

## An acceptance by electronic communication of an offer in the United Kingdom and Thailand: a comparison

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### Abstract

This article aims to analyze the development of electronic communication laws in the United Kingdom and Thailand, with a focus on the legal implications of electronic communications in the formation of contracts. Specifically, it examines the declaration of intention, the making of offers, and acceptance in relation to electronic communications. Furthermore, it discusses the judgments of British and Thai courts in cases involving the acceptance of offers through electronic communication, highlighting the evolution of legal principles concerning the formation of electronic contracts. Subsequently, the article analyzes the divergent outcomes of decisions reached by the British and Thai courts. This study employs a qualitative research approach, utilizing descriptive analysis methods to gather primary and secondary sources, including statutes, legislation, common law, case law, international agreements or treaties, as well as academic articles from law textbooks and legal journals. The findings demonstrate that the initiation of change in accepting offers through electronic communication shares a pivotal starting point in both the United Kingdom and Thailand, specifically the court's ruling on the sale of goods via telex. This legal principle has since undergone consistent development through numerous court cases. Finally, this article reveals that the unresolved issue of the timing of effective acceptance through email communication persists. Presently, no explicit rule addressing this matter has been established in current legislation or case law.

**Keywords:** Electronic communication, Electronic Transaction, Acceptance

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## Introduction

In recent decades, communication technology has undergone continuous and rapid development, playing a crucial role in facilitating daily activities, transactions, and business operations, primarily on electronic platforms. The convenience and speed of electronic communication necessitate the improvement and development of laws to align with technological advancements and effectively support transactions in various forms. However, legal issues concerning electronic contracts have emerged from electronic communication.

According to Information Commissioner's Office (2024), Electronic communications refer to any exchange of information between specific parties through telephone lines or internet connections. This encompasses various forms of communication such as voice calls, fax transmissions, text messages, video messages, emails, and internet-based messaging platforms. However, it excludes publicly accessible information like website content or broadcast programming that is intended for general consumption. While the definition under the Electronic Transactions Act B.E. 2544 (2001) section 4 states that electronic transaction is any civil, commercial, or state-related activity or affair that involves the use of electronic means such as computers, telecommunications, or other electronic devices and systems, either partially or completely.

Notably, the acceptance of an offer through an electronic platform diverges from traditional contract law, prompting a distinct legal perspective. Nowadays, parties can accept offers simply by clicking a button on a computer screen, whereas traditional contracts are not as complex as electronic contracts. The legal quandary surrounding the effectiveness of acceptance submission to the offeror has led to various legal consequences, including jurisdictional matters, offer withdrawal, and contract execution dates, for example, the persisting challenge lies in determining when email acceptance communication becomes effective.

## Objectives

The objectives of this study are as follows:

1. To examine the fundamental concepts and theories pertaining to acceptance by electronic communication of an offer.
2. To compare and contrast acceptance by electronic communication of an offer under the laws of the United Kingdom and Thailand.
3. To study and analyze acceptance by electronic communication of an offer in accordance with Thai law.

## Study Method

This study on acceptance by electronic communication of an offer adopts a qualitative research approach, employing descriptive analysis methods to collect primary sources, such as legal texts, and secondary sources, including theses, research reports, articles, relevant meeting minutes, newspaper articles, reports from institutions and agencies, as well as information obtained from the Internet (Documentary Review).

## Literature Review

An offer represents the expression of the offeror's desire, guided by reason. The offeree is informed of this intention through words or actions. Numerous theories exist regarding the point at which this communication is deemed complete (Indrayan, 1996). Four main theories are prevalent: the Declaration theory, Dispatch theory, Reception theory, and Information theory (Nanakorn, 2018, p. 358).

1. Declaration theory: According to this theory, a contract is formed when the offeree demonstrates an external indication of intent to accept the offer, even if the offeror is unaware of it.

2. Dispatch theory: The Dispatch theory posits that acceptance of an offer becomes effective upon dispatch by the offeree. This theory is widely applied in common law jurisdictions for acceptance communicated via post and is also observed in certain civil law jurisdictions (e.g., by placing a letter in a mailbox).

3. Reception theory: The Reception theory holds that acceptance becomes effective when it reaches the offeror. This theory has been adopted in various civil law jurisdictions.

4. Information theory: Lastly, the Information theory stipulates that knowledge of the acceptance is necessary for the creation of a contract.

#### **4.1 Similarity and Difference Between Thai and British Contract Law on Acceptance of an Offer**

The Thai legal system is based on the civil law system, with Thai contract law enshrined in the Civil and Commercial Code, which has been influenced by German law (Pongsapan, 2016). According to Thai contract law, a contract comes into effect through two corresponding declarations of intent: offer and acceptance. Specifically, Thai law addresses the acceptance of an offer in the following manner (Nanakorn, 2021), with provisions written similarly to German law (Bundesministerium der Justiz und für Verbraucherschutz, 2022).

Section 168 “A declaration of intention made to a person in his presence takes effect from the time when it becomes known to the receiver of the intention. This also applies to the declaration of intention made by one person to the other through telephone, other communication devices, or other means through which similar communication can be made.”

Section 169 “A declaration of intention made to a person, not in his presence takes effect from the time when it reached the receiver of the intention. It does not become effective if a revocation reaches him previously or simultaneously.”

Thai law establishes a principle concerning the effect of a declaration of intention in relation to the offer. An offer is considered a declaration of intention, which can be divided into two categories: an offer made to a person who is physically present, which becomes effective when the offeree becomes aware of the offer, and an offer made to a person at

a distance, which becomes effective upon reaching the offeree. These principles align with the intent principles outlined in the German Civil Code, which also applies to offers.

Regarding declarations of intention made to persons who are physically present, Thai law provides guidance. It is generally accepted that a declaration of intention made to a person who is physically present, including telephone communication, is considered effective when the recipient becomes aware of the intention through hearing it.

It is important to note that the issue of the timing of an offer's effectiveness holds significance in the Thai legal system. If the offeror's offer has not yet reached the offeree and is not recognized as an offer, the offeror has the right to withdraw the intention. However, if the offer is already effective, the offeror cannot withdraw the offer.

In contrast, under English contract law, the offeror has the ability to withdraw or revoke the offer at any time before it is accepted. The revocation must be communicated to the offeree prior to the offeree's acceptance of the offer. Therefore, the specific time period during which the offer remains effective is not of great importance (McKendrick, 2017).

Regarding the general rule of acceptance, the case of *Brinkibon Ltd v Stahag Stahl [1983]* established that the formation of a contract occurs when the acceptance of an offer is communicated to the offeror. Communication of acceptance is deemed necessary to provide protection and certainty to the offeror (O'Sullivan & Hilliard, 2016).

## 4.2 Telex Cases

The development of contract law concerning electronic communication in Thailand and the United Kingdom shares a common starting point, namely, the judgment that interprets contract formation through Teleprinter or Telex. The term "Teleprinter" or "telex" refers to telegraphic instruments that transmit and receive printed messages and data via telephone cables or radio-relay systems (Britannica, 2022).

### 4.2.1 The United Kingdom

In the United Kingdom, the case of *Entores Ltd v Miles Far East Corporation [1955]* interpreted contract formation through telex. The essence of this case involved parties from different countries who exchanged offers and acceptances through telex

machines. Lord Denning, the presiding judge, determined that the acceptance sent via telex is effective upon receipt by the offeror's telex machine. Lord Denning stated that (Scamell, 1956):

*“The offeror in such circumstances is clearly bound because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance - yet the sender of it reasonably believes it has got home when it has not - then I think there is no contract.”*

This judgment significantly altered the traditional Postal Rule of contract, which holds that acceptance is effective only upon posting. The Postal Rule, confirmed in *Adam v Lindsell [1818]* and *Bryne v Van Tienhoven [1880]* (Nanakorn, 2018, p. 360-361), dictates that, in cases governed by the Postal Rule and not electronic communication, the contract is formed when and where the acceptance is posted, not when the offeror receives it. Conversely, in the context of electronic contracts, the opposite holds true. Once acceptance is received at its destination, the contract becomes effective thereafter.

*Entores Ltd v Miles Far East Corporation [1955]* distinguished electronic communication from the Postal Rule due to its distinctive characteristic of being an "instantaneous means of communication" (Scott, 1955). Notably, this ruling aligns with Thailand's principle of a declaration of intention made in person, either face-to-face or via telephone.<sup>1</sup>

The case of *Tenax Steamship Co v Owners of the Motor Vessel Brimnes [1974]* further elaborated on the effectiveness of telex communication. It established that communication via telex is considered effective upon appearing in the offeror's telex, even if the message has not been read until the next business day. In this case, the message was sent during the company's business hours, and it could be reasonably assumed by the sender that the offeror might review the message during that time.

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<sup>1</sup> Civil and Commercial Code of Thailand, Section 168

Subsequently, the House of Lords provided a qualified endorsement of the *Entores Ltd v Miles Far East Corporation* case through *Brinkibon Ltd v Stahag Stahl [1983]*. However, the court imposed limitations on this principle to prevent abuse. The court recognized that although communication via telex may be "instantaneous," the receipt of messages may not occur immediately due to after-hours or technical issues with telex machines. Enforcing the principle that acceptance is effective upon receipt may be unfair to the receiving party. To ensure fairness, this principle should be assessed based on the parties' intent, business practices, and a determination of where the risk should lie.

In conclusion, when the offeree communicates their acceptance of the offer to the offeror, the contract is formed. However, when submitting an acceptance by letter, the Postal Rule applies as an exception to the general principle, considering acceptance effective upon mailing. As technology has advanced, the *Entores Ltd v Miles Far East Corporation* case established a new principle stipulating that acceptance via electronic communication is effective upon receipt at the destination.

#### 4.2.2 Thailand

Moving on to telex cases in Thailand, there is a controversial legal case study regarding the interpretation of intention expressed through telex. This issue arises when the expressed intention through telex results in different outcomes. Two Supreme Court cases are noteworthy in this regard.

##### 4.2.2.1 Supreme Court Case No. 3046/2537

In this case, the plaintiff and the defendant utilized teleprinter or telex for the trading of glutinous rice. The court determined that a contract of sale had already been formed when the negotiation was finalized as per the mentioned telex. However, Section 456, paragraphs 2 and 3<sup>2</sup> of the Civil and Commercial Code state that "a contract of sale of movable property with a price of five hundred baht or more, or a contract for buying and

<sup>2</sup> Civil and Commercial Code of Thailand, Section 456 (Previous amendment)

A sale of immovable property is void unless it is made in writing and registered by the competent official. The same rule applies to ships or vessels of five tons and over, including floating houses and to beasts of burden.

An agreement to sale or to buy or the promise to sale or to buy as mentioned of paragraph one is not enforceable by action unless there be some written evidence signed by the party liable or deposited or paid a part of some debts.

The provisions of the foregoing paragraph shall apply to a contract of sale of movable property where the agreed price is five hundred baht or upwards.

selling, or a promise to sell a property with a price of five hundred baht or more, must be supported by written evidence signed by the party liable or providing a guarantee, or by making some partial payment to render it enforceable" (Deka, 2022). Consequently, even though the defendant failed to deliver the glutinous rice to the plaintiff, the absence of evidence of partial payment, deposit, or the defendant's signature as required by Section 456, paragraph 2, prevented the plaintiff from seeking enforcement of the case.

The telex communication between the plaintiff and the defendant constitutes a declaration of intention between parties at a distance, as stipulated in Section 361.<sup>3</sup>

#### 4.2.2.2 Supreme Court Case No. 3651/2537

The disputed contract in question between the plaintiff and the defendant pertains to the sale of rice, which falls under the category of a contract for the sale of movable property with a value of five hundred baht or more, as stated in Section 456, paragraphs 2 and 3 of the Civil and Commercial Code. In this case, the defendant did not provide a signature on the Telex, and there was no accompanying evidence in the letter signed by the responsible party, neither a guarantee nor partial payment made by the defendant. Consequently, the plaintiff lacks the necessary evidence to initiate a lawsuit against the defendant under the rice purchase agreement" (Chansawang, 2022).

Upon examining the provisions of the Civil and Commercial Code, it becomes evident that certain provisions are incompatible with the adoption of electronic contracts. For instance, Section 456, paragraphs 2 and 3 stipulate that any contract involving the purchase of movable property with a value of 500 Baht or more must be supported by written evidence signed by the responsible party; otherwise, the legal enforcement of the contract is not possible. The rationale behind the requirement for such evidence is to ensure the certainty of the agreement and to provide proof of the transaction's existence, particularly in significant contracts involving substantial obligations (Pieck, 1996).

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<sup>3</sup> Civil and Commercial Code of Thailand, section 361.

A contract between persons at a distance comes into existence at the time when the notice of acceptance reaches the offeror.

In accordance with the declared intention of the offeror or to ordinary usage no notice of acceptance is necessary, the contract comes into existence at the time of the occurrence of fact which is considered as a declaration to accept.

In essence, the law considers a contract without the aforementioned evidence to be uncertain, and in the event of a dispute brought before the court, the court may struggle to ascertain the true intent of the parties.

This may not align with the nature and circumstances of international trade, which often involves swift negotiations or transactions conducted through communication technologies. Currently, business sectors commonly communicate through electronic platforms, such as telex, fax, or email. Considering the nature and conditions of such communication, it may be impractical for the signatures of the parties to appear on such devices.

#### 4.2.2.3 Electronic Transactions Act 2001: Time of receipt of data message

(1) Time of receipt of a data message when the addressee has designated an information system:

If the addressee has designated a specific information system for receiving data messages, the receipt of a data message is deemed to occur when the data message enters the addressee's designated information system, as stipulated in Section 23, paragraph 2 of the Electronic Transactions Act 2001. However, if the data message is delivered to an information system other than the addressee's designated system, it will be considered received at the moment the data message is retrieved from that alternative information system.

(2) Time of receipt of a data message when the addressee has not designated an information system:

If the addressee has not designated a specific information system, the data message is considered received when it enters the addressee's information system, as provided by Section 23, paragraph 1 of the Electronic Transactions Act 2001.

If the offeror has designated an email address, the electronic contract is formed when the acceptance, in the form of an online message, enters that email address at the offeror's place of business or habitual residence, as specified in Section 361 of the Civil and Commercial Code (for an offer to a person at a distance) and Sections 23 and 24 of the Electronic Transactions Act 2001 (in the absence of a place of business). However, if the email message is delivered to an email address other than the offeror's designated address,

the electronic contract is created when the acceptance, in the form of an email message, is retrieved from that email address at the offeror's place of business or habitual residence (in the absence of a place of business). If the offeror has not specified an email address, the electronic contract is formed when the acceptance, in the form of an email message, is sent to any of the offeror's email addresses at their place of work or habitual address (in the absence of a place of business).

In the case of chat-room contracts (instant messaging), the electronic contract is formed when the acceptance, in the form of a data message, enters the offeror's information system and the offeror becomes aware of it, as outlined in Section 356 of the Civil and Commercial Code (for an offer to a person who is present) and Sections 23, paragraph 1 and 24 of the Electronic Transactions Act. Consequently, the electronic contract is formed at the place of business or habitual abode of the offeror (in the absence of a place of business) (Pitiyasak, 2003).

## 5. Results and Discussion

### 5.1 Comparison between the Laws of the United Kingdom and Thailand

Considering the contracts in the judgments from both the United Kingdom and Thailand, it is evident that the disputed contracts in these cases were all communicated through telex machines, yet they resulted in different judgments. The Thai decisions (Supreme Court Case No. 3046/2537 and Supreme Court Case No. 3651/2537) were made prior to the enactment of the Electronic Transactions Act 2001, while the judgment in *Entores Ltd v Miles Far East Corporation* in the United Kingdom was made before the enforcement of the Electronic Commerce (EC Directive) Regulations 2002 (The National Archives, 2022).

In the telex case in the United Kingdom, it follows the principles of Common Law, which recognizes two forms of contract: deeds or consideration (Stone & Devenney, 2014). Not all agreements that consist of a complete offer and acceptance are necessarily enforceable. Additionally, according to *Balfour v Balfour [1919]*, social and domestic agreements are generally not legally enforceable unless the parties clearly demonstrate the intention to create a legal relationship (Macdonald & Atkins, 2014).

When comparing the Thai Supreme Court rulings, the different judgments are a result of a different legal system. In the *Entores* case, the court determined that the acceptance of an offer was based on the absence of a written contract, but only text in telex. However, in such cases, there is consideration where both parties aim to exchange products and make payments to each other.

The decisions of the Thai Supreme Court are based on the Civil Law system, and the court cannot apply the Common Law's consideration principles in its reasoning. At that time, there was no law recognizing the applicability of electronic communications, such as the Electronic Transactions Act 2001, so the court had to rule that the contract was not enforceable (School of Advanced Study, University of London, 2022). Consequently, Thailand subsequently enacted the Electronic Transactions Act 2001 to prevent such court decisions from recurring (Chansawang, 2022).

In accordance with the Civil and Commercial Code of Thailand, the acceptance of an offer can be done in two ways: sending a letter of acceptance or delivering acceptance in person to the offeree.<sup>4</sup> Based on the Thai court's verdict in the telex case, the court reasoned that the telex communications between the disputed parties constituted a contract because the agreement was completed through telex. The court relied on Section 361 of the Civil and Commercial Code, which concluded that a contract between distant parties is formed when the offeror receives notification of acceptance. The court regarded telex as equivalent to delivering acceptance by mail. However, it is important to note that the court's consideration focused on the topics of signature on telex as written evidence and the content of the telex, without including the topic of the time of contract formation. Although the interpretation by the Thai court differs from that of the United Kingdom court, the final outcome of the Thai court aligns with the United Kingdom, whereby a contract between parties at a distance becomes effective when the notice of acceptance reaches the offeror. The Thai courts consider acceptance via telex to be effective upon receipt, similar to the *Entores* case's view of telex communication as instantaneous communication (*Brinkibon Ltd v Stahag Stahl, 1983*).

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<sup>4</sup> Civil and Commercial Code of Thailand, sections 168-169

Consequently, telex communication and the submission of acceptance are effective when the offer is received, not when it is sent. This principle aligns with the general principles of offer acceptance in English contract law, where acceptance is effective when communicated by the offeree to the offeror (*Brinkibon Ltd v Stahag Stahl, 1983*).

The development of English contract law in this matter is more complex than Thai contract law, as it divides the criteria into three categories: general rules, the Postal rule, and an exception to the Postal rule (Instantaneous communication).

## 5.2 Acceptance of an Offer via Email

At present, email plays a vital role in business communication compared to other forms of electronic communication. Email is reliable, convenient, and fast, which raises questions about the effectiveness of acceptance sent via email. Unlike telex, when an email is sent, the recipient receives it only upon downloading it to their system.

Regarding contractual obligations in the United Kingdom, as established in *The Brimnes* case, the court has established rules stating that acceptance sent by the offeree becomes effective upon receipt at the destination, even if the offeror has not read it. There are different theories questioning which principle should be applied to email delivery.

Some suggest that the postal rule should be applied to acceptance submitted via email since sending an email resembles sending regular mail. It does not have an instantaneous status, and emails can potentially get lost, leaving the offeree uncertain if the message was successfully sent. A delivery receipt only confirms that the message has been sent to the email inbox, not directly to the offeror (Todd, 2017). On the other hand, others argue that the principle from the *Entores* case should be applied because the sender is in a position to know whether the message has been sent or not (Mulcahy, 2008).

Subsequently, the European Union Directive on Electronic Commerce (2000/31/EC), Article 11, provides instructions on the formation of a contract. According to the directive, when an electronic message or command is sent, it becomes effective when the recipient can access the message or electronic commands. However, the directive does not

specify when acceptance of an offer via email becomes effective. This directive was later adopted as part of British law under the Electronic Commerce (EC Directive) Regulations 2002 (The National Archives, 2022).

Presently, no court decision directly addresses the acceptance of an offer via email. However, Thailand has enacted the Electronic Transactions Act, B.E. 2544 (2001), as a supplement to the existing contract law. This law does not replace any provisions of the Civil and Commercial Code. Multiple sections of Thailand's Electronic Transactions Act align with the UNCITRAL Model Law on Electronic Commerce 1996 and the UNCITRAL Model Law on Electronic Signature 2001. The amended Electronic Transactions Act (No. 3), B.E. 2562 (2019), further follows the United Nations Convention on the Use of Electronic Communications in International Contracts 2005.

Currently, Section 22 of the Electronic Transactions Act 2001 stipulates that (Nanakorn, 2018, p. 423), "The dispatch of a data message is deemed to occur when such data message enters an information system outside the control of the originator." This section establishes that for an electronic message to be effective, it must have been transferred from the sender's control to the recipient's control. Also, Section 22 of the Electronic Transactions Act 2001 has similar content as the European Union Directive on Electronic (2000/31/EC) article 11. Both of which are ambiguous and do not determine when submitting the acceptance will be effective.

Section 23 states that (Nanakorn, 2018, p. 423) "The receipt of a data message is deemed to occur as from the time when the data message enters an information system of the addressee.

If the addressee has designated a particular information system for the purpose of receiving data messages, it shall be deemed that receipt of a data message occurs as from the time when the data message enters the information system designated by the addressee. But, if the data message is sent to any other information system of the addressee that is not the information system designated by the addressee, it shall be deemed that receipt of the data message occurs as from the time when the data message is retrieved from that information system.

The provisions of this section shall apply notwithstanding that the information system of the addressee is located in a different place from the place where the data message is deemed to be received by the addressee under section 24.”

Section 23 bears resemblance to Article 15(2) of the UNCITRAL Model Law on E-Commerce, as it pertains to the timing of data message receipt in scenarios where the addressee has designated or not designated an information system.

An offer or acceptance conveyed as a data message is deemed sent when it enters an information system beyond the control of the originator, within the originator’s place of business. Conversely, it is regarded as received when it enters the addressee’s information system. In instances of instantaneous communication methods, such as instant messaging, an electronic contract is formed immediately upon the acceptance in the form of a data message entering the customer’s or offeror’s information system, with the customer or offeror being cognizant of it. However, in non-instantaneous modes like email, the electronic contract is constituted when the acceptance in the form of a data message enters the offeror’s information system.

Therefore, in the context of sending acceptance via email, one should consider the nature of emails, which share the same format as telex. In the case of *Entores Ltd v Miles Far East Corp*, specific regulations governing electronic communication already exist. Adapting the Postal rule to email might not adequately account for the swiftness of contemporary technology.

The United Nations Convention on the Use of Electronic Communications in International Contracts, to which Thailand adheres, prescribes in Article 10 (United Nations Commission on International Trade Law, 2005):

“1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.”

Considering Article 10 of the Convention, it is apparent that the definition of ‘communication’ also encompasses the acceptance of an offer. However, both Thailand’s Electronic Transactions Act 2001 and the EU Directive on Electronic Commerce lack this definition.

## 6. Conclusion

In summary, concerning the first issue pertaining to the telex case, the judgments rendered in the United Kingdom in all three cases have consistently affirmed that the submission of acceptance becomes effective upon receipt. The rationale behind the court’s adherence to this principle stem from the recognition that electronic communication possesses an instantaneous nature that distinguishes it from the conventional method of acceptance via mail. Conversely, the Thai court has ruled that the formation of a contract through telex is considered complete. However, the court dismissed the case on the grounds of a lack of written evidence for the telex. Nevertheless, upon analyzing the judgment’s content, it can be inferred that the contract had already materialized. Although the court does not explicitly discuss the process of offer and acceptance, it is evident that the court regarded telex communication as sharing the same nature as acceptance by mail. This observation suggests that the Thai court’s perspective on electronic communication has not evolved as anticipated. Consequently, acceptance is deemed effective upon reaching the offeror’s location, mirroring the approach taken in the United Kingdom cases. Ultimately, when it comes to submitting the acceptance of an offer via email, neither the contract law of the United Kingdom nor that of Thailand has addressed such scenarios.

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