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Over-Commoditised; Over-Centralised; 
Over-Observed: the New Digital Legal World?
Factors affecting E-commerce contract law

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1. Introduction

Within the emergence of the Internet as a medium for forming commercial contracts, legislatures around the world were and are still very active to provide a framework regulatory for electronic commerce. The main goal for that is to facilitate electronic commerce and remove obstacles that face its growth. In respect to electronic contracting rules, legislatures face a primary question in whether they need a new set of rules in the electronic setting or the substantial traditional rules are capable to accommodate the new environment. Although, legislations especially in the two examples provided in this paper (UK and US) has been based upon general policy aims to make unification between contracting rules in the electronic environment and that in the traditional world, but the goal of this policy didn't meet the success. This is because that, any legislature will face two main conflicting factors in regulating electronic contracting rules. One is the emphasis on consumer protection; the other is the increasing need for global regulation to mirror the increasing globalisation of trade[1].

This paper analyses the legislative response in UK and US with respect to electronic contracting rules. It argues that the above factors have affected the legislative approaches in the two countries. This is because; there is a conflict between the two factors in which taken one of the above factors as a basis for enacting electronic commerce rules will create rules aim to achieve that factor. For example, on one side, if the legislature aims to achieve the consumer protection factor, this will create rules conflict with the globalisation of the net and the need for harmonisation rules through the globe in which it becomes difficult to harmony these rules. On the other hand, enacting international standards rules without consumer protection aspects will affect the development of electronic commerce in which consumers feel that there is no appropriate protection for them in the electronic setting. A brief comparative study between the two legal systems tells us that in the UK, the electronic contracting rules are consumer friendly rules especially the rules regarding electronic contract formation. While in US, electronic contracting rules are neutral and do not take consumer protection aspects seriously into account. This can be concluded for example from UETA or UCC where there is no single provision regarding consumer protection. This is due to the trend in each country to achieve one of the above factors.

This paper will be divided into two sections, the first, examines the different approaches regarding what type of rules we need in the electronic environment. While the second section analyses how the above factors have affected the regulatory framework in respect to electronic contracting rules in the two countries.

2. Do we need new rules of contracting in the electronic environment?

Governments around the world, use more than one approach to answer this question.[2] The first approach is to enact facilitative laws intended to make online commerce as legally effective as it in the traditional way of contracting normal one. This is to enact laws that extend or adapt existing regulation of transactions to cover electronic transactions. This approach which is the “functional equivalent “approach. This approach aims to identify how the same function could be achieved in
electronic transactions, and extend the existing rules by analogy to cyberspace.[3] Therefore, this
approach attempts to fit cyberspace within the ambit of familiar legal rules through an examination
of the role currently played by a particular legal rule in the non digital commercial world, [4]
identification of the way in which the same function can be achieved in electronic transactions and
extending the existing rule by analogy to electronic transactions.[5]

The second approach would be through establishing a new set of rules that is better suited to the
nature of the new environment. This approach intends to choose out the best rules existing in a non-
digital context and import them into cyberspace.[6] Although this approach aims to set new rules in
the electronic contracting, it stresses the need for identifying the fundamental principles that govern
non-digital transactions and re-examines how those principles could be best placed in the uniquely
different sphere of cyberspace. [7] This approach conceivably has the merit of leading to a much
more healthy development of the law in the long term. This is because taking a deeper consideration
of principles would probably lead to the discovery of *sui generis* rules for electronic transactions that
takes into account the unique features and potential of computer-based communications systems. [8]

While both approaches have been used in developing regulatory regimes for electronic transactions,
it is noteworthy that the functional equivalency approach has dominated proposals for regulating
electronic commerce. [9] One familiar example is the model law prepared by the United Nations
Commission on International Trade Law (UNCITRAL), adopted by a United Nations resolution in
1996.[10] But what is the legislative approach in the two leading countries in the world regarding
electronic contracting rules?

With respect to the UK, by the implementation of the Electronic Signature Directive[11] and
Distance Selling Directive[12]. The UK has made some unification between online and traditional
transactions. Many steps have been taken towards applying the same rules on the electronic
environment before the European parliament initiatives towards regulation of e-commerce. The
Distance Selling Regulations are the best example in that side[13]. These regulations apply to
contracts for goods and services to a consumer where the contract is made exclusively by means of
distance communication including electronic mail.[14] In other words, these regulations concern
transactions carried out at distance, by post, telephone, email in which similar rules apply in this type
of contracting whatever the method of communication used. Also the implementation of the
Electronic Signature Directive relevant to this discussion is the same. The Electronic
Communications Act 2000, legal recognition and enforceability can be achieved especially for
contracts that need writing and signature requirements.[15] Also, although the Electronic Commerce
Regulations 2002 stop short of declaring that all contracts may be concluded on line. However,
According to the Department of Trade and Industry (DTI) Guidance, the Government believes that
the great majority of statutory references, that is where a writing or signature is required, are already
capable of being fulfilled by electronic communications. [16]

In the USA, even unification of the rules is the main goal of electronic legislations acts but different
approach has been taken than that in UK. The US approach is considered as a simplest and
minimalist approach in regulating electronic commerce in general and regarding electronic
contracting rules particularly.[17] This is due to the influence of the UNCITRAL in electronic
commerce legislations in US. Many examples in UETA and UCC show the trend towards unification
of the rules in US. Providing details provisions for electronic contracting rules will affect the main
goal for that unification. Simplest and minimise the rules achieve that trend. Therefore, the electronic
agreements should be given the same legal effect as traditional paper based contracts. This principle
has been clear for most legislation around the world and has been supported by many US scholars
[18]. This principle gives effect to the legitimate expectations of the parties to form online contracts.
Thus the validity of an electronic communication has been considered through the enactment of the
Uniform Electronic Transactions act (UETA)[19] that in article 7 provides for legal recognition of
electronic records, electronic signature and electronic contracts. Furthermore the Electronic
Signature in Global and National Commerce Act (E-sign) clarifies the legal status of electronic
records and electronic signature in the context of writing and signing requirements imposed by law.
According to the act, an electronic record is defined as “a contract or record created, generated, sent, communicated, received, or stored by electronic means”. Also article 2, section 2-204 of the Uniform Commercial Code (UCC) provides that “a contract for sale of goods may be made in any manner sufficient to show agreement including conduct of both parties which recognizes the existence of such contract”.

This approach comes as a reflection of the apparent capitalist economic policy in this country. This policy, which depends on the notion of free market economy and laisser-faire philosophy, has affected US legislation efforts in regulating electronic commerce through its role as “the world’s economic hegemon”. This US political and deregulation role spreads via national and international organizations such as UN and WTO. U.S has also implemented this policy in the area of e-commerce. This is apparent through the U.S framework for electronic commerce which issued under former president Bill Clinton to guide U.S regulation according to this policy.

Even if there is a common success in the two countries regarding recognition and validation of electronic contracts, but the legislatures in the two countries have not met full success to achieve the harmonisation of electronic contracting rules. This is because the legislative approach in the two countries are different this returns to the following factors.

3. Consumer protection and globalisation of the net

Any legislature aims to provide clarity and trust to the actors in the electronic setting will try to reframing the actors rights in the electronic environment especially the consumers. This goal embodies a kind of rules that can protect consumers within the electronic medium. The trend towards providing such kind of protection rules has its own reasons. Firstly, the transaction in the electronic setting is carried in distance, and there is no physical presence of the parties’. This absence of physical presence has given rise to concerns that policy makers must protect the actors engaging in such activities. So, in order for e-commerce to achieve its full potential, consumers must feel that online transactions are safe, trustworthy and fair. Secondly, online sales often involve increased risk and uncertainty than similar transactions in a traditional medium, thereby requiring increased protection. This is a result of such transactions being so revolutionary both in the manner in which they occur, as well as a failure to fit within common conceptual paradigms. For instance, in the traditional sale, a consumer will go to a physical store to purchase the item. Such a transaction involves two significant characteristics. Consequently, this factor demands greater protection for the consumer. In order to achieve this protection; legislatures should ensure that consumer should feel that online contracting is fair and safe as the traditional contracting through enacting consumer friendly rules in the electronic environment.

However, consumer protection is not the only factor legislatures aim to achieve. Another aspect for regulating electronic commerce, which brings to some extent conflict with the consumer protection factor, is the global impact of the net, and the need for uniform rules to facilitate online commerce. This is according to the reason that “electronic commerce dramatically reduces the economic distance between producers and consumers”. This forces the legislatures to enact acceptable international rules in respect to consumers and providers to flourish the global electronic commerce. In fact, in respect to the globalisation factor, both the international community as well as national legislatures have serious problems with regulating electronic commerce mainly because it ignores political borders and is not well very understood, especially by policy makers and their legal advisors. Thus because electronic commerce, by its nature is transnational and encourages cross border transactions of goods and services, national governments, international organizations and private sector businesses have been keenly aware of its development. Many of these institutions hope to harness the economic potential of electronic commerce, to fully take advantage of these economic opportunities businesses, government and organizations have taken the position that any regulation for electronic commerce, must take its potential impact on trade globalisation of electronic commerce. These institutions are in opposition to choose one of the ways to regulate electronic commerce.
commerce, whether to take the harmonisation of laws as an approach to unification these laws regarding electronic commerce; or to adopt self regulation approach as method to regulate this phenomena. It is also important, and may be regarded as an aspect of equality of treatment between media, that while electronic commerce legislation should facilitate electronic transactions it should not require or prescribe their use. This is, however, as we discuss below, easier to state than to achieve.

The harmonisation of the rules has been the main goal of the UNCITRAL.[31] The UNCITRAL approach provides some of the regulatory rules that can be applied in many countries. These rules reflect the globalisation nature of the electronic commerce without detailed rules regarding the issues of contract formation. The generalisation of UNCITRAL’s rules aims to create an acceptable rule for online contracting at the international level without affecting the consumers’ protection need in these countries.

As a member in EU, the UK has been very active to attach strong consumer protection mechanisms[32] in contract law[33]. This trend towards providing rules in consumer contract law can be shown through the regulation and acts enacted in UK.[34] This protection has been derived from set of directives and regulations, which provide framework for the most of consumer protection rules in EU.[35] This trend towards consumer protection contract rules has been affected United Kingdom policy as a member state in legislation the rules of electronic contracts.

In the UK, most of the provisions regarding electronic contracting have an obvious goal to protect consumers in the electronic setting. The Distance Selling Regulations are the best example of that trend. The regulations have three levels of information provisions requirements regarding contractual matters aims to protect consumers in distance contracting. First: in article 7 of the regulations specific Information required prior to the conclusion of the contract. Second: Article 6 requires information to be provided in commercial communications. Thirdly, Article 5 imposes general information provisions requirements.

Also, even if most of the provisions regarding electronic contracting rules enacted through the implementation of the Electronic Commerce Directive in Article 9 of the Regulations are considered as electronic contracting provisions. This article provides novel procedures for forming electronic contracts through the Internet. The goal of these procedures is of course to provide more transparency and protection to the consumer while forming electronic contracts. Also several information provisions in this regulation such as that in article 6,7 show clear that these provisions are not related to electronic contracting but rather they are consumer protection ones.

The consumer protection trend in UK not only generates conflicts within the globalisation of the net but also it makes divergence in the rules that apply in other member states in Europe. This is because article 9 of the Regulations above is based upon article 11 of the EC Electronic commerce Directive which provides: member states shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply: the service provider has to acknowledge the receipt are deemed to be received when the parties to whom they are addressed are able to access them. Therefore, this article gives a clear example for this divergence in respect the timing of electronic contracts. The Electronic Commerce Directive in article 11 falls to propose a more certain or efficient set of rules to govern the timing of electronic contracts. So instead of harmonizing the EU legislation regarding electronic commerce, the Directive creates more than fifteen different rules regarding the formation of contract.[36]

Harmonisation of the rules in the US has been successful through the enactment of UETA. Consumer issues have not being given special attention in this act. This is because of two main reasons. First, on the one hand, UETA is a uniform act, and it will not be adopted from other states if there are provisions regarding consumer protection in the electronic setting and on the other hand the federal Electronic Signatures in Global and National Commerce Act has been very successful in
providing consumer protection rules.[37] Secondly, UETA doesn’t aim to provide substantial contracting rules because many of its rules are influenced by UNCITRAL[38]. A lesson can be learned from the Uniform Computer Information Transactions Act (UCITA). An attempt to codify the law of software licensing included some provisions that would have regulated software licences formed using electronic media and might have been applied by analogy to other contexts. UCITA has been hugely controversial,[39] because it has many substantial provisions regarding electronic contracting in sections 202 through section 206, however, and seems very unlikely to achieve widespread acceptance.[40]

As a result, the Federal Government that aims to harmony the law governing electronic contracting rules, at least in United States has met mixed success. From one side the UETA rules in electronic contracting have addressed only a narrow range of all the issues raised by technological innovation in contracting practices,[41] and from another side the Act does not provide or stipulate any provision regarding consumer protection rules in the electronic setting in which the act gives a push for any state to adopt the uniform act without entering into the nature of consumer protection in any state.

4. Conclusion: The solution

The starting point of the solution is found at the national level. National governments on one side must act to ensure that contractual obligations processed through the Internet are uniform to the extent possible and desirable and that consumer rights are protected at every stage, especially regarding contractual rights. On the other side, national governments also have a responsibility to consider the global harmonisation of their actions in this arena. Not only "The idea of borders”[42], between countries but also between countries and some international or supranational bodies like the European Union and the US are questioned by the globalization of economic and socio-cultural interactions, a globalization which is fostered by network technologies. [43] Nations must take into account these considerations when crafting their responses to electronic commerce. Furthermore, nations should realize that bilateral and multilateral negotiations would absolutely be necessary to ensure that every nation's citizens (both natural and corporate) will enjoy uniform rights and benefits from electronic commerce, no matter where they reside. At the international level, a need for a convention regarding electronic commerce law is needed to take the opportunity of developing the economic opportunity and worldwide sales through a uniform international convention like UNIDROIT and UNCITRAL in which arrangements for these kinds of rules is taken place now.[44]

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[2] It has become extremely fashionable to legislate for electronic commerce and electronic transactions. Such legislations have been proposed or implemented in, for instance, the United Kingdom, USA, Australia, Bermuda, Guernsey, Hong Kong, India and many other countries in the world. Some of these legislations are based, to a greater or lesser degree, on the UNCITRAL Model Law on Electronic Commerce.

Ibid.

See for example, Gregory E. Maggs, Regulating Electronic Commerce, 50 Am. J. Comp. L. 665


Difficulties with this ‘functional equivalent’ approach have been arisen, in part because the jurisdictional and choice-of-law problems created by Internet communications are particularly perplexing. Established rules of international private law have been found inadequate to answer many important questions concerning who has the authority to enforce substantive rules governing e-commerce, or even to determine what those rules are. See Andrew Murray, et al, Regulating E-commerce: Formal transactions in the digital age, 14th BILETA conference, England, 1999. available online at http://bileta.ac.uk/99papers/murray.html.

See: //www.unicitral.org/en-index.htm


These regulations implement Directive 97/7/EC of the European parliament on the protection of consumers in relation to distance contracts.

Some argue that the Electronic Communication Act doesn’t create a presumption that electronic signatures are equivalent to handwritten signatures. But it should be kept in mind that this act takes an intermediary position between minimum compliance with the European electronic signature directive and total facilitation of electronic contracts contemplated by the UNCITRAL model law on providing authenticity or integrity of the message and the electronic equivalence of signature in the traditional way. See, W. Harry Thurlow, Electronic Contracts in the United States and the European Union: Varying Approaches to the Elimination of Paper and Pen, vol 5.3 Electronic Journal of Comparative Law, (November 2001), <http://www.ejcl.org/53/art53-1.html> supra note.


Although, UETA doesn’t have the force of law. It is merely a uniform act designed, to act as a template for local lawmaker. To become effective the uniform act requires to be adopted by state legislatures. UETA has been adopted in 45 states by the end of 2003.

The UCC is a model statute that nearly all the states of the United States have adopted in one form or another.

Christopher William Pappas, supra note17, p.234.

The United States has played a critical role in the global level in the development of electronic commerce .it has been a player on the international level to attempts to develop a coherent global framework for electronic. See UNCITRAL discussions, which has similar broad policy of some electronic commerce legislation in US such as UETA.


Christopher William Pappas, supra note 16, p328
[27] Saami Zain, supra note 25, p168.
[29] Paul Przemyslaw Polanski, A new approach to regulating internet commerce: custom as a source of electronic commerce law, Electronic communication law review 9; 165-205.2002
[33] The distance selling regulation is the best example in that side, then the electronic commerce (EC directive) regulations 2002
[34] The electronic commerce regulation 2002 provides a strong consumer protection with the regulation of protection consumers in respect of distance contracts 1997. this protection such as confirmation of the information article 5 or the right of withdrawal article 6 are best examples of the trend towards provide this kind of protection. See Ann Salaun, Electronic commerce and consumer protection, available online at http://www.droit.fundp.ac.be/textes/consumer.pdf Dec. 2004.
[35] The early directives on defective products liability (council directive 85/374/EEC of July 1985 on the approximation of the laws, regulations and administrative provisions of the member states concerning liability of defective products 1985 O.J L 210/29), on contracts negotiated away from business premises (85/577/EC), also the directive on unfair contract terms ((79/13/EC), and also more recently the directive on distance contracts (97/7/EC).
[39] See for example, Holly Towel, Legal developments in electronic contracting, 712 Practicing Law Institute, July 2002
[40] Only two states adopted this act.
[43] Ibid