

# Certain Comparative Notes on Electronic Contract Formation

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## **Abstract**

Electronic contracts present trade law scholars with a multitude of issues concerning international private law, arising from the peculiarities of the online environment. However, as in traditional paper contracts, directives, model laws and conventions governing electronic commercial transactions still leave open such an important question as when is an electronic contract concluded. This article focuses on the offer and acceptance requirement using a comparative approach to explore how this issue is addressed in Russia as well as in other civil- and common-law jurisdictions. The paper compares different regulatory approaches taken by the EU and US on the formation of electronic contracts, highlighting their differences and the progress made towards convergence and consumer's protection. The relevant law for each country is discussed in relation to two types of transactions: those concluded between qualified professionals or traders, i.e. so-called Business-to-Business (B2B), and those between qualified professionals and consumers, namely Business-to-Consumer (B2C).

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## **Keywords**

offer, acceptance, electronic, contract, invitation to treat, conclusion of contract.

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## 1. Introduction

Electronic commerce, which is carried out through the Internet, constitutes one of the most significant and innovative aspects of the globalization of the world economy. A global economy with a global market such as that which the internet has been able to generate — i.e. sites such as eBay, TripAdvisor etc. — requires global rules. However, as in other areas of the law, states are struggling to implement common harmonized rules for the market. State regulation reveals an inability to grasp legal innovation and changes in the market economy. The continuous evolution of market economic conditions requires flexible tools to adapt the law to the changes in reality. This flexibility can only be guaranteed by the contract — the *unique* tool of legal innovation. It is only through contracts, supported by the underlying principle of “freedom of contract”, that business parties are able to adapt commercial law to new circumstances, and the electronic contract is a practical example of this<sup>1</sup>.

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<sup>1</sup> Galgano F. La categoria del contratto alle soglie del terzo millenio / Contratto e impresa. Milano, 2010. P. 919 ff.

However, as contracts become more innovative, their enforceability becomes less predictable as a result. The business community has tried to reduce some of the legal uncertainties by standardizing their business practices. As experience grows and innovative business practices become routine, parties to international commercial electronic transactions have standardized the terms of their contracts<sup>2</sup>. Accordingly, intergovernmental organizations such as the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT) and The Hague Conference on Private International Law (HCCH), and NGOs such as the International Chamber of Commerce (ICC), driven by market forces, have often struggled to provide operators with appropriate regulation and models through their attempts to codify transnational law in the most comprehensive way. However, as transnational law lacks the detail and exhaustiveness as well as the formal force necessary to replace national laws, these efforts have often been revealed to be inexhaustive in creating uniform regulation. Because domestic national law very often acts as a gap-filler in litigation for international contracts, providing missing terms of parties' agreement or an interpretation of the contract, scholars have even doubted the existence of such a thing as an *international contract*.<sup>3</sup>

Electronic contracts present trade law scholars with a multitude of issues concerning international private law, arising from the peculiarities of the online environment. These include, among others, the role of the Internet service provider, data privacy, identification of the parties, the use of digital signatures and the consequences of input errors in electronic communications<sup>4</sup>. However, as in traditional paper contracts, directives, model laws and conventions governing electronic commercial transactions still leave open the important question related to contract formation: when is an electronic contract concluded? In other words, when does an offer and acceptance in electronic form take effect?<sup>5</sup> Offer and acceptance rules tell us not only

<sup>2</sup> Murray C., Holloway D., Timson-Hunt D. *Smithoff's Export Trade: The Law and Practice of International Trade*. London, 2012. P. 914 para 33–003 ff.; Galgano F., Marrella F. *Diritto del commercio internazionale*. Padova, 2007. P. 452–464.

<sup>3</sup> Cordero-Moss G. *International Commercial Contracts*. Cambridge, 2014. P. 75–77.

<sup>4</sup> Murray C. et al. Op. cit. P. 920-921. Digital signatures as a legal issue of electronic commerce are extensively covered in: UNCITRAL *Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods, passim*. In EU the matter is regulated by the Council Directive 99/93 E-Signature Directive. Art. 5. The Directive recognizes the validity of two kinds of signatures: an electronic signature and an advanced electronic signature. Similarly Russia has Federal Law on electronic signatures containing a list of requirements for the validity of e-signatures (Federal Law of April 6, 2011, No. 63-FZ). In the US the Uniform Electronic Transaction Act (UETA) takes a different approach. It does not distinguish between signatures and defines at section 2(8) an electronic signature as an “electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record”.

<sup>5</sup> The UN Convention on the Use of Electronic Communication in International Contracts 2005. A/RES/60/21 is silent regarding this point. See a comment in: Boss A., Kilian W. *The UN Convention on the Use of Electronic Communication in International Contracts: An In-Depth Guide and Sourcebook*. Austin, 2008. P. 349. In the US, the National Conference of Commissioners on Uniform State Laws has developed two uniform state acts: the Uniform Computer Information Transaction Act (UCITA) in 2002 and the Uniform Electronic Transaction Act (UETA) in 1999 (amended in 2000 and 2002) plus the Electronic Signatures in Global and National Commerce Act (E-Sign) in 2000 as a federal statute applying for those states which has not enacted UETA. In the EU, Directive 2000/31/EC of the EU Parliament and the Council of June 8, 2000 on electronic commerce (E-Commerce Directive); Directive 97/7/EC of the EU Parliament and the Council of May 20, 1997 on the protection of consumers in respect of distance contracts (Distance Contracts Directive); Directive 2011/83/EU of the EU Parliament and the Council of October 25, 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC and repealing Council Directive 85/577/EEC and

the precise time that a contract is made and thus from which moment the parties are legally obliged, but also the place (of sale) of the contract<sup>6</sup>.

This article focuses on the offer and acceptance requirement with a dual perspective. In micro-level terms, the paper analyses pertinent Russian law in relation to contract formation, using a comparative approach to explore how this issue is addressed in other civil- and common-law jurisdictions. In macro-level terms, the paper compares different regulatory approaches taken by the EU and US on the formation of electronic contracts, highlighting their differences and the progress made towards convergence. The relevant law for each country is discussed in relation to two types of transactions: those concluded between qualified professionals or traders, i.e. so-called Business-to-Business (B2B), and those between qualified professionals and consumers, namely Business-to-Consumer (B2C). However, the article does not cover other issues relating to contract formation and computer technology such as the validity of electronic signatures and the satisfaction of requirements of form.

## 2. What Constitutes a Contract in Common and Civil Law Systems?

The extensiveness of the notion of contract varies depending on the context. In common law it is more circumscribed than in civil law, where for instance contracts are divided into bilateral contracts (*contrats synallagmatiques*) and unilateral contracts according to the classification introduced by the Napoléon Code<sup>7</sup>. Therefore while the former category includes contracts in which both parties agree to perform or exchange promises to perform, the latter is represented by contracts in which only one party is legally obliged to uphold the terms of the contract, while the other is under no legal obligation. In common law, the notion of contract identifies *only* bilateral contracts — the ‘consideration’ in contract law being an essential element of the contract. In other words, without the exchange of one thing of value for another there is no contract (i.e. deed or act under seal)<sup>8</sup>.

Similarly, in civil law countries the legal enforceability of a contract is based not on *promise* as is the case in common law systems, but rather on *agreement*. For instance, Article 420 of the Civil Code of the Russian Federation (CCRF) defines a contract as “an agreement by two or more parties whereby civil law rights and responsibilities are created, modified or terminated”. This definition encompasses two different types of obligation: promissory and non-promissory

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Directive 97/7/EC (Unfair Contract Terms Directive) and the Community Framework for Electronic Signatures (E-Signature Directive).

<sup>6</sup> See *Cagnasso O., Cottino G.* Contratti commerciali internazionali. Padova, 2009. P. 56–58, 68–75; *Bianca C.* Diritto civile. T. III. Il contratto. Milano, 2000. P. 306–307; *Ferrari F.* La Formazione del contratto / Galgano F. (ed.) / Atlante di Diritto Privato Comparato. Milano, 2011. P. 69–81; *Bravo F.* Contrattazione telematica e contrattazione cibernetica / G.Alpa. (ed.) / Diritto dell’Informatica. Milano, 2007. P. 381 ff.; *Ferrari F.* A Comparative Overview of Offer and Acceptance Inter Absentes // Boston University International Law Journal. 1992. Vol. 10, p. 171; *Nolan D.* Offer and Acceptance in the Electronic Age / Burrows A. (ed.) / Contract Formation and Parties. Oxford, 2010. P. 61 ff. See also *Murray A.* Entering into Contracts Electronically / L. Edwards (ed.) / Law and the Internet. Oxford, 2000. P. 28; *Ерпылева Н.Ю.* Международное частное право. М., 2015. С. 287–290; *Мухеева Л.Ю.* и др. Постатейный комментарий к Гражданскому кодексу Российской Федерации. Т. 3. М., 2011.

<sup>7</sup> Art. 1102 du code civil français reads: « Le contrat est synallagmatique ou bilatéral lorsque les contractants s’obligent réciproquement les uns envers les autres ». See *Terré F., Simpler P., Lequette Y.* Droit civil. Les obligations. Paris, 2013. Section 64 and section 72; *Malaurie P., Aynes L.* Les obligations // LGDJ lextenso. 2013. P.183 ff.

<sup>8</sup> See *Collins H.* The Law of Contracts. London, 2003. P. 59 ff.

transactions, namely not only those agreements that are formed by the parties' consent — these are only contracts in common law — but also those that have no legal existence until they are delivered, for instance a deposit contract or a lease contract<sup>9</sup>.

If common law is written by judges and strongly characterized by an empirical approach, civil law is a product of codifications conducted by law professors and its peculiarity is its scientific value, that is its ability to classify relevant rules into larger macro categories characterized by a higher level of abstraction<sup>10</sup>. That said, even among civil law countries there is no homogeneity regarding the notion of contract. On one hand, German doctrine reaches the highest level of abstraction by not qualifying as pecuniary the contractual relationship between the parties, but simply requiring — for the contract to exist — the parties to participate by performing. According to German law<sup>11</sup>, all legal acts (*Rechtsgeschäft*) originate simply from the parties' consent (*Willenserklärung*). As a result, even unilateral contracts, which express the parties' consent, are considered to be contracts. On the other hand, Roman-French doctrine characterizes the contractual relationship between parties as pecuniary<sup>12</sup>, and although they accept unilateral contracts, they require more than just the consent between parties for the contract to be concluded<sup>13</sup>. Russian civil law follows the German doctrine in terms of what constitutes a contract, and thus accepts all non-promissory transactions because they are expressions of the parties' intention. Similarly, it recognizes unilateral contracts<sup>14</sup>.

The intention of the parties to comply with each other is always a fundamental requirement of a contract, but not always sufficient as in the case of *real contracts* (*contrats réels*, *Realverträge*) in certain civil law countries. This category of contracts was already known in Roman times. For instance, in Roman law the contract of deposit required the goods to be delivered from one party to the other (a process called *traditio*) in order for the obligation of the recipient — to look after the goods and return them after a certain period — to arise. Other real contracts include pledges, leases, and the loan and transport of goods<sup>15</sup>. While France, Italy, Russia and many other civil law countries recognize these agreements as contracts, common law countries consider them to be bailments<sup>16</sup>. Finally, in Germany, these contracts are included in the macro category of contracts (*negotium iuridicum*), but they are formed and come into effect from the time the parties agree to obligate themselves (*consensual contracts*) rather than when the goods are delivered (*real contracts*).

Under Russian law, online contracts are no different — as far as their conclusion is concerned — from *normal* offline hard-copy contracts, and they are therefore governed by the same provisions of the CCRF<sup>17</sup>. The differences lie in the processing speed, devices and methods in

<sup>9</sup> *Contrat réel* is a contract *qui re contrahuntur*; it is only considered bailment in common law (Ireland, UK and also Croatia), see Ferrari F. Op. cit. P. 72.

<sup>10</sup> Galgano F. Il contratto. Introduzione; *idem*. Contratto e impresa, p. 728 ff.

<sup>11</sup> The situation is similar in other civil law countries like Estonia, Denmark, Slovenia, Hungary, Serbia, Bosnia, Montenegro (see Ferrari F. Op. cit. P. 71).

<sup>12</sup> Art. 1321 of Italian Civil Code states: “Il contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale”.

<sup>13</sup> Although this problem is solved by allowing the parties to phrase a unilateral contract as a promise to perform in order to agree on the consent.

<sup>14</sup> Osakwe C. Modern Russian Contract Law // Loy L.A. Int'l and Comp. L. Rev. 24:113, p. 133.

<sup>15</sup> In French law real contracts are *prêt a usage*, *prêt de consommation* and *gage* to which the French courts added the *don manuel* and the *contrat de transport de marchandises*.

<sup>16</sup> The temporary placement of control over, or possession of personal property by one person, the bailor, into the hands of another, the bailee, for a designated purpose upon which the parties have agreed.

<sup>17</sup> Civil Code of the Russian Federation. Art. 432.

the online environment. According to CCRF Article 432, a contract is deemed concluded if agreement is reached between the parties, in the form required, on all essential terms of the contract<sup>18</sup>. The typical process of formation has three steps: an offeror sends an offer to a specific offeree; the offeree considers the terms of the offer and accepts; the offeror receives the offeree's acceptance. Unless the parties decide otherwise, the contract is concluded at the point when the offeror receives the offeree's acceptance. The acceptance needs to mirror the offer perfectly, otherwise it becomes a counter-offer and needs to be accepted by the other party to form a contract. In addition, of course, the parties must have the legal capacity to make a contract and must observe requirements regarding its form<sup>19</sup>.

Unfortunately, as I will explain below, offer and acceptance rules reflect cultural, economic and political ideas about consensual activity. A common and popular method through which commercial contracts are made electronically is the exchange of electronic mail (e-mail). Nowadays the e-mail account is the digital equivalent of a post-box and it is recognized as a valid form of communication by courts and practitioners. Therefore, an offer sent from the offeror's e-mail account to the offeree's inbox, with the offeree's consequent acceptance sent to the offeror's mailbox, form the contract. Other popular methods of online contracting — especially for B2C sales — are the online transactions and the automated transactions also known as web-wrap, click-wrap or shrink-wrap agreements. These sometimes consist of the vendor displaying products on his website alongside the cost of each product. The customer can search the website, select a product and read the information related to it, fill in an order form that contains all details concerning price and quantity, and place an order by submitting the form, normally by clicking the 'submit', 'buy' or 'I accept' button. Sometimes the process is very similar to what would happen in an actual self-service shop, except that the cashier would be the electronic agent. At other times, however, the website operates like a digital vending machine, including all the terms of the contract and information about the products and thus providing clients with the complete offer. These standardized forms of contract are often used in software licence agreements although their legal validity is somewhat unclear because of their lack of transparency. In fact, the terms and conditions are usually visible only after users have started to install the software, which is the equivalent of a customer having already paid. Even if the use of the programme is deemed acceptance of the contract, in order to solve this problem online sellers have increasingly invested in establishing a certain level of trust with their clients. For instance, a global market platform such as eBay is certified by organizations such as TRUSTe, an established trust mark sales company<sup>20</sup>.

Finally, it is worth noting that in electronic commercial transactions, the offer is generally preceded by a negotiation phase in which the parties bargain for the terms of the contract. While this is generally the case in online contracts between professional traders (B2B), this phase is significantly reduced if not absent in automated transactions (B2C). For this reason, the EU Consumer Rights Directive requires retailers to comply with extensive information requirements "prior to an order being placed by the recipient of the service". In addition, a "cooling off" period (14 days in the UK) is included in the regulation, during which a consumer can cancel a contract without liability, and which can be extended (up to 12 months in the UK) where pre-contractual information is not provided<sup>21</sup>. However, the regulations for contracts between consumers and

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<sup>18</sup> In Italy see Art. 1326 c.c.

<sup>19</sup> Савельев А.И. Электронная коммерция в России и за рубежом: правовое регулирование. М., 2014. С. 153.

<sup>20</sup> Wang F. Law of Electronic Commercial Transactions. London, 2010. P. 36 ff.

<sup>21</sup> Council Directive 2011/83 which had to be implemented before June 13, 2014. In Russia a similar period of two weeks for consumer's protection applies.

traders that are concluded by means of distance communication — online, emails, telephone or post — do not apply to B2B transactions. B2B transactions remain partially covered by the E-Commerce Directive, although this allows the parties to be exempted from any obligation, which mainly concerns the information that must be provided by a service provider<sup>22</sup>.

The regulatory approach to electronic commerce for B2C transactions appears to be quite different in the US, where the Federal Trade Commission has created a “checklist” of basic safeguards for when consumers shop online. However, the Uniform Electronic Transactions Act (UETA) does not specify any information that online merchants are required to give to their clients prior to the formation of contracts. The US approach is targeted to promote self-regulation and economic rationality in this new market, rather than imposing rules that should govern the development and use of electronic commerce. Therefore, the burden of assessing the safety of a website or the reliability of a seller rests on the consumer, following several principles of common sense and prudence. This approach assumes that online sellers compete for reputation in electronic commerce and therefore invest in demonstrating their reliability to clients<sup>23</sup>.

In Russia, the government approved a ruling on the distance selling of goods and services, and a Federal Law governing advertising in Russia. The Advertising Law has imposed a ban on inaccurate advertising containing untrue information, more specifically information that is known to be false, inaccurate or outdated regarding the advantages of the goods advertised over those of other producers or suppliers<sup>24</sup>.

### 3. The Offer in Online Commercial Transactions

Online contracts are typically contracts *inter absentes* where the agreement is formed in subsequent phases. In particular it is useful to highlight two moments that represent the expression of intention of each of the parties: the offer and the acceptance. The offer can be defined as the *offeror's* expression of intention to conclude a contract with a particular person or persons — the *offeree*. This needs to contain all the fundamental elements of the contract. As in other civil law countries, CCRF Article 435 stipulates that an offer must be addressed “to one or several *specific* persons”<sup>25</sup>. However, an offer may still be valid even if it is addressed to an unspecified multitude of persons (*in incertam personam*), for example an offer to the public. With this aim, CCRF Article 437.2 relaxes the requirement for the specificity of addressees by providing that a proposal, in which the respective party's will to make a contract “with anyone who responds” can be discerned, still constitutes a (public) offer with all the same legal effects<sup>26</sup>. To be valid, the offer to the public must contain all the essential elements of a contract<sup>27</sup>. An offer to the public is also familiar in common law countries. In a leading old English case it was said that “an offer can be made to an individual, to a class of persons, or to the whole world”<sup>28</sup>.

<sup>22</sup> Council Directive 2000/31. Art. 10(1).

<sup>23</sup> *Kierkegaard S.M.* E-Contract Formation: US and EU Perspectives // *Shidler Journal of Law, Commerce and Technology*. 2007, no.3, p. 12 ff.

<sup>24</sup> See Government Resolution No. 612 dated September 2, 2007 and the Federal Law of March 13, 2006. No. 38-FZ.

<sup>25</sup> Emphasis added.

<sup>26</sup> In Italian Civil Code it is Art. 1336.

<sup>27</sup> Cour de Cassation française : « l'offre faite au public lie le pollicitant à l'égard du premier acceptant dans les mêmes conditions que l'offre faite à personne déterminée » (Cass. Civ. 28 novembre 1968).

<sup>28</sup> *Carlill v. Carbolic Smoke Ball Co.* (1 Q.B. 256, 268, 1893).

However, if the offer to the public does not contain all the elements of a contract it has to be considered as an invitation to treat<sup>29</sup>.

It is important not to mistake an offer for an invitation to treat, as only the former has the legal force to bind the parties to a contract. An invitation to treat simply results in shifting the role of offeror and offeree, provoking an offer from the other party. For this purpose, CCRF Article 437.1 provides that *advertisement* and “*other proposals addressed to unspecified persons*” are to be treated only as invitations to make offers. It follows from CCRF Article 494.1 that what sets advertisement (a particular product rather than catalogues) apart from a public offer, is the availability of all the essential terms of a retail sale contract in the latter. If, however, products or samples are displayed at their place of sale, this is deemed a public offer even if the price or any other essential terms of sale are not provided — unless the seller has clearly indicated that such products are not intended for sale<sup>29</sup>.

It is therefore rather difficult under Russian law for a retailer to avoid the status of offeror. The Ninth Commercial Court of Appeal explained in one of its resolutions why this is so: the consumer is not in a position to propose the essential terms of a retail contract, such as the price or processing time, to the seller and can only agree to be bound by the terms devised and proposed by the seller<sup>30</sup>.

In addition to the general norms of the CCRF, retail e-commerce in Russia is regulated by a government resolution laying down the rules for what is termed “distance sale of goods”<sup>31</sup>. Importantly, a distance sale takes place only when the customer has selected a product based on its online description, while how the order is placed is not determinative<sup>32</sup>. Because distance selling is regulated by mostly the same norms as any other retail sale contract<sup>33</sup>, the seller must make a contract with anyone who has stated a willingness to purchase a specific product with a description that has been made available by the seller<sup>34</sup>. The essential terms of a distance sale contract include the name, quantity and price of the product, as well as the installment plan should the parties agree on payment in installments<sup>35</sup>. This means that any proposal of a product in an online store that contains the name of the product and its price per unit constitutes a public offer if addressed to a private consumer (as opposed to a business). Reservations to the contrary, often found on retail websites, are therefore void as they contradict the law<sup>36</sup>.

A question with important legal implications is whether products displayed on a website are to be deemed as being displayed “at their place of sale”? If they are, then, as mentioned above<sup>37</sup>,

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<sup>29</sup> *De Nova G.* Un contratto di consumo via internet / Contratti, p. 113; Tosi E. Il contratto virtuale / Digesto delle discipline privatistiche. Appendice di Aggiornamento. T. I. Torino, 2003. P. 458 ff.; *idem.* La conclusione di contratti “online” / I problemi giuridici di Internet. Milano, P. 34; *Minnecci U., Schiarrone A.* Documento elettronico e contratto informatico / Digesto Diritto Privatistiche Sezione civile. Appendice di Aggiornamento, Torino, 2000. P. 345.

<sup>30</sup> Ninth Commercial Court of Appeal. Resolution of December 10, 2012, No. 09AII-33617/2012-AK

<sup>31</sup> Government Resolution No. 612 of September 2, 2007 On Approval of the Rules for the Distance Selling of Goods. Item 2.

<sup>32</sup> Civil Code of the Russian Federation. Art. 497.2. As *Savelyev* points out (Op. cit. P.156), this means, for example, that where a customer selected a product in a brick-and-mortar store and then placed an order online, a distance sale does not take place.

<sup>33</sup> Civil Code of the Russian Federation. Art. 497.2.

<sup>34</sup> *Savelyev A.* Op.cit. P. 12.

<sup>35</sup> Civil Code of the Russian Federation. Art. 455.3, 494.2, 489.1.

<sup>36</sup> *Savelyev A.* Op. cit. P. 158. Generally, sellers on internet prevent a contract to be formed by introducing a clause in their Terms and Conditions in which they state that provision of the goods or services is conditioned to their availability. By doing it, the contract is not formed if the quantity is not available.

<sup>37</sup> Civil Code of the Russian Federation. Art. 494.2.

this constitutes a public offer *even with no essential terms of sale specified*. Courts and legal doctrine seem to diverge on this issue: while the former have been willing to answer this question in the affirmative, the latter is uncomfortable with the idea of an online website as *a place of sale* for physical products<sup>38</sup>. It would appear reasonable to deem Russian Civil Code Article 494.2 not applicable to e-commerce as it certainly was not drafted with online shopping in mind. As it is precisely the transcendence of the physical categories of space and place that modern telecommunication technology allows, attempts to fit e-commerce into the Procrustean bed of legislation that was not intended to deal with the online environment will not produce meaningful outcomes.

In the EU, online consumer transactions are covered by the EC Directive on Electronic Commerce (EC Directive)<sup>39</sup>, which, however, does not regulate the matter of offer and acceptance, leaving it to the discretion of Member States. Looking at the approaches adopted by EU Member States, a non-harmonized scenario emerges. Similar but not identical approaches to the Russian legal system exist in some civil law countries. For instance, the French and Italian civil codes consider a display of goods at their place of sale an offer, conditional on whether a price is indicated beside each good<sup>40</sup>.

Outside the EU, no Swiss law deals specifically with electronic commerce, and therefore the general norms for contract formation apply<sup>41</sup>. In particular, Article 7 subsection 3 of the Swiss Code of Obligations provides that “the display of goods with the price attached constitutes an offer”. The click of a mouse to confirm the placing of an order therefore forms a contract between the seller (the offeror), and the customer (the offeree)<sup>42</sup>. Finally, it may be inferred from reading the Contract Law of China that, as in the case of Russia, the difference between an invitation to treat and an offer under Chinese law is that the latter is concrete and definite while the former is less specific<sup>43</sup>. Commercial advertisement, which is generally deemed an invitation to treat, becomes an offer if it is concrete and definite and expresses the advertiser’s intent to be bound by acceptance. From this, it is reasonable to infer that under Chinese law the online seller is the offeror, while the customer only accepts.

Common law countries and Germany contrast starkly with Russian practice. In Germany, the display of goods in a store as well as on a website — even when a price is included — is only an invitation to treat. The placing of an online order thus constitutes an offer, which the seller is free to decline<sup>44</sup>. Under English law, a display of goods in a shop, i.e. at “their place of sale”, will

<sup>38</sup> Savelyev A. Op. cit. P. 159.

<sup>39</sup> Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

<sup>40</sup> In Italy it is article 1336 c.c. In France, the Civil Code (CCF) contains a dedicated section on the conclusion of contracts in electronic form. CCF Article 1369-4, -5, -6 are an implementation of the EC Directive Article 10 concerning information that must be provided by the online seller (referred to in the Directive as ‘service provider’). However, while the Directive remains silent on the allocation of the roles of offeror and offeree between the seller and the customer, the CCF explicitly refers to the party providing such information as ‘offeror’ and the person placing an order as the ‘offeree’. Therefore, under French law, it is the online seller who makes an offer and it is the customer who accepts.

<sup>41</sup> Available at: <http://www.kmu.admin.ch/kmu-betreiben/03260/03263/03274/index.html?lang=fr> (accessed: March 4, 2015)

<sup>42</sup> Ibid.

<sup>43</sup> Art. 14.1, 15 of Contract Law of the People’s Republic of China. Available at: // [http://www.npc.gov.cn/englishnpc/Law/200712/11/content\\_1383564.htm](http://www.npc.gov.cn/englishnpc/Law/200712/11/content_1383564.htm). (accessed: March 4, 2015)

<sup>44</sup> Whincup M. Contract Law and Practice. Deventer, 2006. P. 64.



generally not qualify as an offer but only as an invitation to treat; the transaction is concluded when the seller accepts the customer's offer at the till. The corresponding rule was laid down and applied in a landmark case in England<sup>45</sup>. The traditional common law system approach has been seen as being protective of sellers<sup>46</sup>. In truth, courts are generally allowed to employ a variety of conceptual tools to delay the moment of contract formation in order to grant both parties room for *manoeuvre* during negotiation, and avoid abuse from one of the parties<sup>47</sup>.

In the context of retail e-commerce, the rule means that it is not the seller who makes an offer by providing information about products on a website, but rather the customer who places an online order<sup>48</sup>. The US understandably follows the English model, which in the US is enshrined in a statute. Uniform Commercial Code § 2-206(1)(b) provides that the placing of an order does not constitute acceptance, but instead "invites acceptance" and is therefore itself an offer<sup>49</sup>. In electronic contracts formed through web-wrap, click-wrap or shrink-wrap agreements the offeror has no way of revoking the offer if something goes wrong, for instance if he removes the goods on display.

Instead, when electronic contracts are formed through electronic mail the possibility of revoking an offer still exists, but it can be limited depending on the country's domestic law. In certain civil law countries the possibility of revoking an offer is limited and an offer can only be revoked if the revocation reaches the addressee before or at the same time as the offer comes to the addressee's attention. Once an offer has come to the attention of the addressee, it becomes effective and should be irrevocable. Under Russian civil law, an offer may stipulate a time period for acceptance<sup>50</sup>. If it does, there is a presumption that this offer is irrevocable prior to the expiration of the stipulated time limit. On the contrary, if no time limit is specified, an offer is revocable within a reasonable period of time<sup>51</sup>. Similarly, under the German code the offeror is bound by his offer, in the sense that he cannot effectively withdraw it, either during a period set by himself or during a reasonable period<sup>52</sup>.

In contrast, the Roman French doctrine allows an offer to always be revocable. However, the offeror may owe damages for a wrongful revocation, according to the principle of good faith in negotiations. With this aim, the recently revised Russian civil code enacts the doctrine of good faith and fair dealing in negotiations (as well as in post-contractual relations). Accordingly, a party that disrupts the negotiations will be liable for the losses incurred<sup>53</sup>. Despite all countries acknowledging the principle of good faith in negotiations, their approaches to what

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<sup>45</sup> See *Pharmaceutical Society of GB v. Boots Cash Chemists* [1953] 1 QB 401; see also *Fisher v. Bell* [1961] 1 QB 394. For a comment on these cases see *McKendrick E. Contract Law*. London, 2009. P. 29.

<sup>46</sup> For example in the case of *Grainger & Son v. Gough* [1896] AC 325 (HL) the judge held that the transmission of price lists did not amount to an offer to supply an unlimited quantity of products described at the price named, as the stock of products from advertisers or merchants could be limited. Decision further approved in *Esso Petroleum Ltd v. Customs and Excise Commissioners* [1976] 1 WLR 1 (HL). In US see *Rosenfeld v. Zerneck* (4 Misc. 3d 193, 776 N.Y.S. 2d 458 (Sup. Ct. Kings Cty. 2004) the Supreme Court of New York State has dismissed the plaintiffs' claim due to the failure of the incorporation of the essential terms in the email.

<sup>47</sup> *Collins H. Law of Contract*. London, 2003. P. 171–172.

<sup>48</sup> *Reed C., Angel J. Computer Law: The Law and Regulation of Information Technology*. Oxford, 2007. P. 106.

<sup>49</sup> UCC § 2-206(1)(b): 'An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods [...].'

<sup>50</sup> Civil Code of Russian Federation. Art. 440.

<sup>51</sup> *Ibid.* Art. 436.

<sup>52</sup> *Zweigert K., Kötz H. Introduction to Comparative Law*. Oxford, 1998. Part II. P. 356 ff.

<sup>53</sup> Civil Code of the Russian Federation. Art. 434 (1).

should be considered fair dealing diverge. In traditional common law rule, the courts have accorded parties the freedom to negotiate without risk of pre-contractual liability. Accordingly, offers are revocable at the offeror's discretion by giving notice to the offeree of revocation. From the moment the offeree finds out about the revocation the offer no longer exists. As disposed in a notable case<sup>54</sup>, even when the offeror had promised that the offer would remain open for longer, it was revocable. This is a result of the common law doctrine of *consideration*, according to which there is no binding obligation and thus no contract if there is no bargain regarding the terms of an exchange. An irrevocable offer (option) for which the other party has not paid is always revocable. This position has been slightly tempered in US law with the advent of the doctrine of promissory estoppel, according to which the offeror may owe damages for a wrongful revocation<sup>55</sup>.

#### 4. The Moment of Contract Formation

With regard to the conclusion of contracts, EU legal systems are founded on different principles, which reflect the different approaches resulting in the declaration theory, the theory of information or dispatch theory, the postal rule and the theory of reception. According to the declaration theory, a contract is formed when the acceptance of an offer is expressed without unreasonable delay — regardless of whether the acceptance is brought to the mind of the offeror or not<sup>56</sup>. The declaration theory has been criticized as being biased towards the offeree as the contract is deemed to be formed without the offeror being aware of the conclusion. The declaration theory can result in increased uncertainty and confusion for the offeror as the contract is formed exclusively at the wish of the offeree, either to ratify or to refuse if he wants to change his mind<sup>57</sup>.

The information or dispatch theory allows a contract to be formed at the moment the acceptance comes to the notice of the offeror<sup>58</sup>. In this case, the offeror can withdraw the offer at any time before the offeree's acceptance comes to his knowledge. In contrast to the declaration theory, the offeree may suffer under this scenario as it is difficult for him to determine when the acceptance comes to the notice of the offeror. In addition, the contract formation could be delayed considerably without any good reason. Because of this, the principle is often mitigated by a "presumption of consciousness" according to which every acceptance addressed to a specific person is assumed to be known by that person once it arrives at his or her address<sup>59</sup>.

Similarly the reception theory states that a contract is concluded once the acceptance is received by the offeror or at least made available for him — regardless of whether he is aware

<sup>54</sup> *Dickinson v. Dodds* [1876] 2 Ch.D. 463 (Eng. Ct. App.).

<sup>55</sup> A promise that the promisor should expect to be relied on imposes liability for any such reasonable reliance in order to prevent injustice. See Restatement (Second) of Contracts §§ 87(2), 90(1) (1981).

<sup>56</sup> This is the principle followed by Islamic law in determining the time of contract formation *inter absentes*. See *Alzaagy A. The Time of Concluding the Contract in E-Commerce from Islamic Legal Perspective // Cyber Orient*. 2012, no. 6, p. 3 ff. Chile too is moving towards this mechanism.

<sup>57</sup> This effect is mitigated by the rules on revocability of the offer and bona fide in pre-contractual negotiation, see *Ferrari F. Op. cit.* P. 80 f.

<sup>58</sup> This principle applies in Italy, Spain and Holland. See *Ferrari F. Op. cit.* P. 80; *Galgano F. Il negozio giuridico*. Milano, 2002. P. 83 ff. Author mentions that in the Italian Report to the King (n.70) it was written: "We cannot accept that a person can become intentionally contractually bound without being aware of the existence of the contract".

<sup>59</sup> *Ferrari F. Op. cit.* P. 89.

of it or not. This principle seems better at dividing the risks of the contract formation between the parties. Initially, the risk of communicating the acceptance is held by the offeree (as in information theory) and therefore, if the acceptance does not reach the offeror or arrives *late*, no contract is formed<sup>60</sup>. However, if the acceptance reaches the offeror's address, then the risk shifts from the offeree to the offeror even if the offeror is not aware of the offeree's acceptance. This principle of contract formation applies in Russia.

Finally, the postal rule (also called the mailbox rule) is very popular in common law countries. According to this rule the contract is formed at the moment when the offeree sends his declaration of acceptance to the offeror, or to use the words adopted in a leading Scottish case, "a contract is accepted by the posting of a letter declaring its acceptance; the acceptor has done all that is necessary for him to do, and is not answerable for casualties occurring at the post office"<sup>61</sup>. Similarly, and more recently, British courts affirmed the validity (effectiveness) of an e-mailed notice of an arbitration reference regardless of the fact that the recipient's staff assumed the e-mail was 'spam' and ignored it<sup>62</sup>.

Following this rule<sup>63</sup>, not only is the offeree unable to revoke his acceptance once he has sent it, but the offeror cannot revoke his offer after an acceptance has been sent to his address. He can only revoke it if the communication of acceptance is not in the course of being transmitted to him<sup>64</sup>. Therefore in this specific case, it is the offeror and not the offeree who bears the risk of communication. This approach was traditionally favoured by English courts because they perceived that the acceptance rule might result in each side waiting for confirmation of receipt of the last communication *ad infinitum*<sup>65</sup>.

The reason for the adoption of the postal rule among common law legal systems lies in the need to provide certainty in business transactions between the parties, especially when the means of communication are not instantaneous. In this sense, the courts believed that the conduct of business would in general be better served by giving the offeree certainty. However, even in the old days (pre-internet), English courts accepted that the postal rule should not be applied where it would lead to "manifest inconvenience or absurdity"<sup>66</sup>.

As discussed above, electronic contracts can be formed through e-mails, online transactions or automated online transactions (web-wrap, click-wrap or shrink-wrap agreements). Indeed, e-mail messages appear to be the digital equivalent of paper letters, and although they are a much faster medium of communication, they also seem to be fragmented and not *totally* instantaneous when compared to a telephone call or a telex. For instance, they may not reach the offeror's mailbox because of server malfunction or network congestion. For this reason, the application of the postal rule to electronic contracts concluded through e-mails could still make sense. However, despite this, such an application appears highly unlikely in the eyes of a large part of the doc-

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<sup>60</sup> Or for instance if the offeree writes to an incorrect e-mail address or the e-mail contains a virus.

<sup>61</sup> *Dunlop v. Higgins* 1 H.L. Cas. 381, 1848.

<sup>62</sup> *Bernuth Lines Ltd v. High Seas Shipping Ltd* ("The Eastern Navigator") [2005] EWHC 3020.

<sup>63</sup> See the rule was first established in the case of *Adams v. Lindsell* [1818] 1 B. & Ald. 681.

<sup>64</sup> In US law it is incorporated in the § 64 Restatement (Second).

<sup>65</sup> The intent of providing business certainty is confirmed by another famous case, *Household Fire and Carriage Accident Insurance Co. v. Grant* [1879] 4 Ex D 216, in which the court held that, even if an acceptance is lost or never arrives at its destination, the contract is still concluded, provided that the letter is properly stamped and the loss is not attributable to the offeree's fault.

<sup>66</sup> *Holwell Securities Ltd v. Hughes* [1974] 1 WLR 155, p. 161. See Hill S. Flogging a Dead Horse — The Postal Acceptance Rule and E-mail // *Journal of Contract Law*. 2001. Vol. 17, p.151; Nolan D. Op. cit. P. 67–69.

trine<sup>67</sup>. In fact, if we assume that a fax transmission is considered to be an instantaneous form of communication, e-mails do not seem to be less instantaneous when compared with telex. It goes without saying that for electronic *boilerplate* contracts like web-wrap, click-wrap, shrink-wrap, browse-wrap, which already stand as an offer on the website, like a software licence agreement, this doubt does not even exist. In such cases, the website is practically a “digital vending machine”, which responds to the user action in a predetermined way. By clicking the acceptance box the client expresses agreement with the terms of the contract, and by proceeding to payment, downloading the product and *de facto* using it, the client accepts the offer.<sup>68</sup>

If the postal rule is not applied then the general rule applies. The general rule accepts that a contract is effective at the time when the receipt of acceptance is applied<sup>69</sup>. This position is also supported by the US Restatement (Second) of Contracts, which provides that acceptance given by telephone or another medium of “substantially instantaneous two-way communication” is governed by the principles (receipt rule) applicable to acceptance when the parties are in the presence of each other<sup>70</sup>. A similar approach (the acceptance rule) also exists between parties in civil law countries as China<sup>71</sup>.

The moment when the offeror is deemed to have received an email is not entirely clear. It could be when the e-mail is read by the offeror or, more likely, when it arrives on the server that manages the offeror’s e-mail, or when the e-mail ought reasonably to have come to the offeror’s attention. As far as the formation of B2B electronic contracts for the sale of goods are concerned, a similar principle is contained in Article 15(1) of the Vienna Convention on International Sales of Goods (CISG). The article specifies that “[a]n offer becomes effective when it reaches the offeree”. According to the Advisory Council that moment “[c]orresponds to the point in time when an electronic communication has entered the offeree’s server”. At the same time, Article 18(2) provides that “an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror”<sup>72</sup>.

The disadvantage of making the effectiveness of an e-mailed acceptance depend on the time that it ought reasonably to have come to the offeror’s attention is that it creates uncertainty. The assent has to reach the offeror within the time specified in the offer or, if no time is specified, within a reasonable time (immediately if the offer is oral, unless the circumstances indicate otherwise). With regard to the interpretation of “within a reasonable time”, some academics agree that “it will be prudent for the offeror to state that an e-mailed acceptance will occur if the e-mail (1) reaches the offeror’s inbox (2) during the offeror’s normal working hours”<sup>73</sup>. However,

<sup>67</sup> Wang F.F. Op. cit. p.56; Nolan D. Op. cit. P.67–69; Riefa C., Hornle J. *The Changing Face of Electronic Consumer Contracts / Law and the Internet*. Oxford, 2009. P. 105; Dickie J. *When and Where are Electronic Contracts Concluded?* // Northern Ireland Law Quarterly. 1998. Vol. 49, p. 332; Dodd J., Hernandez J. *Contracting in Cyberspace* // Computer Law Review and Technology Journal. 1998, no. 1, p. 12.

<sup>68</sup> Nolan D. Op. cit. P. 79.

<sup>69</sup> *Entros v. Miles Far East Corporation Ltd* [1955] 2 Q.B. 327. This is confirmed recently by *Greenery SA v Memphis Biofuels*. September 2, 2008 (Com Ct).

<sup>70</sup> Restatement (Second) of Contracts. § 64 (1979).

<sup>71</sup> Wang F. Op. cit. P. 56–58.

<sup>72</sup> That rule, which appears in the first part of CISG art. 16(1), is tempered by the second part of Art. 16(1): “Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.”

<sup>73</sup> Andrews N. *Contract Law*. Cambridge, 2011. P. 46; Jalil M.A. *Clarification of Rules of Acceptance in Making Business Contracts* // Journal of Politics and Law. Vol. 4, pp. 109–122. Also see *Schelde Delta Shipping BV v. Astarte Shipping Ltd* (The ‘Pamela’) [1995] 2 Lloyd’s Rep 249 Queen’s Bench: it was held an acceptance that was sent out of business hours by telex would not be effective until the opening of the office on the next business day.

exactly how long depends on whether the means of communicating the offer were fast or slow, as well as on its subject matter<sup>74</sup>. For instance, offers to buy perishable goods, or a commodity whose price fluctuates daily, will lapse quite quickly. Therefore, it is deemed reasonable to apply the theory of “normal working hours” for the acceptance by e-mail communication to be effective, while this period should probably be shortened substantially for faster means of communication such as automated transactions<sup>75</sup>.

In order to minimize uncertainty in online transactions, in the US the UETA — consistent with the UNICITRAL Model Law on Electronic Commerce<sup>76</sup> — determines the time and place of dispatch and receipt of electronic communications. Section 15(b) of the UETA states that “an electronic record is deemed received when it enters an information processing system designated by the recipient for receiving such messages (e.g. home office) and it is in a form capable of being processed by that system”. Accordingly, the time of dispatch is the moment when an offer “leaves an information system under the control of the originator or of the party who sent it on behalf of the originator”. The time of receipt is the time when an electronic communication becomes “capable of being retrieved by the addressee at an electronic address designated by the addressee”<sup>77</sup>.

The UCITA, which is uniform commercial code for software licenses and other computer information transactions, goes even further with detailed provisions to indicate explicitly the application of the general rule to contracting by electronic means. Article 215 of the Act provides for electronic messages to be in effect at the time of receipt regardless of whether any individual is aware of that receipt. Finally, under the section entitled “Offer and Acceptance in General” (203 (4)) it is stated that “if an offer in an electronic message evokes an electronic message accepting the offer, a contract is formed when an electronic acceptance is received”<sup>78</sup>.

In the EU, the EC Directive does not define a time of dispatch or receipt. In order to protect the customer, it requires a business to acknowledge receipt of a consumer’s order by electronic means and that the consumers only receive this acknowledgement when they can access it.<sup>79</sup> The Directive does not expressly determine the moment at which the contract is formed. It focuses on accessibility, but the meaning of “able to access” is ambiguous and rules regarding online acceptance will be subject to the national law of each Member State. Although it could be implied from the text of the law that no contract is concluded until the consumer can access the acknowledgement of receipt of a successful transaction, it has been argued that a legal requirement of confirmation is not needed, as there is no general rule that a contract be confirmed, and when the contract is already at hand the confirmation has no legal effect at all<sup>80</sup>. Therefore,

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<sup>74</sup> According to Russian Civil Code (Art. 441), the duration of a “normally required” time is a question of fact, dependent upon the nature of the contract, commercial practice and other factors.

<sup>75</sup> Wang F. Op. cit. P. 58.

<sup>76</sup> See Art. 15(b) following Art. 15 of UNICITRAL Model law, which reaches similar conclusions with a different wording that the UN Convention on the Use of Electronic Communication in International Contracts (Art. 10 UN Convention).

<sup>77</sup> Art. 10(1) e 10(2) UN Convention.

<sup>78</sup> This constitute a rejection of the “Mailbox Rule” for electronic messages, thereby placing the risk on sending party if receipt does not occur. However since UCITA only relates to contracts in computer information, the mailbox rule is still in place for many electronic contracts in the US meaning that the acceptance is effective when sent (dispatched).

<sup>79</sup> EC Directive 2000/31/EC on Electronic Commerce. Art. 11.

<sup>80</sup> In addition, neither contract law nor the E-commerce Directive imposes any legal consequences if there is a lack of acknowledgement of receipt. So it is reasonable to question the effectiveness of this article regarding consumer protection.

in online transactions, a consumer's action of clicking the 'Submit' or 'Pay' buttons, or sending an e-mail, completes the formation of the contract through acceptance<sup>81</sup>.

## 5. Conclusion

Online contracts are contracts *inter absentes* where parties are not in one another's presence. Such contracts foreground — for the purpose of identifying the moment of transfer of ownership and risk — the problem of defining the time of dispatch and receipt of the electronic communication, especially if, for instance, there are competing acceptances. However, despite efforts to harmonize domestic laws into a uniform rule internationally applicable to online contracts, the question of the exact moment when an online contract is formed remains unresolved. In determining the time of online contract formation, differences mainly depend on the principle adopted by the domestic law of the country and interpretation by the courts that govern the online contract. However, these differences do not seem so vast and, in any case, by reasoning from general principles or by analogy with the rules governing traditional paper contracts, the courts have proved capable of dealing with the issues posed by the challenges of electronic commerce<sup>82</sup>.

With regard to automated transactions and self-service sales online, which nowadays are probably the most widely adopted types of electronic B2C transactions, it has to be pointed out that consent of the parties plays a much more limited role than in paper contracts *inter praesentes*. This complicates everything not only from the proposal point of view — where it is not always clear who is the offeror and who is the offeree, as national laws differ in their approaches to allocating the roles of offeror and offeree in online consumer transactions — but especially from the acceptance point of view. As a result, contract formation has often been completed *per facta concludentia*, that is after the goods have been received or payment has been made.

In completely automated transactions where the website works as a digital vending machine, the products on display are supported by prices and terms of contract, therefore constituting a complete offer. The client accepts the offer by paying for the product, for instance a PC programme, and simultaneously downloading the software licence. However, this is not the case in self-service sales online. Electronic businesses implement self-service models because they are cost-cutting models and, most importantly, they generate demand, which is converted into new customers without the need for market research or trying to persuade clients over the phone to buy new items. Furthermore, through self-service sales the online retailer is most of the time able to defer the moment of contract formation, in order to retain the option of later refusing to fulfil the order. A good example of this is Amazon, which structures the products displayed on its website as an invitation to treat. Once an order is placed, the client receives only an acknowledgement of the receipt of the order, while the real acceptance will arrive only once the item ordered is dispatched to the client. Consumer protection is most needed in such types of electronic transaction. If the Amazon case is taken as an example, it should be noted that when the company uses external third parties to fulfil the clients' demand, these parties are professional retail sellers. However, this is not always the case. For instance TicketBis, which

<sup>81</sup> In the UK this reasoning seems confirmed by the new regulation on electronic commerce (SI 2002/2013, Reg. 15), which gives consumers the right to cancel the contract (implying a contract is already formed) for breaches of the regulation or prevent businesses from enforcing contracts in the event of significant breaches of the rules. See *Collins H. Op. cit.* P. 172.

<sup>82</sup> *Wang F. Op. cit.* Author proposes the acceptance rule as the standard rule for all countries; *Nolan D. Op. cit.* P. 87; *Hill J. Cross-Border Consumer Contracts*. Oxford, 2008. para 1,24 and 1,53.

provides a platform for the event tickets market (buyers and sellers), does not involve professional sellers, increasing the probability of fraud<sup>83</sup>. The website acts as a mediator between the two parties — seller and buyer. When an offer of a ticket is placed and the terms of use accepted, the mediator releases an acknowledgement of the order, which constitutes the acceptance of the mediation contract between the buyer and the website. Therefore, the buyer is charged the price of the ticket and his offer becomes irrevocable even though his contract of sale is not yet formed. In this way the website has bound the buyer and gained time to postpone the formation of the contract between the buyer and the seller — the contract of sale for which the mediation should be provided. By doing this, it retains the right to refuse the order if the seller desists from the sale<sup>84</sup>.

It could be argued such a clause poses a significant imbalance in the parties' rights and obligations arising under the contract, considering that the client pays for his ticket immediately with no possibility of withdrawing the offer, while the other party is under no obligation<sup>85</sup>.



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<sup>83</sup> It is not surprising to read many clients' complaints on Internet. see available at: <https://ticketbischeats.wordpress.com/2013/03/25/warning-avoid-ticketbis/>; <https://it.trustpilot.com/review/ticketbis.net>; <http://www.complaintsboard.com/complaints/ticketbis-net-fake-tickets-c611343.html>. (accessed: 10.11.2015)

<sup>84</sup> See Art. 3.1 and 3.2. Available at: <http://www.ticketbis.net/information/legal> (accessed: 10.11.2015)

<sup>85</sup> In EU see Reg. 5(1) in Unfair Terms in Consumer Contract Regulation 1999 (SI 1999/2083).

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