

The Postal Acceptance Rule in the Digital Age*

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Abstract: This article examines the application of the postal acceptance rule to email acceptances. Different views have been argued against the application of traditional rule like the postal acceptance rule, which was established in 1818 as a legal norm in contract formation to modern communications like the email. The paper presents the arguments and rationale behind the application of this rule and contends its applicability to the modern communication via e-mail. The paper posits that email is not an instantaneous method of communication, but can be viewed as a digital version of the normal post and thus the postal acceptance rule should apply to this kind of contracting.

Keywords: E-commerce, Email, Contract law, Conclusion of Contract, Postal Acceptance Rule.

1. Introduction

The conclusion of distance contracts has been one of the controversial issues in the law of contract formation. It raises some question marks, especially with regard to the type of rules that should govern the timing of contract formation. More specifically, a strong debate has been emerged recently as to whether the postal acceptance rule may apply in respect to contracting through email. This paper is then divided into two main parts. The first one examines the justifications of the postal acceptance rule, while the second part analyses thoroughly the application of postal acceptance rules to email contracting.

2. The Justifications of the Postal Acceptance Rule

The postal acceptance rule was first established in the case of the court of *Adams v Lindsell* ([1818] 1 B & Ald, 681) when the court had to decide the moment of contract formation by post. The court found that parties when communicating acceptance by post were not sure at the precise time the acceptance had been communicated. As postal communication is subject to delay, the parties could not be simultaneously aware of the communication. This created a number of problems and has led to a formulation of the rule. (Yamaguchi, 2004) This rule as accepted in the common law legal systems is: "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted". (*Adams v Lindsell* [1818] 1 B & Ald 681 and *Henthorn v Fraser* [1892] 2 Ch 27 at 33)

The uncertainty regarding the moment of contract formation does not happen in the environment of face-to-face communication or even in distance contracting where an instantaneous method of communication is used. In this kind of contracting, all parties are aware of contract conclusion and they do not face problematic issues such as delay or failure of transmission which occur in non instantaneous communications. (Fascianp, 1996-97)

In contrast, the case of *Adams v Lindsell*, adopted the rule to avoid "the extraordinary and mischievous" consequences which could follow if it were held that an offer might be revoked at any time until the offeree was in the position of "accepting it had been actually received". (See, *House hold Fire and Carriage Accident Ins.Co.V. Grant* (1879) LR Ex D 216 at 221; see also *Re Imperial Land Co of Marseilles* (1872) LR 7 Ch App 587 at 594) This justification for the postal rule appears to provide the best solution in determining the time that the parties reach *consensus ad item* and it was felt, that at the time of posting the letter, there would be a greater chance of a 'meeting of minds' occurring than at the later time when the letter was delivered. (Evans, 1966)

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Another reason has been suggested for the validity of this rule, is that the offeror must be considered as having made the offer throughout the whole time that his offer is in the post, and that therefore, the agreement between the parties is complete as soon as the acceptance is posted. (*Henthorn V. Fraser* [1892] 2 Ch.27, 31). This idea depends on the assumption that the offer creates a power that binds both parties and that an acceptance is an exercise of that power. Consequently, the offeror has, in the beginning, full power to determine the acts that are to constitute acceptance. However, after the offeror makes that determination, the legal consequences are out of his hands because an offer has then become effective and the offeree has an advantage over the offeror in the contract formation process. The offeree may need additional time to decide whether or not to accept the offer and during that time, may need to spend money and effort in reaching to a decision. (Payton, 2003)

Some go further, considering the post office as an agent of the offeror. In *Household Fire and Carriage Accident Insurance Co. v. Grant* ((1879) LR 4 Ex D 216), Thesiger LJ suggested agency as a basis for this rule as he affirmed:

“How then are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties”. (Ibid) This argument has not been accepted by the literature, as the post office and telegram company are clearly not agents, to which acceptance may be communicated, especially as we know that the post office as a governmental agency for public service working under its own regulations could never be an agent in this area. (Evans, 1966) Moreover, letters are always sealed when posted, thus the contents of a sealed letter cannot realistically be said to have been communicated to the post office, which in any case is at most an agent to transmit the acceptance, and not to receive it. The mere delivery of letters by post does not of itself complete a contract.

In fact, it can be said that this rule is efficacious as it is cognizant of both of the business convenience of the offeree and the fair allocation of risk, as it establishes a finite date for the contract and avoids circular communication. (Watnick, 2004) Any delay which occurs between sending and receiving post letters creates potential risk for both of parties due to the uncertainty as to precisely when the message is deemed to have been received. This justification may be considered as the corner stone for application of the postal acceptance rule. Relying on contract formation in posting or dispatch, established a definite time for confirmations between parties if they ask for it, without any need for further communications. This can be understood as Treitel (1991) concludes that “courts in applying the postal rule aim to bring a rationale of necessity and predict that if the contract were to come into force it can best be achieved on sending the acceptance.”

For example, if the offeror asks for notification, then the offeree would need notification of the receipt and so on. Another way of illustrating this is demonstrated if we consider that A is required to receive B's acceptance, then B should have the right to receive notification from A, that the acceptance was received, and A should have the right to receive notification from B, that the notification of receipt of the acceptance was received and so forth. Carrying this on to its logical conclusion, putting the risk in the hands of the offeror would appear logical since it is he who is the master of the offer and he is the position to for or stipulate a specific action in order to be exposed to the potential risk. (Evans, 1996)

These traditional justifications have been argued in respect to post contracting since as we explained above there is a gap of time and a delay between sending a letter and receiving it and parties are not in a position that they can control transmission of letters by post. Thus, can it be argued that if email contracting is similar to contracting by post then the postal rule should be applied to email acceptances?

3. The Postal Acceptance Rule and Email Acceptances

Several authors express the view that email and other methods of online contracting are instantaneous communications and that the general acceptance rule should apply to their acceptances. (Hill, 2004) In fact, this argument may be true in respect to website acceptances since there is no actual space in time between the sending and the acceptance of the offer. Transmission of email messages are different than that happen in website contracting as we will examine in the following.

3.1 How is E-mail Transmitted?

A user who has an email account can draft a message that he is going to send without having a connection to the internet. After the user creates this message on the sender's computer the first stage of the e-mail's journey starts when he opens the connection to the internet server provider (ISP). The second stage occurs at the moment the sender actually presses the send button, which, so long as the network is not busy and the

receiver's email address has been correctly entered, transmits it along the international network of computers until it reaches the intended receiver's ISP. From the ISP the email enters the internet where it may bounce from a minimum of one computer to many millions, before reaching the ISP of the receiver. (Christensen, 2001) The recipient will then be able to retrieve the message by logging onto their ISP and downloading the message.

In fact, the e-mail's journey, while travelling through the internet, may involve travelling across the world even though the person receiving the message is in the next building. This journey takes a moment, sometimes minutes, until the recipient receives the email message. This fact does not differ even, if the internet service provider for the offeree is the same as for the offeror, as would be the case if they are members in the corporation or the university email network. (Fasciano, 1996-97) This is because the transmission of email through the network depends entirely on the viability of the ISP for the offeree or the offeror. For example, if the offeree is in London and the offeror in New York, then the journey should start from London's internet service provider of the offeree and go to another network service provider in the Atlantic and perhaps it will then need two or more connections prior to it reaching the offeror's service provider in New York. The speed of email messages depends, in these cases, on whether one or more of these service providers are busy with millions of applications from other internet users. Considerable delays may occur in email communication between when a message is sent and when it is received by the recipient. These delays result from the complex path over which the email is sent. For example, if person A in Aberdeen sends an email message to person B in Belfast, usually there will be no direct link between the computer systems. This explains why, on occasion, an email takes a longer time than usual to reach the recipient. (Interview with Wemberto Vaccsuell, 15 April 2005) To this end, it can be said that email is not an instantaneous form of communication, because as explained previously, there can be gap in time between dispatch and deemed receipt.

This conclusion was recently pointed out in Singapore, in the judgment of Rajah JC during the case of *Chwee Kin Keong v Digilandmall.com Pte Ltd*, ([2005]SGCA 2) "... unlike a fax or a telephone call, it is not instantaneous. Emails are processed through servers, routers and internet service providers. Different protocols may result in messages arriving in an incomprehensible form. Arrival can also be immaterial unless a recipient accesses the email, but in this respect email does not really differ from mail that has not been opened."

If email contracting can be considered as a non-instantaneous communication, then the question that arises upon the courts is: at which point of time should it be deemed to have been sent? Examining the nature of dispatch is an essential point for the courts if they want to apply the postal rule in the context of email. Usually, an acceptance is considered as having been sent at the time the acceptance went out of the possession of the offeree and into the possession of the third party allowed to receive it. The third party, of course, is neither an agent of the offeree nor of the offeror, but in the situation of email, it is the ISP. Even though the offeree's server is not under the offeree's control, it is considered a provider for the internet service to the offeree and likewise, it is not agent to the offeree, as it is an independent entity, such as a company server or a university service provider.

In transmission of the acceptance through email, the message is considered to be out of the offeree's position at the time the offeree connects to the internet and presses the 'send' button. The offeree may receive acknowledgement that the message is successfully sent (if this acknowledgement is available in his email system), otherwise the offeree will receive a message in his mail box system, indicating a failed delivery notice of an email which has not been successfully transmitted. There are times when a computer freezes upon sending a message, the offeree should at that time resend the email, because the message may not have been sent or may have been altered when it was frozen. Clarifying the moment of dispatch by time can be ensured by looking at the time of sending of the email, is recorded by the ISP and can be found by looking in the offeree's account. This time usually corresponds with the time which appears on the sender's computer at the time of sending the email. Some email accounts embody a universal GMT timing of the provider of the email account itself.

3.2. Application of the Postal Acceptance Rule to E-mail Acceptances

The first reason for extending the application of postal acceptance rule to email contracts is the absence of any legislative establishment regarding determining the conclusion of email acceptances. Let us take example of two legislations, one from Europe, English law and the other in the USA, in respect to the US uniform laws. In general, even though the electronic commerce legislation, in the UK and the US, do not aim to provide substantial changes to the rules of contract formation, particularly regarding email contracting, they do provide clarification of the contracting process, especially in contracting through websites. (See Arts 9, 10, 11 of the E-commerce Directive 2000) The US laws are active in determining the time and place of dispatch and receipt of

electronic messaging. Taking the Model Law (UNICITRAL) approach (The UNCITRAL Model Law on Electronic Commerce has the same approach as the UETA, see article 15) as a main source, US legislation relating to this discussion reject the application of the postal acceptance rule for electronic transactions and adopt the general rule (receipt rule), for the acceptance to be effective. The reasons for this are firstly, in the US, the application of the general rule depends on whether the method of communication is instantaneous or "substantially instantaneous as two-way communication". For example, in cases regarding contracting by fax or telephone, even though the parties are not in physical proximity of one another, the general rule is applied to these types of communication. Since email cannot be described as direct and instantaneous communication thus it cannot be within this argument. Secondly, US laws, especially the UETA, UETA clarifies the moment when a message is considered as having been received by the recipient and when it could be accessible in order to be received. The UETA contains a section entitled 'Time and Place of Sending and Receipt', which states that an electronic record is deemed to be sent when it is properly addressed or directed to another recipient, is in a form capable of being read by the other parties' system and when it is out of the control of the sender but however, it does not establish when the acceptance becomes effective and the contract is formed. Additionally, subsection 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." (S. 15 of the UETA). This Section closely follows Art 15 of UNICITRAL Model law.)

The Uniform Computer Information Transactions Act (UCITA) 1999, which is uniform commercial code for software licenses and other computer information transactions, goes further, with detailed provisions to indicate explicitly the application of the general rule in 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. Receipt is defined as: "In the case of an electronic notice... coming into existence in an information processing system or at an address in that system in a form capable of being processed by or perceived from a system of that type by a recipient, if the recipient uses, or otherwise has designated or holds out, that place or system for receipt of notices of the kind to be given and the sender does not know that the notice cannot be accessed from that place". (See UCITA Art. 102(A) (52)) In this Act, under the section entitled "Offer and Acceptance in General", S.203 (4), it states 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". This means that UCITA considers that the general rule should apply to electronic transactions, even if the recipient is not aware of its receipt. (Poggi, 2000)

This position comports with the Restatement (Second) of Contracts position in terms of the timing of acceptance. The Restatement (Second) of Contracts states that mutual assent is usually reached after one party has made an offer and the offer is "followed by an acceptance by the other party." The acceptance may be made by any medium used by the offeror or by any other means that is "customary in similar transactions at the time and place the offer is received." The Restatement provides different rules depending on how an offeree transmits his acceptance. It provides that acceptance "completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror." Section 63(b) of the Restatement (second) of contracts further provides that acceptance under an option contract is not operative until received by the offeror. However, the Restatement also provides that in the case of an acceptance by telephone, teletype or any means that is "substantially instantaneous two-way communication," the acceptance "is governed by the principles applicable to acceptance where the parties are in the presence of each other." In such cases, the acceptance must be received by the offeror to be effective. (Poggi, 2000, p.234)

At the English legislation level, there is no indication of treatment of conclusion of contract or timing issues as there is in the UETA or the UCITA. The Regulations of Electronic Commerce 2002 do not have any article indicating when a message is considered as having either been sent or received. These Regulations brought the majority of the provisions of the Directive into force on 21st August 2002. The Electronic Commerce Directive requires member states to establish a somewhat more complicated rule that departs from the UETA and the UNCITRAL, Article 11 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 and they are deemed to be received when the parties to whom they are addressed are able to access them.

Unlike UETA, the Regulations do however, focus on accessibility and the contracting process on the website, rather than analyze in depth, the general and vague concept "able to access". (Ramberg, 2001) This is because the Regulations aim to provide transparency by requiring information to be supplied. The best example of this information is the duty on a service provider to provide certain information about the

procedures of how contracts can be concluded by electronic means. However, in the drafting process of the E-commerce Directive regarding formation of electronic contracts, there was considerable debate as how best to regulate this issue and unify it within Europe. The first and second draft of the Directive contained a section entitled 'Moment at which the contract is concluded'. According to the drafting process, the electronic contract is considered to be formed upon the final confirmation of receipt from the consumer after he has received the second acknowledgement from the consumer. (Murray, 2006) The draft of the E-commerce Directive contained a novel method for timing issues in formation of electronic contracts; this is the confirmation of receipt of the acknowledgment. In this section, drafters of the Directive wanted to create uniformity and certainty in online contracting throughout Europe. In the final draft, this section has been changed, under the name 'Placing of order' and reduces the number online contract formation stages to three. Moreover, provisions which govern the mechanism of forming online contracts (Regulation 11), do not apply for contracts concluded exclusively by email. For example, Regulation 11 (2) b of the E-commerce Regulations makes reference to an "acknowledgment of receipt of the order... without undue delay and by electronic means". This Regulation does not apply to email acceptances, but it does apply to website contracting in which the service provider shall send an acknowledgement of receipt of the order without any due delay to the consumer and that service is not available in the case of emails. (Murray, 2006)

It can be said that this explanation is illustrative of the trend in the two countries to consider online contracting, especially contracting through websites, as an example of an instantaneous method of contracting and thus apply the general rule to this type of contracting in determining the moment of contract conclusion. This is not the case with respect to electronic mail, where there is no explicit provision that indicates the nature of such contracting. It can be inferred however, from the general provisions regarding timing issues in electronic transactions, that email will not receive the same treatment as websites.

The second important reason for applying the postal rule is that it avoids any business uncertainty regarding the timing of email contracts. For example, applying the general rule will create uncertainty in what is the definitive time of considering the email formed. If A sends his email acceptance late Friday afternoon and the recipient B, left his office at lunchtime not to return until the following Monday, at what time can we consider the time of receipt? Is it on Monday morning when B returns to work or at any time when the B opens his email account and accesses the particular email, even if it was out of the working hours? In fact, applying the postal rule will avoid such uncertainty and create a definite time regarding to email contract conclusion.

The third reason returns to the nature of email contracting. Email is considered to be a non-instantaneous method of communication and therefore subject to delay. Contracting by email has been considered as the digital equivalent of the postal system. (Gardner, 1997) According to the difficulties with the transmission of email, delays, failure of networks, hacking by third parties or incorrect email addresses of intended recipients, may delay or prevent the delivery of an email. They suggest therefore, that risk of non-delivery of the email, as with the ordinary post, should lie with the offeror. Nevertheless, it should be kept in mind that similar issues of delay identified in relation to telexes are similarly applicable to email. In fact, no universal rule can cover all situations. These possibilities were not sufficient to persuade courts to find that the general rule of communication should be displaced. Likewise with email, the mere possibility of delays, incorrect addresses or technological failures may not be sufficient to create a universal rule that an email acceptance is effective at a time other than communication.

Generally, courts tend to apply the general rule in cases where there is an instantaneous method of communication, such as the telephone or the EDI or where they are virtually instantaneous and direct, such as telex. (*Entores Ltd. v Miles Far East Corporation* [1955] 2 QB 327) This approach is clear in the courts' decisions that hold that acceptances sent via telex are only effective upon their receipt by the offeror (*Ibid*) and a similar, albeit obiter, statement in relation to facsimile communications was made by Lord Gill in the case of *Merrick Homes v Duff*. (1996 GWD 9-508. The Second Division reserved opinion on the use of facsimile transmissions when the case was heard on appeal 1997 SLT 570). Also, in the case of *Entores Ltd. v Miles Far East Corporation*, the court concluded that the contract was made when the acceptance was received by the plaintiffs in London because:

".....So far as telex messages are concerned, though the dispatch and receipt of a message is not completely instantaneous, the parties are to all intents and purposes in each other's presence just as if they were in telephone communication, and I can see no reason for departing from the general rule that there is no binding contract until notice of the acceptance was received by the offeror". (*See Entros v. Miles Far East Corporation Ltd* [1955] 2 QB 327)

When there are difficulties in the transmission, such as technical delay or human error, the situation is not very clear, even in the case of instantaneous communications. The House of Lords hesitated to apply the general rule where there is a delay or error in the transmission. For example, in *Brinkibon Ltd v Stahag Stahl*

und Stahlwarenhandel GmbH, ([1982] All ER293), the court held that "Some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the senderNo universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases a judgment where the risks should lie." (Ibid)

The above conclusion has been taken in the US, especially regarding telex acceptances, because there may be some delays in receiving the acceptance, the telex appears to be treated in the same manner as regular mail. (See generally *In re Marin Motor Oil Inc.*, 740 F. 2d 220,227-229(3d Cir.1984) (treating the sending of a telex, rather than its receipt, as the relevant time of a formal demand under the United States Bankruptcy Code); *Norse Petroleum v. LVO Int'l Inc.*, 389 A. 2d 771(Del.1978)). A contract completed by a telex acceptance is formed when the telex is "transmitted." In one particular case involving telex communication, *Re Marin Motor Oil, Inc.*, there was extensive discussion in the court over the sound reasons for adopting a dispatch rule as the effective time for a communication under the United States Bankruptcy Code. The court stated that when certainty is an important aspect of a communication, as it was in this case, the rule that would provide the most certainty would be a dispatch rule. The court noted that the date of dispatch is easily recognizable from the postmark on the outside of an envelope or on the electronically recorded date and time indicating that a telex has been sent. (See *Marin Motor Oil Inc.*, 740 F. 2d at 227-229) Additionally, the court noted that applying a receipt rule would involve the court in a more difficult factual inquiry. For example, the court stated that the time the telex was sent was easy to ascertain, while the time for receipt was more difficult to determine.

The last reason returns to the contention that applying the general rule to email acceptances will complicate the situation, as there are numerous identifiable points along the communications network at which a communication may be considered received by the addressee (Payton, 2003, p.184). For example, shall we consider that receipt occurred at the point at which an e-mail arrives at the service provider's server or at the point at which the email is downloaded to the recipient's computer? Some commentators assume that the email is considered to be received at the time when it enters the offeror's ISP, (Dickie, 1998) while others consider that an email is received at the time the email entered the mailbox of the offeror, even if he does not log into it and read the email. (Fasciano, 1996-97) Whenever this time is, the essential point is determining the exact point of time the offeror could access the message and download it to his computer system.

4. Conclusion

The present study addressed the issue of applying the postal acceptance rule to email acceptances. It seems that the justifications for applying the postal rule in the age of post may be valid to be analogized to a new method of communication, such as the email. Email cannot be considered as an instantaneous method of communication, since there are some delays and gaps between sending and receiving messages. Parties do not communicate instantaneously between one other. What gives our argument its persuasive reasoning is that the absence of any legislative action in deciding the time of contract conclusion by email. In contrast, there is much greater clarity regarding the application of the general rule to website acceptances. Having examined the basis of the development of the postal rule and applying the reasoning above, the logical conclusion would be that e-mail acceptances do benefit from the postal rule and email may be the last bastion for the application of such rule.

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