

Between Two Worlds – Commerce and Legislation
in the Information Era

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(i) Two Worlds – One Law?!

From time immemorial the needs of commerce fueled the desire of individuals to further discover the world and to develop innovations. This is demonstrated by the Portuguesian, Bartolomeu Dias, when he rounded the Cape of Good Hope in an attempt to establish maritime routes for commerce with Asia and India, and this is again demonstrated by the Italian, Christopher Columbus, who discovered America while sailing under the Spanish crown in an attempt to find a new maritime trade route from Europe to India.

Even though the era of great explorers and adventurers has elapsed, many business owners today find themselves floundering while attempting to determine the proper route for them to advance in the virtual world, just as hundreds of years ago their forefathers wondered what was the “correct navigational route for them to choose”.

Rather frequently we come across clients that ask “what do you do when you want to open a store and sell products online?”. These clients expect to hear an abundance of complicated and creatively insightful advice in the spirit of the informational era, but are repeatedly surprised to receive almost the exact advice and insight that they heard when they opened their business down the street in the "real" world, or when they installed a sign on the front window of their store, or when they hung the price list above their cash register.

And indeed, the general legal principles applying in the virtual world are identical in principle to those applying in the tangible world. Thus, the transaction between an Internet surfer and between an on-line site that offers to sell any type of product or

service results in a binding contract, exactly as it would have been created if the client entered a shop, shakes the hand of the seller or signs on a paper, and pays for the merchandise.

(ii) Two Worlds – One Contract Law

Contract laws in Israel are settled in an entwinement of statutes and case law, and emphasize the best of continental contract law as well as common law. In this regard, a number of key laws were enacted in Israel, which were applied *mutatis mutandis* also to agreements in the virtual world of the Internet, just as they apply to agreements in the "real" world.

The above is demonstrated in Contracts (General Part) Law, 1973, which establishes the ways of making a contract, its content, performance and negotiation in good faith, contract to the benefit of third party, defects that are likely to bring forth the rescission of a contract (mistake, deception, coercion or oppression), ways to recession and consequences thereof, and so forth.

An additional key law is Contracts (Remedies for Breach of Contract) Law, 1970 that deals with the matter of reliefs for breach of contract, including enforcement, cancellation and various types of indemnifications.

An additional important law is Standard Contracts Law, 1982, which defines what is a standard contract, when a condition in a standard contract will be considered a discriminatory condition, and as such should be altered or voided. The law also establishes and defines the role of the Israeli court as it relates to Standard Contracts.

The dynamics of Israeli Contract Laws and the broad definitions of the legal terms defined therein enabled the Israeli courts to determine on multiple occasions, that the "regular" Contract Laws apply also to interactions by Internet, and transactions conducted electronically are not necessarily different, from a Contracts Law perspective, from regular commercial transactions.

For example, the transaction between a buyer and a seller on an electronic sales site will lead to a binding contract in the classic sense, just as would have been generated by the “regular” Contract Laws, provided however that the pre-conditions for making a contract as set forth in Contracts (General Part) Law exist.

Contracts (General Part) Law states that a contract is made by way of offer and acceptance. This is true whether the contract is contracted face to face or if it is contracted when servers, monitors and keyboards separate the parties.

Therefore, a person's proposal to another constitutes an offer, whether in the “real” world and whether in the virtual world via a computer screen, so long as it evinces the conclusive intent of the offeror to engage with the offeree in a contract, and is specific in a way which allows the contract to be concluded with the acceptance of the offer.

The acceptance of the offer, whether in the “real” world and whether in the virtual world via pressing a key, will be performed by a notice which was delivered to the offeror and indicates the conclusive intent of the offeree to contract with the offeror per his offer.

This is not to say that the operator of an electronic trade site is exempt from protecting himself – at least on a contractual level – by means of a written Terms of Use and Policy of Use that establish the relations between him and the surfer (and generally with regards to the issue of judicial jurisdiction and the applicable law, a topic which we will discuss shortly). However, if he does not do so, the Contract Laws – the same laws that were enacted many years prior to the invention of the Internet – will still apply in entirety on transactions in the virtual world.

(iii) Two Worlds – Two Jurisdictions?

Another question which arises with regard to Internet interactions, and this is a question more unique to the information era, is by which law an on-line contract shall be governed and construed when one party resides in one country, and the second

party is in a different country, while the server – where the agreement was allegedly concluded by way of offer and acceptance – is located in yet a third country.

One can also ask the question of which court will have the jurisdiction to adjudicate a dispute between the parties – will it be the court in the seller's country or in the country of the buyer? And if the parties are residents of the same country, in which district or city will the case be conducted?

In relation to these questions, the courts in the State of Israel have tried to apply the classic tools on deciding on *Forum Non Conveniens, mutatis mutandis*, to the virtual world.

However, there has not yet been an unequivocal answer in Israeli courts on the question of which international jurisdiction and law should be applied when parties to an Internet agreement from different countries are concerned. That is to say, what law shall govern the contract and what is the competent court to adjudicate between the parties? As of the present the leading criteria in courts when deciding on the above is the identity of the potential surfers to whom the web site was targeting and whether these surfers are subject to the jurisdiction of the court deliberating the case?

So long as there is no dispute on the jurisdiction of the Israeli court and solely open is the question of local jurisdiction within the State of Israel, courts unequivocally adjudicated – when deciding on copyright infringement and slander over the web as well as commercial agreements on the Internet – that the web constitutes “one judicial district” within the State. When determining local jurisdiction that stems from the use of the Internet, one can say that the use is performed in each and every site within the country, irrelevantly to the place of residency of the surfer or the publisher of data over web (such was the case in two different matters which were adjudicated in the District Court in Jerusalem: **Reut Electronics & Components Ltd. v. Mirror Image Ltd.** and **The Local Planning and Construction Committee of Herzliya v. Dor Zahav Construction and Investments Company Ltd.**).

(iv) Two Worlds – a Special Law

As described above, Israeli courts have adapted “real” legal tools on virtual legal interactions. This was the case with regard to Contracts Law and as related to the question of competent jurisdiction. However, such adaptation is not always possible.

Thus, in order to keep a grasp on one of the evils of internet traffic – spam – the Israeli legislator enacted a *lex specialis* for the information era.

At the end of 2008 Amendment no. 40 to the Communications Law (Telecommunications and Broadcasting), 5742 – 1982 which is also called the “Spam Act”, went into effect. Amendment no. 40 has adopted an opt-in model – i.e. an advertiser is prohibited from sending advertising material, unless and so long as the addressee provided his affirmative and express consent to it, subject to a number of exceptions.

Amendment no. 40 defines (in section 30a) “Advertising Material” as “a message which is distributed in a commercial manner, the purpose of which is to encourage the purchase of a product or a service or to encourage disbursement in any other manner”.

The amendment also determines that an advertiser is prohibited from sending Advertising Materials by facsimile, automatic dialing system, electronic message (e-mail) or by short message service (SMS; text message), without the prior explicit and written consent of the addressee, which may be accepted, *inter alia*, by way of an electronic mail or a recorded message.

In this regard, an exception was determined, whereby a single approach on behalf of the advertiser to a business addressee, via one of the aforesaid methods, which is an offer to consent to receive Advertising Materials from his behalf, will not be prohibited.

So too it was determined that an advertiser is entitled to send the aforesaid advertisements even if he did not receive the consent of the addressee, provided

however that there exist all of the following: (1) the addressee provided his contact details to the advertiser during the process of purchasing a product or service, or during negotiations to purchase such, and the advertiser notified him that the details that were provided will be used for the purpose of sending Advertising Materials from his behalf; (2) the advertiser provided the addressee an opportunity to notify him that he refuses to receive such advertising materials, in general or of a specific type, and the addressee did not do so; (3) the advertisement relates to a product or service which is similar to a product or service previously purchased by the addressee.

In order to allow the addressee to halt the delivery of Advertising Materials, the Spam Law stipulates that even if the addressee provided his consent to accept Advertising Materials or did not notify of his refusal to receive such, he can, at any time, notify the advertiser in writing (including by the same method which the advertisement was sent) of his refusal to receive Advertising Material, generally or of a specific type, and to renege from his consent, as it was given, all at no cost.

Moreover, an advertiser who sends Advertising Materials is obligated to include in his messages various details in a prominent and clear manner, that is not misleading, as to the fact that each message is of an advertising nature; the name of the advertiser, his address and the way of contacting him; a notice about the right of the addressee to send, at any time, a notification of refusal to continue to receive Advertising Materials, and the like, which varies per the technical nature of the Advertising Materials which were sent (e-mail, SMS/text message and so forth).

As a means of deterrence, the Spam Act imposes punitive damages of NIS 1,000 for each and every Advertising Material which is sent in violation of the provisions of the Act. The advertiser may also be liable for criminal and civil sanctions. Moreover, the Spam Act also imposes liability on the officers of the company advertising, as well as on the individual responsible for marketing or advertising. Increased liability is imposed on a person or entity who was previously convicted for spamming.

In this context it is worthwhile to remember an additional exception that was legislated some time prior to Amendment no. 40, and the violation of which may lead

to the imposition of a punitive fine. According to the above exception one is banned from sending Advertising Material via facsimile, without receiving the prior written consent of the addressee, unless it was transmitted one time to a business addressee, and provided that the transmission includes an offer to consent to receiving Advertising Materials by facsimile. Hereto, liability may be imposed on the officers of the company advertising, as well as on the person responsible for marketing or advertising.

(v) **Epilogue**

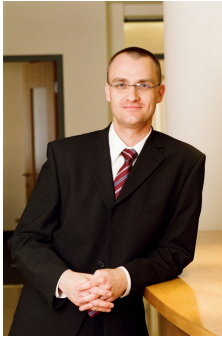
It is only natural that the law lags behind technology in a way that brings the Israeli courts to cope with the questions of the future with the tools of the past.

However, it can be definitively asserted that the Israeli legal system successfully handles the unique legal challenges of the information era, and manages to establish legal stability that is so vital to the world of commerce.

From time to time “regular” laws are easily applied, and occasionally the application of various laws requires adaptations as well as flexible and creative interpretation. Sometimes, the legislature is required to intervene and enact entirely new and innovative statutes.

In any event, when taking into consideration the dynamics involved when applying classic and innovative statutes to technological developments in general and specifically on the area of electronic trade, it is highly recommended to adopt heightened caution and to consult with experts in the field prior to commencing commercial transactions.

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This article is for informational purposes only, and should not be viewed as any form of legal advice or a legal opinion. For questions and comments relating to the article, you are invited to contact Advocate Guy Kedem by email: main-rg@gkl.co.il

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