but it could be argued that the inclusion of this provision is an indication of a willingness to consider the relevance of the addressee's awareness of communications in determining the time of receipt and, by implication, the time of acceptance and contract conclusion.

The approach taken in Article 10 of the UNECIC is thus similar to the approaches seen in our investigation of the South African position and the position in the UNCITRAL Model Law. However, the important addition of the requirement of the addressee's awareness of delivery opens up a new line of thinking, namely that the addressee's awareness should play some role in the determination of the time of receipt of an electronic communication and acceptance of an offer. It remains to be seen whether this recognition will have any impact on the future development of the law relating to electronic communications and transactions.

4. Conclusion

This discussion has provided a brief overview of the law relating to offer and acceptance in electronic contracts. In investigating the current legal position, it is clear that there are certain aspects which warrant future discussion and development. The main proposal is that the issue of the awareness of the recipient should be taken into account when determining time of receipt or acceptance of an offer. The current reliance on the reception theory appears to focus more on the protection of the sender of the communication, as the only thing required for a valid receipt of a data message is that it has been delivered to the addressee's information system, and he is capable of accessing it. No consideration is given to whether or not he has noted the contents of the communication, which places the burden on the addressee in the event of a dispute. The identification of the addressee's awareness of the delivery of communication as a requirement for valid receipt in the UNECIC is one step towards a more balanced approach which provides protection to both parties, and it will be interesting to see how this idea develops in future instruments.

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